

# Implementation of the Alternative Investment Fund Managers Directive

June 2013





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In this Policy Statement we report on the main issues arising from Consultation Papers 12/32 and 13/9 (*Implementation of the Alternative Investment Fund Managers Directive*) and publish the final rules.

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## Abbreviations used in this paper

<b>AIF</b>	alternative investment fund
<b>AIFM</b>	alternative investment fund manager
<b>AIFMD</b>	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
<b>AIFMD UK regulation</b>	The Alternative Investment Fund Managers Regulations 2013
<b>BIPRU</b>	Prudential sourcebook for Banks, Building Societies and Investment Firms of the FCA Handbook
<b>CASS</b>	Client Assets sourcebook of the FCA Handbook
<b>CBA</b>	cost benefit analysis
<b>CDF</b>	common deposit fund
<b>CIF</b>	common investment fund
<b>CIS</b>	collective investment scheme
<b>CIU</b>	collective investment undertaking
<b>COBS</b>	Conduct of Business sourcebook of the FCA Handbook
<b>COLL</b>	Collective Investment Schemes sourcebook of the FCA Handbook
<b>Commission</b>	European Commission
<b>CP</b>	consultation paper
<b>CPM firm</b>	collective portfolio management firm
<b>CPMI firm</b>	collective portfolio management investment firm
<b>CRD</b>	the Capital Adequacy Directive 2006/49/EC and the Banking Consolidation Directive 2006/48/EC

<b>EEA</b>	European Economic Area
<b>EIS</b>	enterprise investment scheme
<b>ESMA</b>	European Securities and Markets Authority
<b>EU</b>	European Union, which includes the European Economic Area (EEA) unless otherwise stated
<b>EuSEF</b>	European social entrepreneurship fund
<b>EuVECA</b>	European venture capital fund
<b>FCA</b>	Financial Conduct Authority
<b>FOS</b>	Financial Ombudsman Service
<b>FSCS</b>	Financial Services Compensation Scheme
<b>FSMA</b>	Financial Services and Markets Act 2000, as amended
<b>FUND</b>	Investment Funds sourcebook of the FCA Handbook
<b>GENPRU</b>	General Prudential sourcebook of the FCA Handbook
<b>IPRU (INV)</b>	Interim Prudential sourcebook for Investment Business of the FCA Handbook
<b>level 1 Directive</b>	see AIFMD
<b>level 2 regulation</b>	Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision
<b>Member State</b>	a Member State of the European Union
<b>MiFID</b>	Directive 2004/39/EC on Markets in Financial Instruments
<b>NURS</b>	non-UCITS retail scheme
<b>Part 4A permission</b>	a firm's permission granted under FSMA to carry on a regulated activity
<b>PE</b>	private equity
<b>PERG</b>	Perimeter Guidance manual of the FCA Handbook
<b>PII</b>	professional indemnity insurance
<b>PS</b>	policy statement

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<b>QIS</b>	qualified investor scheme
<b>RAO</b>	Financial Services and Markets Act (Regulated Activities) Order 2001 (SI 2001/544)(as amended)
<b>REIT</b>	real estate investment trust
<b>SUP</b>	Supervision manual of the FCA Handbook
<b>SYSC</b>	Senior Management Arrangements, Systems and Controls sourcebook of the FCA Handbook
<b>the Treasury</b>	Her Majesty's Treasury
<b>UCIS</b>	unregulated collective investment scheme
<b>UCITS</b>	undertaking for collective investment in transferable securities
<b>UCITS Directive</b>	Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (recast)
<b>UPRU</b>	Prudential sourcebook for UCITS firms of the FCA Handbook

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# 1. Overview

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## Introduction

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- 1.1** We are setting out our rules for implementing the Alternative Investment Fund Managers Directive (AIFMD or 'the Directive'), and providing our response to the feedback to our consultation.
- 1.2** In November 2012 we published Consultation Paper (CP) 12/32 *Implementation of the Alternative Investment Fund Managers Directive Part I*.<sup>1</sup> We consulted on matters where we have a degree of national discretion on how to implement this Directive, in particular on how fund managers should meet the required prudential standards and on what regime should be put in place for depositaries of alternative investment funds (AIFs).
- 1.3** In March 2013 we published CP13/9 which was Part II of the same consultation.<sup>2</sup> In it, we consulted on a range of topics including guidance on the perimeter of the Directive's scope, how systems and controls and conduct of business rules and guidance will apply to different categories of alternative investment fund manager (AIFM), which consumer redress rules will apply to AIFMs, and what fees will be charged. We also consulted on further aspects of some matters we covered in Part I of our consultation, such as prudential and depositary requirements and marketing issues.
- 1.4** The rules will come into force on 22 July 2013, the date by which we must implement the Directive, although there are some transitional reliefs for firms for up to one year from then.

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## Who is affected by this?

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- 1.5** This Policy Statement (PS) will be of particular interest to:
- investors (retail and professional)
  - fund managers, including managers of UCITS schemes
  - depositaries and custodians
  - MiFID investment firms
  - listed and unlisted investment companies not currently subject to FSMA authorisation

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<sup>1</sup> <http://www.fsa.gov.uk/library/policy/cp/2012/12-32.shtml>

<sup>2</sup> <http://www.fca.org.uk/news/consultation-papers/fsa-cp13-9-aifmd-implementation-2>

- service providers to the fund management industry, such as prime brokers, valuers, administrators and outsourcing specialists
- representative trade bodies and associations, and
- business advisers and consultants, and other advisers involved, serving in or linked to the fund management industry in the UK.

### Is this of interest to consumers?

- 1.6** AIFMD is mainly directed at firms offering asset management services to professional investors. Many of these firms do not promote their products or services to consumers more generally. However, given that one of the main objectives of AIFMD is to achieve an appropriate level of investor protection for retail, professional and institutional investors, our rules may be of wider interest to consumers.

### Context

- 1.7** The new rules will support our objectives of protecting and enhancing the integrity of the UK financial system and securing an appropriate degree of protection for consumers. Firms that have a full authorisation under AIFMD have the right to manage and market funds throughout the EU, which supports our objective of promoting effective competition in the interests of consumers.
- 1.8** As we explained in the two CPs, many of the Directive requirements are supported by implementing measures in the form of a directly-applicable level 2 regulation. This was published in the Official Journal of the EU on 22 March 2013.<sup>3</sup> We will not reproduce the whole regulation text in our Handbook, but in some places we will include extracts and add references to relevant sections, to help connect our rules with the corresponding part of the level 2 regulation.
- 1.9** There are, or will be, other EU rules and guidelines arising from work carried out by the European Securities and Markets Authority (ESMA). These include binding technical standards and guidelines on types of AIFM and AIF, guidelines on remuneration of key personnel, and a consultation on guidelines on reporting requirements. Each of these is covered in more detail in the relevant chapter of this paper, but readers are advised to refer to the material published by ESMA.<sup>4</sup>
- 1.10** We also explained in our CPs that the Treasury is responsible for implementing many aspects of AIFMD in the UK. The Treasury has laid its draft statutory instrument before Parliament, containing its AIFMD regulations and consequential changes to primary and secondary legislation ('the AIFMD UK regulation').<sup>5</sup> As at the date of publication of this paper, the statutory instrument is proceeding through Parliament and the Treasury expects it to be made law by 22 July.

<sup>3</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:083:0001:01:EN:HTML>

<sup>4</sup> ESMA Investment Management Standing Committee documents, [www.esma.europa.eu/page/investment-management-0](http://www.esma.europa.eu/page/investment-management-0)

<sup>5</sup> The Alternative Investment Fund Managers Regulations 2013, draft statutory instrument, <http://www.legislation.gov.uk/ukdsi/2013/9780111540206>

- 1.11** Here, we generally address only the matters that we asked questions about in the CPs. This paper does not aim to tell firms everything they need to know about how to comply with the requirements of AIFMD. We address various operational aspects, such as the process for obtaining an authorisation or variation of permission to manage AIFs, on our website.<sup>6</sup>
- 1.12** We will also try to answer questions from firms addressed to the usual supervisory contacts, where the firm has considered the issue and is uncertain how best to proceed. But ultimately it will be for firms to review and consider all the published material described above and to take professional advice as appropriate, to determine what their obligations are and how to comply with them.

### Summary of feedback and our response

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- 1.13** We received 33 responses to CP12/32 (three of them confidential) and 32 responses to CP13/9. We are grateful to all those who replied for the comments and suggestions they made. Lists of the stakeholders who sent non-confidential responses to each CP appear in Annexes 1 and 2.
- 1.14** In Chapter 2 we summarise feedback received on our draft perimeter guidance (PERG). The responses were very diverse, with requests for further guidance on a wide range of topics. We have made a few changes to reflect common themes, especially concerning capital raising, whether certain types of structure will be AIFs, and how UK delegates of a non-EEA AIFM will be treated.
- 1.15** Chapter 3 focuses on systems and controls and conduct of business rules, as they apply to AIFMs in the full scope of AIFMD and small AIFMs that are not subject to all its requirements. Respondents mostly asked us to clarify how the rules will work, although there were objections to the way they will apply to internally managed investment companies that will become Part 4A authorised firms. However, we have not made significant changes to our proposals.
- 1.16** Chapter 4 deals with the prudential rules for AIFMs but also affects UCITS management companies. The rules are largely unchanged from what we consulted on except in relation to internally managed AIFMs, where we are taking a stricter interpretation of the Directive's additional own-funds requirement.
- 1.17** Chapter 5 deals with the application of the ombudsman service rules and the Financial Services Compensation Scheme (FSCS) to AIFMs and depositaries of AIFs. Very few issues were raised in the responses and we have not changed our proposals.
- 1.18** Chapter 6 covers our proposals for depositaries of AIFs, which most respondents were broadly content with. We have changed our approach to UK firms carrying out depositary services for non-EEA AIFs, to make the rules more flexible and encourage competition.
- 1.19** Chapter 7 gives feedback on our proposed guidance on marketing, which we have adjusted to take account of comments on own-initiative approaches from investors and whether listing and trading on a secondary market constitute marketing. We also cover matters related to the notification of cross-border marketing activity.

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<sup>6</sup> [www.fca.org.uk/firms/markets/international-markets/aifmd](http://www.fca.org.uk/firms/markets/international-markets/aifmd)

- 1.20** Chapter 8 deals with our proposed fee arrangements for authorised and registered AIFMs and depositaries. Feedback was mostly supportive so these are little changed, although we have set lower fee tariffs for small registered AIFMs.
- 1.21** Chapter 9 covers the rules applying to remuneration of an AIFM's key personnel and outlines further work to be done in this area. It also explains our approach to implementing, at a later date, the prospective EU passport for non-EEA AIFMs and AIFs.
- 1.22** Chapter 10 summarises responses to the cost benefit analysis in each CP and sets out further analysis in areas where we have modified our original proposals.

### Equality and diversity

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- 1.23** As noted in CP12/32 and CP13/9, we have assessed the equality and diversity impact of our proposals and do not believe they will give rise to any equality or diversity issues. We did not receive any comments to contradict this view during the consultation process.

### Next steps

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- 1.24** The rules will come into effect on 22 July 2013. Firms that are already carrying on management of AIFs, or providing services as a depositary, custodian or valuer, may be able to take account of the transitional provisions set out in the Treasury's AIFMD UK regulation, until 21 July 2014. All firms that will become AIFMs should plan what they will need to do to have gained a Part 4A permission to manage an AIF, or to have been registered with the FCA, by that date.
- 1.25** Firms intending to act as depositary for an unauthorised AIF can, if they are currently authorised persons, begin providing the service as soon as they are able to comply fully with the requirements of the Directive and the level 2 regulation. This transitional provision expires on 21 July 2014, by which point they will need to hold a Part 4A permission to act as trustee or depositary of an AIF. Firms that are not yet authorised persons must become authorised with the relevant Part 4A permission before they can begin to provide the service.
- 1.26** Legislation creating two new forms of European-wide collective investment undertaking will also come into effect on 22 July 2013. Regulations for European venture capital funds (EuVECA) and European social entrepreneurship funds (EuSEFs) were published in April 2013, which will allow small authorised and registered AIFMs to manage and market two new types of alternative investment fund.<sup>7</sup> As these regulations are directly applicable in law, they come into force without consultation, but we have taken account of them in our final Handbook instrument and in this paper, to reflect their position within the current regulatory structure.
- 1.27** To prioritise our resources effectively and achieve timely transposition, we have deferred consulting on some matters that do not have to be in place from 22 July. These include:

<sup>7</sup> Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds, OJ L115, 25 April 2013:  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:115:0001:01:EN:HTML>  
 Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds, OJ L115, 25 April 2013:  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:115:0018:01:EN:HTML>

- consequential changes for all parts of the FCA and PRA Handbooks
- rules on fees for managers of EuSEFs and EuVECAs (see chapter 8 of this paper)
- rules for the eventual implementation of European passports for non-EEA AIFMs managing EEA AIFs and for non-EEA AIFs being marketed in the EEA (see chapter 9)
- integration into the Handbook of ESMA guidelines on key concepts of the AIFMD, remuneration of key personnel, and reporting by AIFMs
- guidance on a proportionality framework for remuneration requirements (see chapter 9), and
- the transition of rules and guidance affecting UK-authorised funds from the Collective Investment Schemes sourcebook (COLL) to the Investment Funds sourcebook (FUND).

**1.28** We expect to consult on at least some of these matters later in 2013.

## 2. Implementation and scope

- 2.1** This chapter covers our analysis of the responses to the questions in chapter 3 of CP12/32 and chapter 2 of CP13/9 on implementing the Directive, and in particular its scope.

### CP12/32 – Scope

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**Q1:** *Although we will return to this issue in a later consultation, once ESMA has completed its work on types of AIFM, do you have any concerns or questions regarding our approach to AIFMD scope as described in this chapter?*

- 2.2** We received 14 responses. They did not raise concerns with our general approach but made a variety of specific points, although there were some common themes. Some responses offered views or requested guidance on the treatment of joint ventures, structured products and special purpose vehicles. Others expressed concerns about the timeline for implementation, a matter which is largely determined by factors we do not control.
- 2.3** Three respondents asked questions about delegation arrangements. Two wanted guidance in the case of a non-EEA AIFM delegating to a UK MiFID firm. The other respondent asked for guidance on the extent to which the board of an investment company can retain an element of supervision, monitoring and control over an externally appointed manager and still properly treat the external manager as the AIFM.
- 2.4** Other comments raised points which have since been clarified, for example whether internally managed investment companies will be subject to AIFMD.

#### Our response

We have not changed our general approach to AIFMD scope, given that respondents did not disagree with our analysis. A number raised points in subject areas which we subsequently addressed in CP13/9, for example about the treatment of joint ventures, structured products and special purpose vehicles.

Our comments on delegation arrangements can be found in the response below.

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## CP13/9 – PERG guidance

### **Q1: Do you have any comments on the proposed PERG guidance?**

- 2.5** We received 22 responses to this question. They broadly welcomed the PERG guidance, but each raised comments in a variety of specific areas. However, there were common themes, which we reflect below. All references in this chapter are to the numbered questions and answers in PERG 16 as it appears in Appendix 1 of this paper, unless otherwise indicated.
- 2.6** Our draft guidance was based on the draft versions of the ESMA Guidelines on Key Concepts of the AIFMD published in December 2012, and the AIFMD UK regulation and associated legislation consulted on by the Treasury in January 2013. Since then, ESMA has published the final version of its Guidelines on Key Concepts of the AIFMD (referred to in this chapter as the ‘ESMA guidelines’).<sup>8</sup> ESMA has made changes to some of the key characteristics it proposed, for example the definition of an ‘ordinary company with general commercial purpose’. As a result of that change and others, our guidance has been modified to follow the ESMA guidelines, over and above any changes reflecting feedback to our own consultation.
- 2.7** The Treasury has laid the final draft of the AIFMD UK regulation, and we have also taken account of changes to that instrument from the draft available when we published CP13/9. We note below where changes made by ESMA or the Treasury, rather than the FCA, have a bearing on issues raised by respondents.
- Capital raising**
- 2.8** Several respondents wanted PERG to make clear that the definition of AIF requires capital to be raised from a number of investors in accordance with a defined investment policy. Several respondents also wanted confirmation that the fact that an entity’s shares can be bought and sold on a stock exchange is not, of itself, the raising of capital.
- 2.9** Similarly, another respondent stated that an entity would not be an AIF where there are two investors but one of them is investing only a nominal amount. In such a case, the respondent suggested there would no capital raising from the second investor; there would be no pooling and the nominal capital would not be applied in line with an investment policy.

### **Our response**

ESMA’s guidelines emphasise the link between capital raising and the defined investment policy, which has been reflected in the answer to question 2.10. We agree that the fact that an undertaking’s shares can be bought and sold on a stock exchange is not of itself the raising of capital by the undertaking, and explain this in the answer to question 2.10.

We have also expanded the answer to question 2.11 to say that a limited partnership in which there is a single limited partner making a substantive contribution and a general partner making a nominal £1 contribution, will not be an AIF, subject to question 2.12. This is linked to the answer to question 2.1 which states that a collective investment undertaking (CIU) will be an AIF where, among other things, it raises capital from a number of investors with a view to investing that capital for the benefit of those investors in line with a

<sup>8</sup> ESMA guidelines on key concepts of the AIFMD, final report, May 2013

defined policy. A wholly nominal investment by an investor would not, in our view, meet the requirement for capital to be invested for the benefit of such an investor in accordance with a defined investment policy.

### Ordinary commercial business

- 2.10** The answer to the draft question 2.18 in the CP set out various factors which, if present, may be relevant in determining whether an entity is a CIU. Respondents asked us to state explicitly whether or not each factor points to an undertaking being a CIU.
- 2.11** Two respondents commented on the statement in the draft question 2.23 that the AIFMD treats a fund as investing if its ultimate underlying assets are investments, in the sense of financial instruments such as shares and debt securities. They suggested this is not a helpful way to distinguish between a fund and an ordinary company, for example where the ordinary company is the holding company for a group, or a financial institution is acting as broker dealer or investment bank.

#### Our response

We have amended the answer to question 2.18 to take into account certain changes made to the ESMA guidelines. We have also made it clearer how the various factors point towards, or away from, determining whether an undertaking is a CIU.

We state in the answer to question 2.22 that an undertaking will not be set up for general commercial or industrial purposes if its underlying business relates to financial assets, a distinction which is consistent with the definition of 'general commercial or industrial purpose' in the ESMA guidelines. However, the answer to question 2.22 now makes it clear that the fact that a business acts through a subsidiary will not of itself mean that the business is a financial business.

### Is a real estate investment trust (REIT) caught?

- 2.12** Six respondents commented in this area. Five of them supported our approach, while one respondent asked for criteria to be given to determine whether or not a UK REIT is an AIF.

#### Our response

As most respondents agreed with our approach to REITs, we have not modified our guidance.

### Carried interest and co-investment vehicles

- 2.13** Regarding the answer to draft question 2.35, some respondents asked whether carried interest vehicles would be AIFs where, for example, the manager or family trusts invested, in addition to the employees themselves. Similarly, one respondent wanted us to acknowledge other types of co-investment vehicle, for example those where managers and executives invest.

**Our response**

We have reflected in the answers to questions 2.35 and 2.52 that a carried interest or co-investment vehicle does not necessarily become an AIF just because the manager and employees (or family trusts) invest in it.

**Structured products**

- 2.14** Two respondents said that the exemption described in the answer to draft question 2.37, dealing with securitisation vehicles, should be widened to include certain structured products. Four respondents asked us to be clear on the treatment of structured products.

**Our response**

The answer to question 2.44 now states that we will assume that a special purpose vehicle issuing debt securities in the way described will not be an AIF, if the arrangements meet the exclusion in paragraph 5 of the Schedule to the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (Debt securities).

**Individual investment management agreements**

- 2.15** The answer to draft question 2.40 proposed that if investments as provided in the investment management agreement were carried out in 'lock step' (i.e. at the same time), this may result in the scheme being a CIU. One respondent said it is possible to have individual but synchronised co-investment arrangements, provided the investors were making the investment decisions.

**Our response**

We agree that it may be possible to have individual but synchronised co-investment management agreements if the investors are making the investment decisions. So we have amended the answer to question 2.40 to allow for this interpretation.

**Enterprise investment schemes (EIS)**

- 2.16** A respondent wanted the guidance to focus on the difference between proper individual portfolio management arrangements (where an investor entrusts a manager with a sum of money, to be invested in EIS shares on a discretionary basis, based on the individual circumstances of the particular investor), and EIS funds, where the manager would not be making investments on the basis of their suitability for any individual investor. This respondent also found the reference to MiFID confusing, given their view that an EIS fund – while not a collective investment scheme – is properly considered a CIU, so that its manager is exempt from MiFID in this respect.

**Our response**

We agree with the comments about EIS, which have now been reflected in our answer to question 2.43.

### Joint ventures

- 2.17** While responses largely supported our proposed guidance on joint ventures, six respondents asked us to clarify the position of real estate joint venture vehicles, in particular those established as limited partnerships. Several of these respondents said the proposed statement ‘each of the parties should have a continuous involvement in the overall strategic management of the undertaking’ was troublesome. Limited partners cannot exercise control directly without losing their limited liability status, but in fact exercise control indirectly through a separate entity – the general partner.

#### Our response

The answer to question 2.47 now discusses limited partnership structures, whose investors may exercise control through the general partner and may participate economically through their limited partnership interests.

### Application of the CIU definition to MiFID

- 2.18** Four respondents, referring to the answer to draft question 2.52, expressed concern that the definition of an AIF should not be elided or merged in any sense with the definition of a CIU for MiFID purposes.

#### Our response

We changed the answer to Question 2.66 so it now explains that the meaning of ‘collective investment undertaking’ in PERG 16 is not relevant to its meaning in other EU Directives, such as MiFID.

### Investment compartments

- 2.19** A number of respondents asked for the approach to umbrella funds with investment compartments (sub-funds) to be clarified. One respondent welcomed the guidance generally but wanted us to clarify that where an AIFM chooses to market a sub-fund in the EU, this would not necessarily constitute marketing of each sub-fund in the same umbrella. Another respondent felt that the two issues to consider were whether the manager of the AIF or the manager of the sub-fund were the AIFM, and that for the purpose of some of the rules it would appear more logical for the sub-fund to be treated as the AIF (eg with respect to leverage or reporting).

#### Our response

In our view an AIFM may choose to market one or more sub-funds of an umbrella AIF in the UK or another Member State, without marketing the entire umbrella. We would expect notifications under Articles 31, 36 or 42 to market AIFs in the UK, or requests to us to notify authorities in other Member States of marketing under Article 32, to specify which sub-funds in an umbrella are to be marketed.

An umbrella which is an AIF will be required to have in place a single AIFM for the umbrella as a whole. However, as explained in the following section on reporting, ESMA is consulting on guidelines which propose that if an AIF

is formed as an umbrella with several compartments or sub-funds, portfolio-specific information should be reported at the level of those compartments or sub-funds.

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### Managing an AIF

- 2.20** Six respondents took issue with the final paragraph of the answer to draft question 3.8. They said that where an AIFM becomes a letter box entity, its delegate should not automatically be deemed to be the AIFM. The delegate has limited ability to assess whether the appointing AIFM has failed to comply with its obligations and thus to know whether by default it (the delegate) has become the deemed AIFM. This was particularly a concern with third-party arrangements, where the delegate's knowledge of the AIFM's activities may be limited.

#### Our response

Since we published CP13/9, the Treasury has revised its amendments to the Regulated Activities Order (the RAO). Article 51ZC(3) of the RAO now states that a person does not manage an AIF if the functions it performs for the AIF have been delegated to it by another person, provided that such other person is not an AIFM that has delegated such functions to the extent that it is a letter-box entity. We have reflected this in the answers to questions 3.7 and 3.10.

We also give further guidance on the situation of a UK firm acting as the delegate of a non-EEA AIFM. If delegation by an AIFM results in it becoming a letter-box entity, its UK delegate may be considered to be managing an AIF. It is important that firms are appropriately authorised, and do not carry out regulated activities which they are not authorised to perform.

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### Reporting

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**Q2: *Do you agree with the proposed reporting frequency for sub-threshold AIFMs and the proposed reporting period end dates for all AIFMs?***

- 2.21** We received four responses to this question, of which three supported the proposal. The fourth pointed out that many AIFs currently report on March and June year ends, and to change the reporting period may be expensive, or difficult to effect, for example where the AIFM is part of a large group and is required to report on the same date as its parent. They suggested that the reporting date should be set at the AIFM's existing year-end reporting date, with matching adjustments for quarterly and biannual reporting.

### Our response

Since we published CP13/9, ESMA has published for consultation its draft guidelines on reporting obligations under Article 3 and Article 24 of AIFMD, which include proposals for reporting end dates.<sup>9</sup> Our proposals are consistent with those draft ESMA guidelines, so we will leave these unchanged.

The FCA's powers to direct small registered UK AIFMs and small non-EEA AIFMs on the manner and content of their reporting requirements will come into effect only when the Treasury's AIFMD UK regulation is in force. We expect to make these directions in July 2013 and publish them in the next Handbook Notice.

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<sup>9</sup> Consultation paper on ESMA's guidelines on AIFMD reporting obligations under Articles 3 and 24 of the AIFMD, May 2013.

## 3. Operating requirements for full-scope and sub-threshold AIFMs

- 3.1** This chapter covers our analysis of the responses to the questions in chapter 3 of CP13/9 regarding applying the Senior Management Arrangements, Systems and Controls sourcebook (SYSC) and the Conduct of Business sourcebook (COBS) to:
- full-scope UK AIFMs
  - small authorised UK AIFMs of authorised AIFs, and
  - small authorised UK AIFMs of unauthorised AIFs.
- 3.2** The Treasury has now significantly revised its proposed regime for small authorised UK AIFMs of authorised AIFs, which means that most of the proposals we made for applying rules to this category of firm are no longer relevant. We do not provide feedback on responses to those proposals.

### Applying SYSC and COBS to full-scope UK AIFMs

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- 3.3** We proposed to apply a small number of SYSC rules and guidance to full-scope UK AIFMs where we think adequate investor protection measures need to be in place and AIFMD is silent on the matter. We also proposed to amend the rules in COBS that govern operators of unregulated collective investment schemes (CIS), to apply them more widely to full-scope UK AIFMs where appropriate. This affects both the rules that apply when the AIFM manages the assets of an AIF and the information it must provide to retail investors in an unregulated CIS.
- Q3:** *Do you agree with the proposed application of rules and guidance in SYSC and COBS to full-scope AIFMs? Are there any other matters that should be addressed in these sourcebooks?*
- 3.4** We received four responses to this question. Two respondents asked why, through COBS 18.5.3R (1A), we are amending COBS 2.1.1R (the client's best interests rule) so that references to 'client' must also be construed as referring to the investors in the fund.
- 3.5** One respondent suggested that certain COBS rules should be amended to comply with AIFMD. They cited COBS 18.5.4AR, which would modify how certain COBS provisions on best execution apply to AIFMs, but does not refer to the level 2 regulation provision that best execution obligations do not apply to AIFMs where there is no choice of execution venue.

- 3.6** Another respondent questioned the case for applying a number of the SYSC and COBS requirements to internally managed closed-ended investment companies. They cited various reasons for this: for example, that an investment company does not provide services and does not have clients, and that an investment company should not be considered to be a firm.
- 3.7** They also stated that certain provisions of SYSC and COBS should not be imposed on investment companies, because such requirements do not arise from AIFMD, as follows:
- guidance in SYSC 4.2.5G on decision-making where more than two individuals effectively direct the firm's business
  - the various provisions on financial crime at SYSC 6.1.1R and 6.3
  - the distance marketing requirements of COBS 5.1.1R
  - the electronic commerce requirements of COBS 5.2.1R, and
  - periodic disclosure requirements for the use of dealing commission in COBS 11.6.15R – 11.6.19R.
- 3.8** The respondent referred to rules such as COBS 1.1.1CR relating to auction bidding and SYSC 10.2 relating to Chinese walls, which they felt are unlikely to be applicable to internally managed investment companies.

#### Our response:

Rather than amend the client's best interests rule in the way proposed, we now include a new rule COBS 2.1.4R copying out Article 12(1)(a) and (b) of AIFMD, which will apply to full-scope UK AIFMs. The existing client's best interests rule will apply to all other authorised AIFMs, UCITS management companies and residual CIS operators.

COBS 18.5.4AR is unchanged from what we consulted on; it does not restate the level 2 regulation position that best execution obligations do not apply to AIFMs where there is no choice of execution venue, because any rule in COBS 11.2 that conflicts with the level 2 regulation is disapplied.

Internally managed investment companies that will become full-scope UK AIFMs will in our view be firms, because they will require a Part 4A permission. We have, however, clarified that the AIF, not the underlying investors, will be considered the client of an AIFM, which is consistent with our current approach for a CIS.

With respect to SYSC 4.2.5G, guidance does not impose additional obligations on a firm, so the statement that each individual should be able to address dishonesty and irregularities by 'the other individual' would in our view be met where the governing body of the AIF is involved in all decisions. We believe this guidance is helpful in determining what amounts to sound governance for any AIFM regardless of its structure.

Even though the provisions on financial crime in SYSC 6.1 and 6.3 are not specified by AIFMD, we believe they are an integral part of an authorised

person's compliance arrangements and meet our legal obligations to protect consumers. These rules provide an important consumer protection, as it is not impossible for closed-ended investment companies to accept money directly from investors or make payments to them. We see no case for such companies, when they obtain authorisation under FSMA as internally managed AIFMs, to be treated differently to other firms in this regard. The rules require procedures to be proportionate to the nature, scale and complexity of the firm's activities, so an internally managed AIFM is able to tailor procedures to its particular business model provided the risks are adequately managed.

We also believe that the electronic commerce requirements of COBS 5.2.1R are in principle applicable to AIFMs when managing AIFs. In practice, many AIFMs might not carry out the relevant activities to which these requirements apply, but where they do, we see no case for providing an exemption or exclusion. However, we have removed the reference to distance marketing disclosure rules (COBS 5.1) from the table in COBS 18.5.2R, since a firm when carrying on scheme management activity (or, in the case of an AIFM, when carrying on investment management functions), is not required to comply with the Distance Marketing Directive.<sup>10</sup>

Article 24 of the level 2 regulation does not prescribe requirements for the use of dealing commission or its disclosure, but it permits us to impose additional requirements in this area.<sup>11</sup> We are applying these disclosure requirements as we believe this gives clients important information on levels of commissions and the use of fund assets to pay for third-party services.

The rules and guidance at COBS 11.8 relate to the recording of telephone conversations and electronic communications. We believe these provisions are a valuable means of gathering evidence in the context of market abuse and related regulatory breaches. We think these provisions lie outside the scope of AIFMD and are just as relevant to the activities of internally managed investment companies as to other types of AIFM, to whom they also apply.

We acknowledge that certain firms, or types of firms, might never carry out some activities to which rules or guidance apply, for example auction bidding (COBS 1.1.1CR). However, we do not believe this is a reason to exempt them from the rules; if firms ever do carry out the relevant activity, the rule and/or guidance will apply in the usual way.

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### Small authorised UK AIFMs of authorised AIFs

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**Q4: *Do you agree that our rules and guidance will correctly implement the Treasury's proposed regime for small authorised UK AIFMs of authorised AIFs?***

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<sup>10</sup> Directive 2002/65/EC on distance marketing of consumer financial services.

<sup>11</sup> Article 16 of the level 2 regulation allows us to use 'at least' the criteria laid down in Section 1 of Chapter III (of which Article 24 forms a part).

- 3.9** 3.9 We initially proposed that small authorised UK AIFMs<sup>12</sup> of authorised AIFs would be subject to generally the same requirements as full-scope UK AIFMs, but with a few exceptions. The Treasury has now modified the legislation so that these firms will remain generally subject to existing requirements, plus the additional requirements specific to sub-threshold firms under the Directive. As a result, we have modified our original proposals so that these firms will not be subject to the same requirements as full-scope UK AIFMs.
- 3.10** Owing to these changes by the Treasury and our subsequent modifications to the Handbook, this question is no longer relevant.

### Small authorised UK AIFMs of unauthorised AIFs

- 3.11** We noted in the CP that sub-threshold AIFMs of unauthorised AIFs are currently likely to be either operators or managers of unregulated CIS, or firms managing other entities that are not CIS, such as investment companies. We said that we would bring both groups under a single set of rules, closely following the current regime for operators of unregulated CIS.

**Q5: *Do you agree that our rules and guidance will correctly implement the Treasury's proposed regime for small authorised UK AIFMs of unauthorised AIFs?***

- 3.12** We received very few responses to this question. Regarding certain SYSC provisions, one respondent asked why – in the context of internally managed investment companies – AIFMD provisions have not been copied out, as opposed to applying rules and guidance which contain similar but not identical wording; for example, SYSC 10.1.8R contains similar wording to the proposed new rule SYSC 10.1.26R and Article 36 of the level 2 regulation.

#### Our response

For full-scope UK AIFMs, we decided that there is enough difference between the provisions of AIFMD and the relevant existing rules in SYSC and COBS to justify introducing new rules specific to those AIFMs. We think this is preferable to trying to graft extra requirements on to existing rules, which results in further complexity. We have also had to disapply requirements in SYSC and COBS that overlap with the directly applicable level 2 regulation.

In the case of small authorised UK AIFMs, the AIFMD UK regulation allows us to continue to apply existing requirements but not to apply new ones that reproduce AIFMD requirements. We believe that these existing requirements provide important protections for investors: for example, the requirement to disclose conflicts of interest to clients in the situation foreseen by SYSC 10.1.8R (i.e. where the firm cannot be sure it can manage the conflict so as to prevent risk of damage to a client's interests). Since the level 2 regulation does not apply either to small authorised UK AIFMs, we have not had to amend the application of SYSC and COBS to them to the same extent as for full-scope UK AIFMs.

So for example, SYSC 10.1.26R is a new rule specific to full-scope UK AIFMs, which implements the level 1 requirement of the Directive and is supplemented

<sup>12</sup> i.e. firms that manage assets below the thresholds at which full compliance with AIFMD is required.

by Article 36 of the level 2 regulation, whereas SYSC 10.1.18R is an existing rule outside the scope of the Directive that continues to apply as it does now.

None of the above is applicable to a sub-threshold AIFM that is an internally managed closed-ended investment company. Those companies will be registered with the FCA, but will not have a Part 4A authorisation and will not be subject to our rules.

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## 4.

# Prudential requirements for fund managers

- 4.1** This chapter covers our analysis of the responses to the questions in:
- chapter 5 of CP12/32 on the proposed prudential regime for all types of AIFM, including capital requirements, professional negligence risks, the liquid assets requirement and financial reporting matters; and
  - chapter 4 of CP13/9 on the consequential rules and proposed prudential regime for small authorised UK AIFMs.
- 4.2** This includes certain changes to our prudential rules affecting UCITS management companies.

### CP12/32

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#### **CPM firms and internally managed AIFs**

- 4.3** We explained how we proposed to apply the AIFMD's prudential requirements to a firm carrying out collective portfolio management (CPM). We proposed not to require internally managed AIFs to meet the requirements based on either funds under management or expenditure (Article 9(3) and (5)). We asked:

**Q2: *Do you agree with our proposed approach to the capital and PII requirements for CPM firms and internally managed AIFs?***

- 4.4** There were 12 responses and most agreed with the proposal or had no comment. One respondent suggested that the Prudential sourcebook for UCITS firms (UPRU) should be retained, as it is too complicated to make the necessary changes to the interim Prudential sourcebook for Investment Businesses (IPRU (INV)).
- 4.5** The questions and answers on transposition issues published by the Commission services<sup>13</sup> say that the requirements in Article 9(3) to (6) apply to internally managed AIFs. The basis for the Commission's answer is that AIFMD does not differentiate between types of AIFM when it applies these requirements. We did not propose this approach, based upon our policy analysis.

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<sup>13</sup> European Commission, Questions on Single Market Legislation, Alternative Investment Fund Managers Directive, ID 1149, <http://ec.europa.eu/yqol/index.cfm?fuseaction=legislation.show&lid=9>.

### Our response:

- We do not intend to make any changes to the proposal to discontinue UPRU, for the reasons we gave before. We do not expect that IPRU (INV) will be too complicated for firms to understand as a result of the changes.
- In the light of the Commission's published view that Article 9(3) to (6) applies to internally managed AIFs, we have amended our requirements in IPRU (INV) chapter 11 to this effect. This means they are treated as CPM firms. Our analysis of the impact of this change is that we believe most of the affected firms already hold sufficient capital to meet any increased requirements arising from the amended rules. We explain this further in our revised cost benefit analysis in chapter 10.

### Collective Portfolio Management Investment Firm (CPMI firm)

- 4.6** We proposed that an AIFM which conducts the additional activities that are permitted under Article 6(4) and regulated under MiFID should be treated as a BIPRU limited licence firm, but subject to any additional requirements of AIFMD. This is consistent with the way we treat UCITS management companies that also provide services regulated under MiFID. We asked:

**Q3:** *Do you agree that we should treat an AIFM that also undertakes MiFID services as a BIPRU limited licence firm?*

- 4.7** Of 12 respondents to this question, eight argued it is not appropriate to treat such firms as BIPRU limited licence firms. Their main justification is that other EU jurisdictions will adopt a different approach and there should be a greater consistency in this regard.

### Our response

Our analysis showed that a significant number of AIFMs already undertake MiFID-scope business as limited licence firms. It has not been practical to carry out a detailed analysis of how other Member States intend to treat this issue, because in many cases the information is not yet available. As respondents have not provided any other reasons for us to revisit our policy analysis, we will proceed with the proposal.

### Professional negligence risks and the liquid assets requirement

- 4.8** We explained how we proposed to implement the requirement for AIFMs to hold either own funds or professional indemnity insurance (PII) to cover liability risks arising from professional negligence. We also explained how we intended to apply the requirement for an AIFM's own funds to be invested in liquid assets or assets readily convertible to cash in the short term. We asked:

**Q4:** *Do you agree with our proposed approach to professional negligence risks and the liquid assets requirement?*

#### 4.9 The eight firms that responded raised the following issues:

- three asked for confirmation that a group PII policy can be used
- two argued there should be no requirement to cover PII policy exclusions with additional capital
- one argued that either the minimum capital requirement should be increased to reduce the severe imbalance with the PII requirement, or the capital option should be dropped
- one asked for guidance on when we might impose a higher capital requirement
- one asked for international agreement on the meaning of 'assets readily convertible to cash', and
- one raised issues about its proposed group approach to compliance, internal audit and remuneration policy requirements.

#### Our response:

- We can accept a group PII policy if it provides adequate cover to comply with the relevant requirements. We have included provisions in IPRU (INV) 11.3.16R and GENPRU 2.1.72R to reflect this.
- No new reasons were raised why we should not continue with our proposal for PII policy exclusions. If we allowed an AIFM to take out PII policies without any capital coverage for the likely liability, then such policies might not provide adequate cover, potentially leaving AIFs and the investors in them exposed.
- We cannot modify the way the capital and PII requirements are applied to firms, as they are set out in the level 2 regulation which applies directly to firms.
- The higher capital requirement is a power given under the level 2 regulation, and we must provide reasons when we exercise it. We expect these would be determined by the individual circumstances of a firm and we may develop some guidance in due course, in the light of experience in dealing with such cases.
- The Commission's questions and answers on transposition issues<sup>14</sup> say it is not possible to indicate a limitative list of specific types of liquid asset. The emphasis instead should be on specific features that warrant the liquid nature of the asset. However, the Commission encourages ESMA to do more work on this issue to achieve a common approach, so we will contribute to any such work and consult on amending our rules and guidance in this respect as the need arises.
- Our view is that it would be proportionate (and therefore acceptable) for an AIFM in a group to rely on a group-level approach to compliance, internal audit and remuneration issues, provided there is an adequate focus on the individual circumstances of the AIFM.

<sup>14</sup> European Commission questions and answers cited in footnote 13, ID 1153.

- 4.10** We also explained how we proposed to apply the liquid assets requirement to a UCITS management company, whether or not it also manages AIFs. We asked:

**Q5: *Do you agree with our intention to apply the liquid assets requirement also to UCITS management companies that do not manage any AIFs?***

- 4.11** Only four respondents commented on this question, but three of them did not agree with the proposed approach. They argued that this was not a requirement of the UCITS Directive and that UCITS firms are not exposed to risks associated with a funding model relying on deposits.

#### Our response

Respondents did not provide any substantive new arguments, so we intend to proceed with this proposal. We believe this is appropriate and proportionate, as the risks addressed are the same whether or not the UCITS management company also manages at least one AIF, so the requirement should be the same.

#### Financial reporting forms

- 4.12** We explained what consequential changes we planned to make to our existing reporting forms and requirements in our Supervision manual (SUP). We asked:

**Q6: *Do you agree with the proposed changes to SUP 16.12 and that the proposed new forms and guidance notes will provide us with sufficient information to assess whether firms are complying with the capital and PII requirements?***

- 4.13** Seven respondents commented on this question, raising the following issues:

- one asked for a separate form for internally managed AIFs
- one suggested the form should be submitted annually by internally managed AIFs
- one asked us to clarify whether UCITS firms need to submit FSA042
- two suggested the forms should be piloted by a sample of firms first
- two asked us to ensure that the forms should not collect data required under the level 2 regulation, and
- two suggested there should be international coordination over the forms as far as possible.

#### Our response:

- We will continue with our plan to use one form, as this reduces the cost of the project. Also, as the capital requirements for internally managed AIFs now need to comply with Article 9(3) to (6), even if we provided two forms there would be little difference between them.

- We will proceed with the proposal for quarterly returns, as we think this is a proportionate requirement to ensure that we can supervise firms' compliance with the relevant rules.
- We have considered the rules on the application of FSA042 and think they are sufficiently clear, so we will not add further guidance.
- In our view a pilot project would be too labour-intensive to justify the potential benefits. We are confident that firms will be able to complete the forms without difficulty.
- We do not believe there is any overlap with data required to be collected by the level 2 regulation.
- It would be impractical to effect a coordinated international approach to reporting forms. COREP<sup>15</sup> is the only current harmonised reporting process, but in our view it would be too onerous for many of the firms that will be regulated as AIFMs.

We have clarified in the Guidance Notes for the reporting forms FIN066 and FIN067<sup>16</sup> that the definition of 'funds', for the purposes of the funds under management requirement (based on Article 9(3)) is different to that used for the professional negligence requirement (based on Article 9(7)). The latter includes funds managed under delegation (as explained in Recital 23) whereas the former does not (as per Article 9(4)).

- 4.14** To minimise the impact on firms, we have delayed implementing the new SUP 16.12 capital reporting forms until periods ending on or after 31 January 2014, to coincide with planned reporting system developments.
- 4.15** We have included a transitional provision at SUP TP 1.8.2R, which requires firms that are subject to the new capital reporting requirements to report using existing capital reporting forms until that date.

### CP13/9

- 4.16** In CP13/9 we published proposals for rules that would apply to small authorised UK AIFMs of authorised AIFs, reflecting proposals made by the Treasury. Since the Treasury has now decided not to proceed with those proposals, we do not comment on the feedback we received on this subject. We also proposed some consequential changes to the prudential rules in IPRU (INV) and UPRU. We asked:

**Q6:** *Do you agree with our proposed approaches to amending IPRU (INV) and deleting UPRU, as explained above?*

<sup>15</sup> COREP is the Common Reporting framework for the supervisory reporting of prudential requirements by credit institutions and investment firms.

<sup>16</sup> These reporting forms have been rebadged by the FCA with the prefix FIN instead of FSA.

#### 4.17 Four respondents raised the following issues:

- One suggested that IPRU (INV) should be available electronically in HTML format like the rest of the Handbook, as the current PDF version is cumbersome.
- One expressed a number of concerns about the proposed amended Glossary definition of 'funds under management'. They are concerned that the definition should encompass only assets under management of AIFs in the scope of AIFMD and think it should exclude:
  - a. funds invested in entities referred to in Article 2(3);
  - b. AIFs of the types referred to in Article 61(3) and (4); and
  - c. CIS that are not AIFs.
- The same respondent also suggested that the definition should specifically require derivative instruments to be converted into their equivalent positions in the underlying assets of such instruments, using the conversion methodologies set out in Article 10 of the level 2 regulation, and valued on the basis of that equivalent position.
- One pointed out that, despite our statement in paragraph 4.6 that we do not intend to make any changes to the prudential regime for small authorised UK AIFMs of unauthorised AIFs, some such firms that manage investments under a delegation agreement with the fund management company will see a change. They are currently MIFID-scope firms and therefore BIPRU limited licence firms, with the fund as their only client. However, under AIFMD these firms will seek authorisation as a small authorised UK AIFM of an unauthorised AIF and, as shown by the Table in Annex 4 of the CP, will be subject to IPRU (INV) chapter 5.

#### Our response

- We have renumbered chapter 7 of IPRU (INV) as chapter 11.
- We accept that it would be better if IPRU (INV) were available in HTML format. However, this is beyond the scope of the AIFMD implementation project, although we will keep it under review as part of the ongoing maintenance of the functionality of the FCA Handbook.
- We do not agree that it would be appropriate to exclude all the suggested types of funds from the definition of 'funds under management'. Article 9(3), which sets the capital requirement using funds under management as a basis, refers only to the value of portfolios with no exclusions specified. However, where AIFs benefit from the transitional provisions of Article 61(3) or (4)<sup>17</sup>, we accept it is appropriate to allow the AIFM to exclude them from the calculation of its funds under management requirement, professional negligence capital requirement or PII excess capital requirement, and have introduced transitional provision (TP)7 in IPRU (INV) 11 and TP16.5R in GENPRU to this effect.
- We also accept that it would be appropriate to refer to the conversion methodologies set out in Article 10 of the level 2 regulation, as this approach

<sup>17</sup> As transposed in regulations 74(1) and 75(1) of the AIFMD UK regulation.

is consistent with that used for the determination of whether a firm is above or below the AIFMD threshold, so we have amended the definition to this effect.

- Our understanding of the circumstances the respondent outlined is that a firm managing investments under delegation is currently authorised for a MiFID-scope activity although it may also be undertaking AIF management. Under AIFMD, it would choose only to undertake AIF management (and not the MiFID-scope activity also) so it would be categorised as an IPRU (INV) chapter 5 firm. So the change in the prudential categorisation is caused by the change in the nature of the firm's permitted activities.

- 4.18** We have updated in Annex 3 the table summarising how the prudential rules will apply to managers within the scope of the AIFMD or the UCITS Directive. The main difference in this version is the impact of the changed approach to small authorised UK AIFMs of authorised AIFs. They will be subject to IPRU (INV) chapter 5 rather than chapter 11 (if undertaking fund management activities only) or will be BIPRU limited licence firms rather than collective portfolio management investment (CPMI) firms (if they also undertake MiFID-scope activities).

### Auditor rules

- 4.19** An internally managed AIF is subject to the audit requirement as set out in FUND 3. It therefore cannot take full advantage of the small companies audit exemption.<sup>18</sup>
- 4.20** An external AIFM is not subject to any specific audit requirement under our rules or the Companies Act 2006, so it can use the small companies audit exemption. However, it should not include reserves unless they are audited, or interim profits unless verified, in the initial capital and own funds computations set out in IPRU (INV) chapter 11. That implies the need for an audit or verification if the firm wants to use those items (which is different to the approach under IPRU (INV) chapter 5).

### Our response

- We have introduced guidance in Table 11.4 of IPRU (INV) to clarify that a firm using the small companies audit exemption cannot include retained profits or interim profits in the initial capital or own funds calculation, unless it appoints an auditor to audit or verify these items respectively.
- We will propose, in a subsequent consultation, consequential amendments to SUP 3 to reflect CPM firms and CPPI firms and how the auditor rules apply to them. We will also propose to cross-refer in SUP 3 to the FUND 3 requirement for an internally managed AIF.

<sup>18</sup> Section 477 of the Companies Act 2006 entitles a small company to an exemption from audit if it satisfies certain criteria relating to number of employees, turnover and assets.

## 5. Consumer redress: the ombudsman service and the FSCS

- 5.1** In chapter 5 of CP13/9 we consulted on some changes to the scope of the ombudsman service and the Financial Services Compensation Scheme (FSCS), to reflect changes in the scope of regulation under AIFMD.<sup>19</sup>
- 5.2** Our consultation proposals covered the following areas:
- whether investors in investment companies should be able to complain to the ombudsman service or claim from the FSCS about the management of the company
  - whether investors in unregulated CIS (including charity funds) should be able to complain to the ombudsman service or claim from the FSCS about the fund's depository, and
  - how we should amend the territorial scope of the ombudsman service and the FSCS in view of the new passport for EEA AIFMs and the management of non-EEA AIFs by UK AIFMs.
- 5.3** The FCA and the ombudsman service jointly own the rules setting out who is able to complain to the ombudsman service. So we consulted jointly on the proposals relating to the eligibility of investors to complain to the ombudsman service about an investment company or a depository. These rules will be made jointly by the FCA and the ombudsman service.

### Investment companies

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We asked:

**Q7:** *Do you agree that investors in investment companies should not be able to complain to the ombudsman service or claim from the FSCS about the management of the company?*

- 5.4** We received two responses to this question. The first respondent agreed with our proposals, arguing that they reflect the unique features of investment companies. They said if the ombudsman service made an award to an investor in an investment company, the award would need to be paid at the expense of the other shareholders, which would not be fair. They also argued that most complaints were likely to affect all the shareholders in a class, rather than an individual shareholder. They advocated the use of collective action by shareholders to hold the company's directors to account. This could include voting out Board members who did not perform as required.
- 5.5** The other respondent thought that investors in investment companies should be able to complain to the ombudsman service or claim from the FSCS. They argued there are no inherent

<sup>19</sup> In CP13/9 we referred to the Financial Ombudsman Service (FOS) but we use 'ombudsman service' throughout this PS.

constitutional features of investment companies which make malpractice more or less likely than in other kinds of fund.

### Our response

We intend to implement our proposals as consulted on. Our reason for differentiating between investment companies and CIS in this way is not that we think one type of vehicle is any more or less likely to be mismanaged than the other. Shareholders in investment companies have means of influencing the behaviour of the company's directors which investors in CISs generally do not, so investment company shareholders are better placed to resolve disputes and hold directors to account through their own efforts.

### Fund depositaries

With the implementation of AIFMD in the UK, charity funds such as common investment funds (CIFs) and common deposit funds (CDFs) established under the Charities Act 2011 or its predecessors, will be considered AIFs. We asked:

**Q8:** *Do you agree that investors in UCIS (except for CIFs and CDFs) should not be able to complain to the ombudsman service or claim from the FSCS about the depositary of the fund?*

**Q9:** *Do you agree that investors in investment companies should not be able to complain to the ombudsman service or claim from the FSCS about the depositary of the fund?*

**Q10:** *Do you agree that investors in CIFs and CDFs should be able to complain to the ombudsman service or claim from the FSCS about the depositary of the fund (subject to the usual criteria)?*

- 5.6** We did not receive any responses to questions 8 or 10. We received one response to question 9, which agreed with our proposal. They argued that investors in an investment company would not have a direct contractual relationship with the depositary, and that the company itself would take action on behalf of all its shareholders.

### Our response

Since no respondents raised any objections to our proposals, we intend to implement our proposals as consulted on.

## Consumer redress and cross-border AIFM activities

5.7 We asked:

**Q11:** *Do you agree that the ombudsman service's compulsory jurisdiction and our complaints handling rules should cover AIFMs managing FCA-authorised funds, whether from the UK or the EEA?*

**Q12:** *Do you agree that, where an AIFM is not managing an FCA-authorised fund, the ombudsman service's compulsory jurisdiction and our complaints handling rules should cover its activities where they are carried on from an establishment in the UK?*

**Q13:** *Q13: Do you agree that an AIFM carrying out cross-border fund management activities should be required to be within scope of the FSCS, but only for the activity of managing an FCA-authorised fund?*

**Q14:** *Do you agree that an EEA AIFM operating from a UK branch which is not required to be within scope of the FSCS should be eligible to obtain top-up cover?*

5.8 We received one response, saying that our cross-border compensation arrangements were too complex and that investors and intermediaries would find it increasingly hard to make sense of disclosures about compensation. They argued that this complexity would cause a greater tendency for compensation to be sought from intermediaries, rather than other operators that may be at fault.

### Our response

We intend to implement our proposals as consulted on. The complexity of our compensation arrangements reflects the diversity of funds and fund management structures, including those of a cross-border nature that arise from EU legislation establishing a single market for fund management services.

If a firm receives a complaint about an issue for which it is reasonably satisfied that another firm is responsible, it can forward the complaint to that firm rather than investigating the complaint itself.<sup>20</sup>

<sup>20</sup> See DISP 1.7.1R.

## 6. Depositaries

- 6.1** In chapter 9 of CP12/32 we consulted on proposals for the regulatory regime for depositaries of AIFs. In chapter 6 of CP13/9 we consulted on further proposals for how the client assets rules should apply to depositaries of AIFs. This chapter gives feedback on both sets of proposals.

### CP12/32

#### Depositaries of authorised AIFs

- 6.2** We explained that we did not propose to alter or review the capital requirements for depositaries of authorised AIFs for the time being. We said we would await the outcome of EU negotiations on 'UCITS V' which are expected to apply new rules to depositaries of UCITS, similar to those introduced in AIFMD. We asked:

**Q8:** *Are the proposed capital requirements for firms that act as depositaries for authorised AIFs fair and appropriate?*

- 6.3** Of the seven responses to this question, five agreed, one did not offer an opinion, and one said the figure was too high and would deter new entrants to the market from acting for property authorised investment funds. They suggested that the capital requirement of €730,000 applicable to a MiFID investment firm acting as an AIF depositary, would be more appropriate.

#### Our response

As stated in the CP, we will not make any changes to these rules at this time. We will reconsider the matter when there is certainty on any future changes to the UCITS Directive affecting depositaries.

#### The 'private equity (PE) AIF depositary model'

- 6.4** We proposed that a wide range of firms should be able to use the concession in Article 21(3) of AIFMD.<sup>21</sup> Its aim is to offer more flexibility and choice for funds, such as private equity and real estate vehicles, which currently do not have depositaries or custodians. We referred in the CP to 'private equity (PE) AIF depositaries' which we use in this paper also as a term of convenience. We asked:

<sup>21</sup> This applies to AIFs which have no redemption rights exercisable during the period of 5 years from the date of the initial investments and which, in accordance with their core investment policy, generally do not invest in assets that must be held in custody or generally invest in issuers or non-listed companies in order to potentially acquire control over them.

**Q9:** *Do you agree with our approach permitting authorised professional firms and other suitably qualified firms to be authorised to carry on the activity of acting as a PE AIF depositary?*

**Q10:** *What standards should we apply to determine that a firm, which is not a professional firm, is fit and proper to perform this function?*

**Q11:** *Do you agree that it may be necessary or desirable for PE AIF depositaries to be able to hold financial assets in custody?*

- 6.5** All of the 16 respondents to question 9 agreed with the general proposal, although DATA (the representative body for depositaries of authorised open-ended funds) and one other existing depositary said that the same regulatory and prudential standards should apply to new entrants as to existing firms, to ensure a level playing-field.
- 6.6** Only seven respondents commented on question 10, and there was no consistent view. One said the standards applicable to MiFID investment firms should apply here too, another said no additional standards should be imposed. Others suggested some form of specific test should be applied or developed; two responses mentioned the audit and assurance standard AAF 01/06.
- 6.7** There were 13 responses to question 11, and all but one agreed that it would be necessary or desirable for PE AIF depositaries to hold financial instruments in custody in some circumstances. They mentioned the situation of a private equity fund exiting an underlying company after it has been listed, and the possibility of a unit trust holding units or shares in another fund, which would then be registered in the name of the trustee. DATA and one other existing depositary said the same standards of custody should apply to these firms as to other depositaries.

### Our response

We continue to believe that our proposals will help to open up a competitive market for the provision of depositary services, while maintaining an adequate standard of investor protection. So we are proceeding with our proposal to allow any authorised firm to apply to act as a 'PE AIF depositary', provided there is no fundamental conflict of interest with its other regulated activities (e.g. it is not an AIFM or a UCITS management company).

Depositaries of authorised AIFs (and UCITS) have specific investor protection obligations set out in COLL, and we are not persuaded that all other AIF depositaries need to adhere to them too. So, given that not all depositaries have exactly the same responsibilities, we do not consider it necessary to apply the same prudential requirements to all of them. In all other respects, the same rules will apply to PE AIF depositaries as to depositaries of other unauthorised UK AIFs.

We do not think there is a need for specific rules or guidance on the standards that should apply to PE AIF depositaries. Our Authorisations team, as part of their work in assessing applications from firms to be a depositary, will review the firm's arrangements for systems and controls. Evidence of compliance with

relevant standards such as AAF 01/06 may be taken into account as part of this process.

We recognise most or all PE AIF depositaries will need to hold (or delegate to a custodian to hold) some financial instruments in custody. Although any one AIF might not hold any such instruments for most of the time, a depositary acting for numerous AIFs could frequently need to hold assets in custody. So when PE AIF depositaries are granted the Part 4A permission of acting as a depositary of AIFs, they will be given a standard limitation on the types of AIF they can act for, but will have no compulsory limitation on the functions (including custody) that they can perform for those AIFs.

We also take the view that AIFs may hold a limited long-term exposure to such instruments – that is, the general requirement not to hold them relates to the degree of exposure, not just its duration. We have provided further guidance in FUND 3.11.13G on what we believe is meant by AIFs that ‘generally do not invest in assets that must be held in custody’.

#### **Capital requirements for firms acting as PE AIF depositaries**

- 6.8** 6.8 We proposed to set an own funds requirement of at least €125,000 for firms wishing to act as PE AIF depositaries. We suggested that additional requirements, such as a higher level of own funds or an expenditure-based requirement, might be appropriate where the firm performs, or is responsible for, custody of financial instruments. We asked:

**Q12:** *Do you agree with the proposed approach to setting capital requirements for firms acting as PE AIF depositaries? If not, please give reasons.*

**Q13:** *Should such depositaries be subject to different requirements, depending on whether or not they may hold financial instruments in custody? If not, what type of requirement would be most appropriate for these higher-risk firms: more own funds, an expenditure-based requirement, or some other method of calculation (please specify)?*

- 6.9** All but one of the ten respondents to both questions agreed with the proposal for a minimum of €125,000 own funds, although two respondents queried whether a firm operating in several European jurisdictions would have to meet the capital requirement separately in each. One respondent said a lower figure would be suitable, unless the firm carries out custody as well as verification of ownership.
- 6.10** Seven respondents favoured the idea of higher capital where custody is part of the service, although two said this should only be where relevant financial instruments form the majority of the portfolio. One firm supported a higher own-funds requirement and opposed an expenditure-based requirement, whereas others were open as to the method. The other three respondents rejected the need for any additional requirement to be imposed.

### Our response

The feedback from prospective PE AIF depositaries indicates that most of them regard €125,000 as a reasonable level of capital, which will provide adequate assurance of the firm's financial soundness without setting too high a barrier to market entry. We intend to proceed on the basis we consulted on. This capital requirement is a condition of authorisation in the UK and has no bearing on any requirements that a regulatory authority in another Member State might impose.

Given that firms interested in entering this market are likely to make provision of custody an integral part of the service they offer, we are not convinced we can justify applying additional capital requirements to them as a matter of course. They would probably all consider it necessary to comply with any higher requirement for firms that provide or arrange custody, so a €125,000 threshold that applied only to PE AIF depositaries not offering custody would probably be redundant.

There may be a case for applying reporting requirements in order to monitor the custody activities of PE AIF depositaries. We did not propose any specific reporting requirements for AIF depositaries in either of our CPs, but we intend to look further at this and may bring forward proposals in due course.

### Independence of depositaries

- 6.11** We proposed that for all unauthorised AIFs, it should generally be possible for the AIFM and the depositary to be entities within the same group, provided there is proper management of conflicts of interest. We noted, however, that allowing custody to be performed by an entity in the same group as the AIFM might not be in the best interests of investors. We asked:

**Q14:** *Do you agree with our approach permitting AIF depositaries to be in the same group as the AIFM so long as Directive requirements are met?*

**Q15:** *What additional safeguards, if any, should there be to ensure effective management of conflicts of interest, especially in relation to custody of AIF assets?*

- 6.12** Of the 12 responses to question 14, 11 were in favour (though one thought it might be contrary to the aims of the Directive) and one opposed it. Some of those in favour emphasised that proper management of conflicts would be essential, while others endorsed the proposal without any further qualification.
- 6.13** One respondent to question 15 opposed the idea that the AIFM and depositary should be allowed to be part of the same group. Of the other nine, four thought that no additional safeguards were necessary, whereas five were in favour of them but had various suggestions as to what they might be.

### Our response

Although the AIFM and the depositary must be separate entities, nothing in AIFMD prohibits them from being members of the same group. AIFMD addresses several situations where different units within the same entity can perform potentially conflicting functions, provided there is proper separation between them, so we think the same principle should apply here.

We agree that proper identification and management of potential and actual conflicts of interest is a fundamental safeguard of investors' interests. AIFMD requires both the AIFM and the depositary to act independently and in the interests of the AIF and its investors, and places specific obligations on both parties concerning conflicts of interest. We do not think there is a need at this stage to provide further guidance on how such conflicts should be managed where the AIFM and depositary are entities in the same group.

Nor do we think there is a clear case at present for applying additional requirements where custody is performed within the same group. To do so might make intra-group custody an expensive and unattractive option for AIFMs, and it is likely that any additional costs would be passed on to the AIFs themselves. So it is not clear that the benefits to investors would justify these potential additional costs. It would however be appropriate for us to review in due course how the market develops following implementation, and to consider whether commercial arrangements are working effectively and in the interests of investors.

#### Depositories for non-EEA AIFs

- 6.14** Article 36 of AIFMD imposes certain depositary requirements where an EEA AIFM manages a non-EEA AIF and wishes to market it in a Member State by national private placement. The three functions of cash monitoring, safekeeping of assets and oversight of the AIFM must be carried out for such AIFs, although other aspects of the depositary regime do not apply. We proposed that UK firms wishing to perform any of the depositary functions under Article 36 would need to hold the Part 4A permission to act as a depositary of AIFs, and that a single UK firm should be appointed for each AIF where any of the duties are performed in the UK. Such firms would have to hold own funds of at least €730,000 unless they were acting only as PE AIF depositaries. We asked:

**Q16: Do you agree with our approach requiring UK firms providing depositary services under Article 36 to hold a Part IV permission to be an AIF depositary?**

- 6.15** We received ten responses, of which seven (coming from DATA and regulated firms) supported the proposal. The other three, which came from law firms and associations, said the proposed rule would not be proportionate and was potentially anti-competitive. We have also received other feedback from firms, though not as part of a consultation response, indicating their concern that the proposal for a single UK entity to provide depositary services was unnecessary and would constrain their ability to make efficient and cost-effective arrangements for non-EEA funds. One respondent said Article 36 depositary firms should be able to limit their activities (i.e. not have to carry out all three functions) and benefit from a reduced capital requirement.

### Our response

We have reconsidered this proposal and decided to change it so that UK firms can perform each of the three functions separately. In each case they would still need to be authorised to act as depositary of an AIF. A depositary that acts for UK AIFs will not require any additional permission to perform services for non-EEA AIFs.

Alternatively, a firm could be authorised to provide services for non-EEA AIFs only, in which case we would grant it a Part 4A permission with a limitation to that effect. A firm might for example provide only the service of oversight, in which case it would still need to apply for the Part 4A permission of acting as depositary of an AIF, but with a limitation to perform oversight of non-EEA AIFs only.

We have also reconsidered what capital requirements would be appropriate for firms that provide one or more depositary services under Article 36 only. To avoid undue regulatory burden and stimulate competition, we think it is reasonable to set a lower initial capital requirement than we originally proposed. To be consistent with firms authorised under MiFID that are able to carry on safeguarding and administration of assets and hold client money, we have set the minimum figure for all depositaries in this category at €125,000. This is also consistent with the requirement for PE AIF depositaries. This requirement will apply whether the firm performs one, two or all three of the specified functions, as long as it acts only for non-EEA AIFs in each case. We comment further on this in our revised cost benefit analysis in chapter 10.

### Transitional arrangements for appointing non-UK depositaries

- 6.16** We proposed that, in accordance with the transitional provision in Article 61(5), an EEA (non-UK) credit institution could be appointed as the depositary of a UK unauthorised AIF until 2017. This would potentially make it easier for AIFMs of UK AIFs to appoint suitable depositaries and could help to stimulate competition in the provision of depositary services. The transitional arrangement would not be open to authorised AIFs (NURS and QIS), which already have depositaries in place who are familiar with the specific UK retail funds regime. We asked:

**Q17:** *Do you agree that EEA credit institutions should be allowed to act as depositary to UK AIFs? If you expect to be an AIFM of UK AIFs from 2013, would you consider using such a firm as depositary?*

**Q18:** *Should authorised funds be excluded from this arrangement?*

- 6.17** There were ten responses to question 17, and all agreed in principle with the first part of the question. DATA and one existing depositary were concerned that such firms should be able to demonstrate relevant knowledge and expertise in the UK market. Another firm said that this would make little difference to AIFMs of private equity and real estate funds, who would not look to credit institutions to provide depositary services. No prospective AIFMs responded positively to the second part of the question.
- 6.18** Of seven responses to question 18, five agreed with the proposal, one said it risked an uneven playing-field in terms of costs, and the other said the similarities between the underlying assets of authorised funds and unregulated CIS would not necessarily justify excluding authorised funds.

### Our response

We have included transitional rules in FUND so that a UK AIFM of an unauthorised AIF can appoint an EEA credit institution (not established in the UK) as its depositary until 2017. AIFMs that wish to appoint such firms to act for their UK AIFs should notify us as part of their application for authorisation. We expect to contact the relevant depositary directly and obtain written confirmation that it is willing and organisationally ready to act.

The AIFMD UK regulation will allow a credit institution established in the UK to be appointed as a depositary for an EEA AIF. In that case it will be carrying on the regulated activity of acting as trustee or depositary of an AIF, so our rules will make it subject to FUND 3.11 when doing so.

We intend to proceed with our proposal to exclude authorised funds from these arrangements. Although there are arguably benefits to be gained from increased competition, we do not think this would be in the best interests of investors in authorised funds, especially given its temporary nature.

### Cost benefit analysis

- 6.19** In the cost benefit analysis of CP12/32, we noted that our proposals would have cost implications for some firms that wished to act as PE AIF depositaries. Feedback on this issue is given in chapter 10.

### CP13/9

- 6.20** In CP13/9 we set out our proposals for changes to both Chapter 6 (Custody rules) of the Client Assets sourcebook (CASS) and other CASS and CASS-related provisions as part of our implementation of AIFMD. We asked:

**Q15: Do you agree with the proposed application of CASS and CASS-related Handbook provisions in relation to each type of depositary as noted above? If not, please provide reasons.**

- 6.21** We received two detailed responses. One queried why we did not propose to apply all of CASS 6.3 (Depositing assets and arranging for assets to be deposited with third parties) to depositaries, particularly given the requirements of Article 98 of the AIFMD level 2 regulation. The respondent also questioned the application of prime brokerage daily reporting.
- 6.22** This respondent also asked whether a third party, to whom safekeeping of assets has been delegated by a depositary, must limit the use of an omnibus account so that it could include only the assets of AIFs, and not of any other clients of the third party.
- 6.23** The other respondent questioned whether the specialist regime for the depositaries of unauthorised AIFs constitutes the bespoke private equity regime referred to by the UK Investment Management Strategy produced by the Treasury.<sup>22</sup>

<sup>22</sup> HM Treasury, the UK investment management strategy, March 2013.

### Our response

We are applying only a limited number of the provisions within CASS 6.3 to a firm acting as a depositary of an AIF. Those provisions are in accordance with the principles set out in Article 16 of the MiFID Implementing Directive<sup>23</sup>, to which Article 21(8) of AIFMD refers. In any event the level 2 regulation is directly applicable so it would be wrong to duplicate its requirements in our rules.

The new guidance provides for the situation where a prime broker has entered into an agreement under Article 91 of the level 2 regulation (Reporting obligations for prime brokers), and makes available to the depositary statements as specified by Article 91. In that situation, if the prime broker firm sends the same statements to its client, the prime broker firm would be considered to have met the obligations under CASS 9.2.1R.

We confirm that the omnibus account referred to in FUND 3.11.31G can include the assets of AIFs and other clients of the third party, as long as these assets are segregated from the third party's own assets. We have amended the guidance accordingly.

Our rules implementing the specialist depositary regime for private equity AIFs and similarly-structured funds are explained earlier in this chapter. The new specialist regimes in CASS 6 are applicable to all firms acting as a trustee or depositary of an AIF in relation to their safekeeping duties, but vary depending on whether the AIF is authorised or unauthorised. Unauthorised AIFs include, but are not limited to, private equity and other funds with the characteristics set out in FUND 3.11.12R.

Based on the above, we are proceeding with the proposed changes to CASS 6, and the other CASS and CASS-related provisions.

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#### **Depository responsibilities for cash monitoring**

- 6.24** We continue to engage with stakeholders about the practical application of the requirements for cash monitoring by depositaries. We do not propose any changes to the Handbook on this matter at this stage, but will keep this under review.

#### **Wider CASS policy review**

- 6.25** As stated in CP13/9 we are also carrying out a wider policy review of certain chapters of CASS, including CASS 6. We expect to publish the results of this review in a Consultation Paper later this summer.

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<sup>23</sup> Commission Directive 2006/73/EC implementing Directive 2004/39/EC.

## 7. Marketing

- 7.1** In chapter 7 of CP13/9, we consulted on proposals concerning AIFMD marketing, including a new section of PERG providing guidance on what constitutes marketing under the Directive, and new notification forms relating to marketing. This chapter covers the responses to the questions in CP13/9 regarding AIFMD marketing. We did not ask any questions in CP12/32 about AIFMD marketing.

### PERG guidance on marketing

- 7.2** We proposed a new section of PERG covering a number of marketing issues, such as the meaning of offering and placement, the territorial scope of marketing, and passive marketing. This guidance was based on the then current draft of the Treasury's AIFMD UK regulation. We asked:

**Q16:** *Do you have any comments on our proposed marketing guidance in PERG? Are there any other issues related to AIFMD marketing that should be included in the guidance?*

- 7.3** We received 17 responses to this question. Several of them were detailed, and there were recurring issues, which we group under the headings below.

### Passive marketing – marketing at the initiative of the investor

- 7.4** Thirteen respondents raised concerns about our proposed guidance on passive marketing, which they found overly restrictive. For example, they were concerned that we might consider an investor's approach to an AIFM as not being at his/her own initiative where:

- general background information concerning an AIFM, such as its existence, team and track record, is generally available, even if published on a website
- an existing investor in an AIF managed by the AIFM has received communications from the AIFM
- the investor has no prior knowledge of the AIF in question, or
- the investor has had previous dealings or involvement with that AIFM.

- 7.5** Several respondents focused on the communications between an investor and the AIFM or its agents. One recommended we should clarify that, for communications to be deemed to have been solicited at the investor's request, such a request need only be made once in the course of dealings. The AIFM could then rely on that request until the investor indicated that it no longer wished to receive further communications.

- 7.6** Another respondent noted that retail investors will still be protected by the UK's financial promotion and scheme promotion regimes, and that the passive marketing exemption was inserted into the Directive to ensure that EEA professional investors continue to have access to AIFs in which they wish to invest. Consequently, they suggested that the passive marketing exemption should cover a much wider range of circumstances where the investor positively requests that an offer should be made to it.
- 7.7** A UK institutional investor in AIFs welcomed our proposal to clarify the meaning of marketing at the initiative of the investor. This respondent emphasised the importance of being able to approach investment managers at its own initiative without them being deterred by a substantial regulatory compliance burden.
- 7.8** One respondent explained that, for MiFID purposes, a service is presumed to be provided at the client's initiative unless the MiFID firm has made a personalised communication to the client which contains an invitation or is intended to influence the client. The same respondent asked whether an investment firm, or an intermediary acting on behalf of an AIFM, can rely on the initiative of an investor or must verify there has been no other marketing to the investor by the AIFM or others.

### Our response

We have made consequential changes to our guidance, to reflect amendments to the Treasury's AIFMD UK regulation since we published our proposals. These include:

- the change in the scope of the marketing definition, which has been narrowed to AIFMs and persons acting at their initiative, or on their behalf, and
- marketing under the EuSEF and EuVECA designations (PERG 8.37.12G).

Some of the responses we received relate to policy positions taken by the Treasury in their regulation, rather than any FCA interpretation. We note this below as appropriate.

In response to feedback, we have greatly simplified our guidance on marketing at the investor's own initiative. Rather than trying to give exhaustive guidance on this topic, we have removed material on how to determine whether the marketing is at the investor's initiative and on scenarios that caused concerns to respondents, such as the investor's prior knowledge of the AIF or previous involvement with the AIFM. Instead, we simply explain that firms may generally rely on a confirmation from an investor that the approach is at his/her own initiative. However, in supervising this area we will take account of any evidence suggesting that marketing activity has been going on, as that might point to circumvention of the Directive's obligations.

We would expect that intermediaries acting on behalf of an AIFM might need to verify with the AIFM whether a particular investor's request is at his/her initiative, but this would be dependent on the circumstances such as the distribution agreement in place, etc.

### Effect of listing

- 7.9** 7.9 Several respondents suggested we state in PERG that if a firm maintains a listing on a public market for an AIF that it manages, this fact should not be considered marketing under AIFMD.

#### Our response

We agree with respondents that listing an AIF is not in itself marketing under the Directive, and have revised PERG 8.37.5G (3) accordingly. We note that the process of listing an AIF may however be accompanied by marketing activity, which would be captured.

- 7.10** **Secondary offerings** Several respondents noted that marketing restrictions would also apply to secondary offerings of units or shares of an AIF. They distinguished secondary offerings from primary offerings, arguing that the terms ‘offering’ and ‘placement’ which define AIFMD marketing, relate only to primary offerings.

#### Our response

We have revised PERG 8.37.5G (3) on the definition of AIFMD marketing, which now includes a condition that the offering or placement seeks to raise capital in the AIF. As a result, many secondary offerings will not be considered within scope of AIFMD marketing, except where there is an indirect offering or placement, such as where a placement agent has purchased units in an AIF for distribution to investors.

- 7.11** **The meaning of an offering or placement** Two respondents noted their satisfaction with the guidance on the meaning of an offering or placement. However, a few others were concerned that the phrase ‘make units or shares of an AIF available’, which we used, is too wide and is inconsistent with the general understanding of marketing.

#### Our response

We have revised PERG 8.37.5G by adding a condition that the offering or placement seeks to raise capital in the AIF. We have also made it clearer that this definition applies regardless of whether the marketing to the investor constitutes a contractual offer or an invitation to make an offer.

- 7.12** **Territorial scope of the marketing provisions, and location of investor** Several respondents noted that according to PERG, the provisions would capture marketing to UK or EEA nationals located outside the EEA. They asked whether they would be required to look through a nominee structure to the underlying investor, to determine its domicile or registered office. Respondents also asked for more guidance on the meaning of ‘domicile’ as used in the Directive, and suggested that it should be a residence test.

#### Our response

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The Treasury revised regulations 49 and 50 of the AIFMD UK regulation to limit the scope of marketing to the territory of the UK. However, regulation 45 still refers to the 'domicile' of an investor. Stakeholders should construe the reference to 'domicile' in line with its meaning in AIFMD, i.e. its meaning under EU law, which may be different to the UK definition of a person's domicile for tax purposes.

As to who should be treated as the investor, our guidance now says that the person making the investment decision should be considered as the investor for these purposes.

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### Offering of feeder funds

- 7.13** Two respondents asked us to confirm that the marketing of a feeder AIF does not amount to the indirect marketing of its underlying master AIF and to clarify whether, when marketing a non-EEA feeder AIF to UK investors, it would be necessary to enter both the feeder and master AIFs on the Article 42 private placement register. One respondent asked whether an AIFM may market a non-EEA feeder AIF that it does not manage, in the case where that feeder AIF invests into a master AIF managed by that same AIFM.

#### Our response

It is unnecessary to make separate notifications for both a non-EEA feeder AIF and its corresponding non-EEA master AIF, unless the master AIF will also be directly offered to investors. However, on the notification form for a non-EEA feeder AIF, we will ask for some information about the master fund, such as its full name and statutory authority. The question of whether such a non-EEA master AIF will additionally have to report to us about its portfolio, even if it is not notified to us, is part of the recent ESMA consultation on AIFMD reporting.

When an AIFM markets the funds of another AIFM, it will be treated the same as any other third party marketing an AIF on behalf of its manager. So the AIFM would be able to market a non-EEA feeder AIF that it does not manage, where that non-EEA feeder AIF invests into a master AIF that is managed by that AIFM, provided the correct notification is made for the feeder AIF.

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### Draft documentation

- 7.14** Some respondents agreed with our interpretation that sending potential investors draft documentation is not marketing, but were worried that other Member States might not agree with us. This might result in firms making early applications for a marketing passport under the Directive, to be able to send draft documentation to investors in other Member States where the communication of draft documentation would be considered marketing.

#### Our response

In the absence of EU guidance on whether the communication of draft documentation is marketing, there will be uncertainties over this point and others concerning marketing in other Member States. We have noted this in a new paragraph PERG 8.37.6G (3).

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### Notifications of marketing

- 7.15** The Directive permits UK and EEA AIFMs to operate on a cross-border basis from 22 July 2013. We proposed forms for these AIFMs to notify us of the cross-border marketing of a UK and EEA AIF, and the passporting of management services to another Member State. We asked:

**Q17: Do you have any comments on the information required on the forms for passporting? Are there any other matters relating to marketing under AIFMD that should be addressed in rules or guidance?**

- 7.16** There were five responses to this question. One respondent supported transitional arrangements for firms applying Article 42 of the Directive (private placement of funds managed by non-EEA AIFMs). This respondent also argued for an efficient and practical private placement regime, which does not introduce additional provisions to those required by the Directive. In particular, they noted there is no requirement in the Directive for an AIF marketed under the private placement regime to have a single AIFM.

#### Our response

The Treasury has revised parts of the AIFMD UK regulation for the private placement regime, taking into account most of the concerns noted above. The regime is now structured as a notification regime, and under regulation 59 the relevant funds are not required to have a single AIFM. However, the AIFM making the notification must be the person responsible for complying with the relevant requirements in AIFMD.

The FCA's powers to direct small registered UK AIFMs and small non-EEA AIFMs on the manner and content of their reporting requirements will come into effect only when the Treasury's AIFMD UK regulation is in force. We expect to make these directions in July 2013 and publish them in the next Handbook Notice.

### Charity funds

- 7.17** Charity funds such as CDFs and CIFs established under the Charities Act 2011 or its predecessors will be considered AIFs. However, the regulation of the funds as charities will remain with the national charity regulator. To allow CDFs to make a promotion to eligible charities, we proposed extending the marketing exemption in COBS 4.12. We asked:

**Q18: Do you agree with the proposal to permit CDFs to be marketed to eligible charities?**

- 7.18** We received no responses to this question. The Treasury has not made any changes to the treatment of charity funds since we published CP13/9, so we will proceed with our proposal.

## 8. Fees

- 8.1** In chapter 8 of CP13/9 we consulted on changes to the fees regime for firms within the scope of AIFMD. This was to reflect the changes to the scope of regulation and the definitions in the RAO, as part of the implementation of AIFMD.

### Authorised AIFMs and depositaries

**Q19: Do you agree with our proposed structure of application and periodic fees for authorised AIFMs and depositaries?**

- 8.2** We had one response to this question, disagreeing with our proposal to charge authorised internally managed investment companies by using an income proxy based on assets under management. The respondent argued that the range of fees an external manager might charge varies significantly and there is no way to make such an estimate without creating an arbitrary figure. In their view, the 1% figure chosen may represent a significant under-estimate for some asset classes and an over-estimate for others.

#### Our response

We do not intend to change our proposals.

We proposed to put authorised internally managed AIFs into fee-block A9 (Managers and depositaries of investment funds and operators of CIS or personal pension schemes). The tariff base for this fee-block is gross income from charges to the fund. Since internally managed AIFs do not generate income from charges to the fund, we proposed that these firms should treat an amount of 1% of the value of the AIF assets under their management as a proxy for their income.

The alternative would be to create a new fee-block for authorised internally managed investment companies. This would require a change to our systems, incurring additional costs which we would recover from the firms concerned. In the absence of a suitable income measure, the fees for authorised internally managed investment companies in a separate fee-block would most likely be based on the value of their assets under management. So the distribution of fees between them would be identical to the distribution under our proposals.

We expect there to be a relatively small number of authorised internally managed investment companies and we believe that these can be accommodated within our existing fee structure. So we intend to include them in fee-block A9 with an income proxy of 1% of assets under management, as we proposed.

## Registered AIFMs

### **Q20: Do you agree with our proposed structure of application and periodic fees for registered AIFMs?**

- 8.3** We received one response to this question, which disagreed with our proposed application and periodic fee rates for registered AIFMs, arguing that they were too high in comparison to the proposed rates for non-EEA AIFMs marketing AIFs under Article 42 AIFMD.

#### **Our response**

We have revised our proposals since there will now be more than one kind of registered AIFM.

#### **Registered internally managed investment companies**

Our supervisory processes for registered AIFMs will be different to those for non-EEA AIFMs marketing AIFs under Article 42.

In the case of registered internally managed investment companies, we must register the AIFM and ensure that it complies with certain requirements. For example, the AIFM should not be on the register if any of the individuals responsible for its management have been convicted of any offence involving fraud or dishonesty, or are subject to a prohibition order, or could be made subject to a disqualification order.

Because of these differences in the scope of regulation, we consider it appropriate to charge different fees to registered AIFMs. Nevertheless, having further considered our application and supervisory processes for registered internally managed investment companies, we intend to set both the application fee and the periodic fee at the lower level of £750 each. These fees will be kept under review as we gain more experience in registering and supervising these firms.

#### **Registered managers of property funds**

The Treasury changed its draft AIFMD UK regulation after the publication of CP13/9. In particular, sub-threshold managers of property funds will now be subject to a registration regime rather than being classed as small authorised UK AIFMs. The fees we consulted on for authorised AIFMs included sub-threshold managers of property funds. However, if those firms are to be registered rather than authorised, this will reduce the amount of resource we require to process their application and to supervise them on an ongoing basis.

We have reviewed the fees that these firms should pay. Under the new regime, registered managers of property funds will be subject to a similar regime to registered internally managed investment companies. We therefore intend to charge them the same fees, which will be an application fee and a periodic fee of £750 each.

### **Registered managers of EuSEFs or EuVECAs**

Since the publication of CP13/9, the final EuSEF and EuVECA Regulations have been published in the Official Journal and the Treasury has updated its Regulations to include a process for registering EuSEF and EuVECA managers from 22 July 2013.

We currently do not consider it appropriate to charge registered EuSEF and EuVECA managers a different fee to that levied on other categories of registered AIFMs. This is an application fee and a periodic fee of £750 each. We will keep these arrangements under review. We would consult on any proposal to levy a different fee in the usual way.

We expect that most firms applying for registration as a EuSEF or EuVECA manager will already be, or will shortly become, authorised AIFMs. The fees we intend to charge registered EuSEF or EuVECA managers will be in addition to any fees they might pay as authorised AIFMs and are designed to cover the additional work required to process their EuSEF or EuVECA application and supervise their compliance with those Regulations. For example, we will need to check that the investment strategies of the EuSEF or EuVECA funds fulfil the criteria in the relevant Regulations. On a provisional basis, we intend to charge EuSEF and EuVECA managers the same fees as other registered AIFMs. This will be an application fee and a periodic fee of £750 each.

The FCA's powers to make fees rules for registered AIFMs will come into effect only when the Treasury's legislation is in force. We therefore expect to make these rules in July 2013 and publish them in the next Handbook Notice.

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## **AIFs marketed under national private placement**

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### ***Q21: Do you agree with the proposed fees structure for recording and maintaining AIFs on the national private placement registers?***

**8.4** We received one response to this question, which agreed with our approach.

#### **Our response**

The updated AIFMD UK regulation includes a number of changes in relation to marketing AIFs in the UK under national private placement. In particular, the application process for these AIFs has been replaced with a notification process, and the FCA will no longer need to maintain a public register of these AIFs.

So we have reconsidered whether our proposed application fees for AIFs marketed in the UK under national private placement are appropriate. Under the notification process, the AIFM will still need to provide us with information, similar to what would have been required under the proposed application process, and we will still need to check the notification is complete and fulfils the required criteria. We will also still need to maintain a list of AIFs marketed in the UK under national private placement, but we will not need to publish it. In view of these considerations, we have decided to lower the fee rates to the following:

**Table 8.1**

AIFs marketed under national private placement: notification fees	
Type of fund	Fee per fund
AIF managed by full-scope non-EEA AIFM	£250
AIF managed by sub-threshold non-EEA AIFM	£125
Non-EEA AIF managed by EEA AIFM, where the AIFM is not otherwise paying any FCA fee as an AIFM	£250

The FCA's powers to make fees rules for national private placement notifications will come into effect only when the Treasury's AIFMD UK regulation is in force. We expect to make these rules in July 2013 and publish them in the next Handbook Notice.

### Recognised schemes

**Q22: Do you agree with the proposed new fee structure for recognised schemes?**

- 8.5** We did not receive any responses to this question, so we intend to make the rules as consulted on.

### Ombudsman service and FSCS levies

**Q23: Do you agree with our proposed changes to the regimes for funding the ombudsman service and FSCS?**

- 8.6** We did not receive any responses to this question, so we intend to make the rules as consulted on.

### Applications by EEA AIFMs to market AIFs to non-professional UK investors

- 8.7** Under regulation 54(4)(b) of the AIFMD UK regulation, a full-scope EEA AIFM can apply directly to the FCA for approval to market a fund to non-professional investors in the UK. This will allow an EEA AIFM to market AIFs to those categories of non-professional investor to whom unregulated CIS can be marketed under UK law (e.g. sophisticated or high net worth individuals). If the EEA AIFM wants to market an AIF to ordinary retail investors, it will instead need to apply for the AIF to be authorised or recognised by the FCA.

- 8.8** On receiving an application to market AIFs to non-professional investors in the UK, the FCA will need to check whether the fund is allowed to be marketed to the categories of investor specified in the application under UK law.
- 8.9** We do not currently propose to levy a fee for this application. We will, however, keep the costs of processing these applications under review. We would consult on any proposal to levy a fee in the usual way.

## 9. Other matters

- 9.1** This chapter covers our analysis of the responses to the questions in chapter 7 of CP12/32 on the proposed remuneration regime and how firms that will be subject to both the existing FCA remuneration code ('the Code') and the AIFMD regime should comply with these requirements.
- 9.2** In this chapter, we also provide further information regarding:
- the implementation of the ESMA guidelines on remuneration, and
  - rules for the eventual implementation of European passports for non-EEA AIFMs managing EEA AIFs and for non-EEA AIFs being marketed in the EEA.

### AIFMD remuneration

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- 9.3** The remuneration rules and principles in AIFMD will overlap with the existing rules of the FCA Remuneration Code (the Code) where an AIFM is a subsidiary of a credit institution and where an AIFM carries on the additional MiFID investment activities permitted under Article 6(4). We proposed that if an AIFM is subject to both remuneration regimes and is compliant with the AIFMD remuneration regime, that compliance will satisfy the requirements of the Code. We asked:

**Q7:** *Do you agree with our proposal for aligning the existing requirements under the FSA Remuneration Code with the new AIFMD remuneration rules? Do you have any specific concerns regarding:*

- *Our proposed treatment of AIFMs which are part of a banking group?*
  - *AIFMs doing MiFID investment business?*
- 9.4** Thirteen respondents replied to this question, and the majority agreed with our proposal. One firm was concerned by the prospect of having to implement three remuneration regimes (based on CRD, AIFMD and a potential new regime under the UCITS Directive) for employees working on similar portfolios.
- 9.5** Several respondents agreed that complying with the AIFMD remuneration regime should be deemed to be complying with the Code where both regimes may apply to a firm, such as where a firm is part of a banking group or doing MiFID investment business. However, one respondent asked if it would be possible to comply with both the AIFMD remuneration regime and the Code within a firm by applying these rules proportionately, based on the extent of its business under each Directive.

- 9.6** We did not consult on proportionality with respect to remuneration, but several respondents expressed a preference for an AIFMD framework similar to that set out in the Code, and to align the proportionality levels so that similar-sized firms would be treated similarly under both regimes. One respondent suggested that proportionality under the AIFMD regime should allow firms solely to apply the Code, where the firm is part of a banking group and its AIFMD business represents a small portion of its business.

### Our response

We intend to proceed with our guidance that complying with the AIFMD remuneration regime will be deemed to be complying with the Code. We believe this should be less burdensome to AIFMs than having to comply with overlapping regimes. Firms that are doing both MiFID and AIFMD business may choose to apply both regimes to their employees, based on the amounts of an employee's work or the firm's business undertaken under each Directive.

The CRD IV legislative package, when implemented, will introduce caps on variable remuneration.<sup>24</sup> As the precise scope of these provisions is not known at the time of publication, we may have to change our policy in respect of some firms in the future.

We have not yet proposed guidance on an AIFMD proportionality framework, but we will take these responses into account in developing it. We will consult on such a framework in due course.

### ESMA guidelines on sound remuneration policies under the AIFMD

- 9.7** Article 13(2) of the Directive requires ESMA to develop guidelines for the application of AIFMD remuneration rules. ESMA published its final report on these guidelines in February 2013.<sup>25</sup> Once ESMA publishes the official version of the guidelines, which is expected very shortly, we have two months to notify ESMA of whether we will comply with them. As of the date of publication of this PS, we have not yet determined whether we will comply in full with these guidelines. We expect to decide shortly, and we will then publish a statement on our website.
- 9.8** The guidelines allow an AIFM to disapply certain rules, such as deferral of variable remuneration, where it is proportionate to do so based on the firm's size, internal organisation and the nature, scope and complexity of its activities.<sup>26</sup> The guidelines provide more detail on each of these non-exhaustive criteria. A competent authority is allowed discretion to develop its proportionality framework, taking into account the specific nature of AIFMs in its jurisdiction.
- 9.9** As noted above, we intend to consult on a proportionality framework but, in the meantime, we expect firms to consider their situation against the proportionality criteria provided in the ESMA guidelines. Firms should be able to justify any disapplications that they intend to make against these criteria.

<sup>24</sup> [http://ec.europa.eu/internal\\_market/bank/regcapital/new\\_proposals\\_en.htm](http://ec.europa.eu/internal_market/bank/regcapital/new_proposals_en.htm)

<sup>25</sup> Guidelines on sound remuneration policies under the AIFMD, final report – [www.esma.europa.eu/page/investment-management-0](http://www.esma.europa.eu/page/investment-management-0)

<sup>26</sup> See paragraphs 23-31 in the Final Report, Guidelines on sound remuneration policies under the AIFMD.

### Passporting of non-EEA AIFMs and AIFs

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- 9.10** AIFMD contains provisions for AIFMs established outside the EEA to be given passporting rights for the management and marketing of AIFs. These rights will be equivalent to the single market rights of an AIFM established within the Union. However, they are not immediately operative, and will not become so until 2015 or 2016 at the earliest, following a review to be carried out by ESMA for the Commission. ESMA would also need to develop a large number of binding technical standards governing the operation of this third-country passport.
- 9.11** The Treasury and FCA consider it necessary for the level 1 measures to be transposed into UK law and regulation now, rather than when they come into effect, so that the UK has carried out its legal duty to transpose the Directive fully. This is consistent with the view set out in the Commission services questions and answers on transposition issues.<sup>27</sup>
- 9.12** The Treasury will execute the measures for which it is responsible by making a statutory instrument in July.
- 9.13** The FCA will also have to make rules on certain matters. There is insufficient time for us to consult on draft rules and then make final rules by 22 July 2013, so we have agreed a special procedure with the Treasury. The statutory instrument will modify the s.138I FSMA consultation requirements on the FCA so that, instead of having to consult before we make the rules, it will be sufficient for us to consult and carry out a cost benefit analysis subsequently on the rules that have been made, or on their proposed replacements, before they come into force on or after 22 July 2015. These provisions will consist of a copy-out representing the minimum needed to transpose AIFMD correctly.
- 9.14** At a later date (though well in advance of the date at which the third-country passport might be implemented in practice), we will review the rules and carry out our normal procedure of publishing a consultation paper with a cost benefit analysis, inviting responses from stakeholders.
- 9.15** The instrument containing the relevant rules will be published in the Handbook notice for July 2013.

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<sup>27</sup> European Commission questions and answers cited in footnote 13, ID 1189 in relation to Article 66.

# 10.

## Cost benefit analysis

- 10.1** This section covers the feedback we received to our cost benefit analysis (CBA) in CP12/32 and CP13/9. Additionally, where we are making policy changes to the draft rules, as noted in previous sections of this paper, we update our CBA with respect to these changes below.

### CP12/32 - CBA

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- 10.2** In CP12/32, we published a CBA that covered the impacts of implementation of both the Directive and the level 2 regulation. We used a variety of data sources in assessing potential compliance and capital costs to AIFMs; market impacts to business models, competition and consumers; and benefits. Several areas, such as the impacts of requirements for depositaries and benefits of AIFMD, could not be assessed quantitatively, due to the scale of the changes and the uncertainties over the impact of the Directive. Additionally, the scale of the changes would make it disproportionate to estimate all the costs and benefits in detail, given that we are mandated to implement AIFMD. The areas where we have discretion are likely to have little influence on the overall costs.
- 10.3** We asked a specific question about the cost implications for some firms that wished to act as PE AIF depositaries:

**Q19: *Do you agree with our assessment of the impact of capital requirements for PE AIF depositaries?***

- 10.4** Of the six responses to this question, four agreed with the assessment. One respondent was concerned that the definition of leverage would put many smaller real estate managers above the threshold of assets under management at which the full requirements of AIFMD, including appointment of a depositary, take effect, but they would not have the means to generate additional income to cover such costs. They suggested that the costs of establishing a separate legal entity to perform the depositary function would be about £150,000 a year.

#### Our response

The issues that have been noted in feedback are a direct consequence of the Directive and the related level 2 implementing measures, so the FCA cannot modify their application to firms. We believe that we have provided as much flexibility as we reasonably can in the way we propose to implement the depositary regime envisaged in Article 21(3), in the expectation that this will have a marginally beneficial effect on stimulating competition to provide such services.

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**10.5** More generally, for the whole CBA, we asked:

**Q20: Do you agree with our analysis of costs and benefits?**

- 10.6** We received seven responses to this question. Several respondents replied that it was too early in the implementation process to determine whether the CBA was correct. Others believed that the CBA was likely to understate the costs of AIFMD implementation. Two responses indicated that the costs would be significantly greater than the benefits of AIFMD.
- 10.7** With respect to specific costs, one respondent expected the fees for external valuers of real estate assets to increase substantially because of their increased liability, the sector's lack of competition, and the lack of appropriate professional indemnity insurance.
- 10.8** Three other responses referred to depositary issues in their comments on the CBA. One noted the costs to closed-ended investment companies of the requirement to appoint a depositary where none currently exists. Another suggested that depositary costs might amount to an additional 3 to 10 basis points a year on fund charges, with higher one-off costs in the first year after implementation. Another noted that the depositary requirements were analysed in a qualitative manner, even though these provisions were generally considered to be one of the most costly parts of the Directive. As a result, the aggregate costs of implementation were significantly understated.

### Our response

As noted, we have limited scope for discretion on the implementation of AIFMD, because it aims to harmonise the regulatory framework across the EU. As such, we are required to transpose the rules in many areas where a cost benefit analysis would otherwise have contributed to informing our policy proposals. Given this constraint, we would be unable to alleviate these costs in any meaningful way, even if we were to accept that the costs would be significantly greater than the benefits.

With regard to the specific feedback on external valuers' fees, we did indeed note in the CP that there is particular uncertainty for real estate firms, as they may not currently rely on external valuation. So, although the external valuers' fees may indeed rise, the sector would not necessarily persist in its current form following the implementation of this requirement. We would expect the increase in demand for such services to encourage entry in the market and, even if valuers' fees may rise in the short term due to increased liability and the perceived lack of competition, the long-term effect is much less certain.

In relation to the costs arising from the depositary requirements, we restate that they arise almost entirely because of requirements outside our discretion.

We noted in the CP that we were unable to quantify these costs precisely, due to a lack of data and the uncertainties of the Directive's impact. However, we reported a range of estimates from both internal and external sources. At the time, the additional costs were in the range of 10 to 25 basis points under a lenient regime. The only additional piece of information we received since then is the consultation response mentioned above, which suggests that our initial estimates were not unreasonable.

We only have limited flexibility on the rules regarding the appointment of depositaries. In this regard and considering the feedback received to the CP, we have eased some of the requirements for non-EEA AIFs (see chapter 6). These adjustments may lead to a decrease in depositary charges, and consequently limit the costs for these AIFs, although the relative cost reduction is unlikely to be significant.

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### CP13/9 - CBA

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- 10.9** In CP13/9, we considered the impacts of a limited number of proposed changes related to:
- the regime for sub-threshold AIFMs
  - additional prudential rules
  - consumer redress: FSCS and the ombudsman service
  - depositaries, and
  - marketing.
- 10.10** There was no specific question on the CBA in the CP, and we received no comments or questions regarding it.
- 10.11** As stated in our consultation, we are not aware of any mutual societies within the scope of the proposed rules. So we do not believe that the changes described in this paper will have a different impact on authorised persons which are mutual societies, compared to other authorised persons.

### Update of the CBA in CP12/32 and CP13/9 following changes made in the draft rules

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- 10.12** As explained in the main body of this paper, we are making some changes to the draft rules and guidance that we consulted upon in CP12/32 and CP13/9. This section provides our view on the costs and benefits of these changes.
- Sub-threshold managers of authorised AIFs**
- 10.13** As we explain in chapter 3, the Treasury has changed its proposals for small authorised UK AIFMs of authorised AIFs. These firms will now remain subject to existing requirements and will not be subject to the same requirements as full-scope UK AIFMs, as we envisaged in CP13/9. So, we have modified a number of areas in the Handbook so that these firms will not be subject to the same requirements as full-scope UK AIFMs.
- 10.14** In CP13/9, we assessed the costs and benefits of the original proposal. Based on our discussions with industry and an analysis of regulatory reports by firms, we found that the resulting compliance costs would be small (up to £15,000 per firm as a one-off cost and up to £1700 a year per firm). We considered that the proposal would benefit investor protection because of the disclosure and operational requirements.

**10.15** Given that these requirements will now not be applied to these sub-threshold managers, the costs and benefits associated with the original proposals will not materialise.

#### **Prudential requirements for internally managed AIFs**

**10.16** As we explain in chapter 4, the Commission has clarified that the requirements in Article 9(3) to (6) of the Directive should apply to internally managed AIFs. Previously (in CP12/32) we proposed not to apply these provisions to such firms but, due to the Commission's stated view, we have changed our approach.

**10.17** As these firms are not currently regulated by the FCA, we do not have data available on their capital resources. So, as we expect few firms in this category, we have assessed the impact of the increased prudential requirement by a review of publicly available financial information and discussions with the largest firms. Based on this, it appears that firms should be able to meet the increased requirement from their current resources and that they would not need to increase them to maintain a similar buffer above the required minimum.

**10.18** Therefore, we do not expect any material cost or benefit to arise from this new requirement.

#### **Depositaries for non-EEA AIF**

**10.19** In response to feedback, we are making some changes to the requirements regarding depositaries for non-EEA AIFs, which we mentioned in chapter 6. Our initial proposal in CP12/32 was that a single UK firm should be appointed for each AIF where any of the duties (cash monitoring, safekeeping of assets and oversight of the AIFM) are performed in the UK, and that such firms would have to hold own funds of at least €730,000 (unless they were acting only as PE AIF depositaries). We have reconsidered this proposal, and will now permit UK firms to perform each of the three depositary functions separately. In addition, we have lowered the capital requirement to €125,000 for all depositaries in this category.

**10.20** In CP12/32, we noted that the requirements for depositaries under the Directive were of particular concern to market participants. We provided some estimates on the impact of various aspects of the requirement, but primarily discussed these costs qualitatively because of the uncertainties of the Directive's impacts. With respect to benefits, we explained that the requirements for depositaries should result in additional protection for investors.

**10.21** In lowering the own funds requirement, we expect this to result in decreased capital costs to firms or no change in costs, depending upon their current capital holdings and the capital amount they choose to hold in excess of our requirements. Our proposal that a firm may perform separately each of the three depositary functions for a non-EEA AIF, permits firms to be more flexible in providing services, and as a result we would not expect any additional costs to be incurred.

**10.22** The new proposals may marginally stimulate competition in the market for providing depositary services to non-EEA AIFs, as firms specialising in one or more of the three depositary functions can operate.

**10.23** The decreased capital requirements in our new proposal will, however, reduce the benefit to investor protection in this area.

# Annex 1

## List of non-confidential responses to CP12/32

1. Association for Financial Markets in Europe
2. Association of Investment Companies
3. Alternative Investment Management Association
4. Association of Real Estate Funds
5. Augentius
6. Aztec Group
7. Baillie Gifford & Co
8. BlackRock
9. British Property Federation
10. British Private Equity and Venture Capital Association
11. Capita Financial Managers Limited
12. CBRE Global Investors
13. Chartered Financial Analyst Society of the United Kingdom
14. City of London Law Society
15. Depositary and Trustee Association
16. Eversheds LLP
17. Hargreaves Lansdown
18. Henderson Global Investors Limited
19. International Underwriting Association
20. Investment Management Association
21. Ipes (Guernsey) Limited
22. JP Morgan

- 23.** Kingfisher Property Partnerships Limited
- 24.** Langham Hall UK LLP
- 25.** Law Society of England and Wales
- 26.** Macfarlanes
- 27.** Managed Funds Association
- 28.** Pantheon Ventures
- 29.** Royal Institution of Chartered Surveyors
- 30.** State Street Corporation

## Annex 2

# List of non-confidential responses to CP13/9

1. Association of Investment Companies
2. Association of Real Estate Funds
3. Alternative Investment Management Association
4. Baillie Gifford & Co
5. Barclays Bank plc
6. Bingham McCutchen (London) LLP
7. BlackRock
8. British Property Federation
9. British Private Equity and Venture Capital Association
10. City of London Law Society
11. Complyport Limited
12. Depositary and Trustee Association
13. Enterprise Investment Scheme Association
14. European Public Real Estate Association
15. Financial Supervision Commission (Isle of Man)
16. Freshfields Bruckhaus Deringer LLP
17. Hugh Aldous
18. Investment Management Association
19. Investment Property Forum
20. Joint Associations Committee on Retail Structured Products
21. King's Cross Central Limited Partnership
22. Joint response from: Kirkland & Ellis International LLP, Bingham McCutchen (London) LLP,

Gibson, Dunn & Crutcher LLP, Jones Day, Katten Muchin Rosenman UK LLP, Kaye Scholer LLP, Mayer Brown International LLP, O'Melveny & Myers LLP, Proskauer Rose LLP, Ropes & Gray International LLP

- 23.** Law Society of England and Wales
- 24.** Managed Funds Association
- 25.** Nabarro LLP
- 26.** Segro plc
- 27.** Simmons & Simmons LLP
- 28.** St James's Place Wealth Management
- 29.** State Street Corporation
- 30.** The British Land Company plc
- 31.** UBS
- 32.** Wellcome Trust

# Annex 3

## Prudential classification for investment fund managers

Type of fund manager		CIS			Non-CIS AIF <sup>1</sup> (e.g. companies)		
		Residual CIS <sup>2</sup>	UCITS <sup>3</sup>	AIF	Unauthorised AIF	Externally managed non-CIS AIF	Internally managed non-CIS AIF <sup>5</sup>
Fund management activities only	Above the threshold <sup>6</sup>	Investment management firm IPRU(INV) 5	UCITS firm	Full-scope UK AIFM	Unregulated CIS (UCIS) and QIS <sup>4</sup>	Externally managed non-CIS AIF	Internally managed non-CIS AIF <sup>5</sup>
	Below the threshold		Collective portfolio management firm IPRU (INV) 11		Small authorised UK AIFM		
Additional MiFID activities <sup>8</sup>	Above the threshold	MiFID investment firm	UCITS investment firm	AIFM investment firm <sup>9</sup>	Investment management firm IPRU (INV) 5		No prudential requirements apply <sup>7</sup>
	Below the threshold	GENPRU / BIPRU	Collective portfolio management investment firm GENPRU / BIPRU	Small authorised UK AIFM			N/A <sup>10</sup>

<sup>1</sup> Non-CIS AIFs are alternative investment funds that are not collective investment schemes.

<sup>2</sup> Residual CIS are arrangements which fall within the definition of a collective investment scheme in s.238 FSMA, but which are not UCITS or AIFs.

<sup>3</sup> A firm can manage both UCITS and AIFs, in which case it will either be a CPM firm or a CPMI firm depending on whether it undertakes additional MiFID activities.

<sup>4</sup> A firm can manage both authorised and unauthorised AIFs, in which case it will either be a CPMI firm or a CPMI firm depending on whether it undertakes additional MiFID activities.

<sup>5</sup> To simplify matters, we have assumed for the purposes of this table that an internally managed AIF will not be structured as a collective investment scheme.

<sup>6</sup> AIFMD sets a threshold of assets under management of the AIFM of €100m for leveraged AIFs and €500m for unleveraged AIFs with no redemptions for 5 years. These thresholds are only relevant for AIFs.

<sup>7</sup> Small registered UK AIFMs are not authorised persons in relation to their activities as an AIFM.

<sup>8</sup> AIFMs above the threshold and UCITS management companies are limited in the MiFID activities they may perform by Article 6(4) AIFMD and Article 6(3) of the UCITS Directive. AIFMs below the threshold are not limited in the MiFID activities they may perform by AIFMD and may perform any MiFID activities provided they have permission to do so.

<sup>9</sup> This firm is also a full-scope UK AIFM.

<sup>10</sup> Internally managed AIFs above the threshold are not allowed to carry out additional MiFID activities (see Article 6(3) AIFMD).



# Appendix 1

## Made rules (legal instrument)

**ALTERNATIVE INVESTMENT FUND MANAGERS DIRECTIVE  
INSTRUMENT 2013**

**Powers exercised by the Financial Conduct Authority**

- A. The Financial Conduct Authority makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):
- (1) the following sections of the Act:
    - (a) section 137A (The FCA’s general rules);
    - (b) section 137B (FCA general rules: clients’ money, right to rescind etc)
    - (c) section 137H (General rules about remuneration);
    - (d) section 137R (Financial promotion rules);
    - (e) section 137T (General supplementary powers);
    - (f) section 138D (Actions for damages);
    - (g) section 139A (Power of the FCA to give guidance);
    - (h) section 213 (The compensation scheme);
    - (i) section 214 (General);
    - (j) section 223 (Management expenses);
    - (k) section 226 (Compulsory jurisdiction);
    - (l) section 234 (Industry funding);
    - (m) section 238 (Restrictions on promotion);
    - (n) section 247 (Trust scheme rules);
    - (o) section 248 (Scheme particulars rules);
    - (p) section 261I (Contractual scheme rules);
    - (q) section 261J (Contractual scheme particulars rules);
    - (r) paragraph 23 (Fees) of schedule 1ZA (The Financial Conduct Authority);
    - (s) paragraph 19 (Establishment), 20 (Services) and 20C (Notice of intention to market an AIF) of schedule 3 (EEA Passport Rights); and
    - (t) paragraph 13(4) (FCA’s procedural rules) of schedule 17 (The Ombudsman Scheme) to the Act;
  - (2) the other rule and guidance making powers listed in Schedule 4 (Powers exercised) to the General Provisions module of the FCA’s Handbook; and
  - (3) regulation 6(1) of the Open-Ended Investment Companies Regulations 2001 (SI 2001/1228).
- B. The rule-making powers referred to above are specified for the purpose of section 138G(2) (Rule-making instruments) of the Act.

**Commencement**

- C. This instrument shall come into force on 22 July 2013, except for Part II of Annex B, Part II of Annex I, Part II of Annex L and Part II of Annex M which shall come into force on 22 July 2014.

**Making the Investment Funds sourcebook (FUND)**

- D. The Financial Conduct Authority makes the rules and gives the guidance in Annex A to this instrument.

**Amendments to the Handbook**

- E. The modules of the FCA’s Handbook of rules and guidance listed in column (1) below are amended in accordance with the Annexes to this instrument listed in column (2) below.

(1)	(2)
Glossary of definitions	Annex B
Principles for Businesses (PRIN)	Annex C
Senior Management Arrangements, Systems and Controls sourcebook (SYSC)	Annex D
General Provisions sourcebook (GEN)	Annex E
Fees manual (FEES)	Annex F
General Prudential sourcebook (GENPRU)	Annex G
Prudential sourcebook for Banks, Building Societies and Investment Firms (BIPRU)	Annex H
Prudential sourcebook for UCITS Firms (UPRU)	Annex I
Interim Prudential sourcebook for Investment Businesses (IPRU(INV))	Annex J
Conduct of Business sourcebook (COBS)	Annex K
Client Assets sourcebook (CASS)	Annex L
Supervision manual (SUP)	Annex M
Dispute Resolution: Complaints sourcebook (DISP)	Annex N
Compensation sourcebook (COMP)	Annex O

**Amendments to the Perimeter Guidance manual (PERG)**

- F. PERG is amended in accordance with Annex P. The general guidance in PERG does not form part of the Handbook.

**Notes**

- G. In the Annexes to this instrument, the “notes” (indicated by “**Note:**”) are included for the convenience of readers but do not form part of the legislative text.

**European Union Legislation**

- H. Although European Union legislation is reproduced in this instrument, only European Union legislation printed in the paper edition of the Official Journal of the European Union is deemed authentic.

**Citation**

- I. This instrument may be cited as the Alternative Investment Fund Managers Directive Instrument 2013.
- J. The sourcebook in Annex A to this instrument may be cited as the Investment Funds sourcebook (FUND).

By order of the Board of the Financial Conduct Authority  
27 June 2013

**Annex A**  
**Making the Investment Funds sourcebook (FUND)**

In this Annex, all of the text is new and is not underlined.

**1. Introduction**

**1.1 Application and purpose**

Application

- 1.1.1 R (1) The application of this sourcebook is summarised at a high level in the following table. The detailed application is provided in each chapter.

<b>Type of firm</b>	<b>Applicable chapters</b>
<i>full-scope UK AIFM of an unauthorised AIF</i>	Chapters 1, 3 and 10
<i>full-scope UK AIFM of an authorised AIF</i>	Chapters 1, 3 and 10
<i>full-scope UK AIFM of an EEA AIF</i>	Chapters 1, 3 and 10
<i>full-scope UK AIFM of a non-EEA AIF</i>	Chapters 1, 3 and 10
<i>small authorised UK AIFM of an authorised AIF</i>	Chapter 1
<i>small authorised UK AIFM of an unauthorised AIF</i>	Chapter 1
<i>incoming EEA AIFM branch of a UK AIF</i>	Chapters 1, 3 and 10
<i>depository of an AIF managed by a full-scope UK AIFM</i>	Chapters 1 and 3

- (2) A residual CIS operator is not subject to the requirements in *FUND*.
- (3) *FUND* 10 will apply to a UK AIFM or incoming EEA AIFM which intends to passport or market on a cross-border basis.

Compatibility with European law

- 1.1.2 R *Handbook rules* which conflict with either a rule which transposes *AIFMD* or a provision in the *AIFMD level 2 regulation* are modified to the extent necessary

to be compatible with European law.

#### Interaction between FUND and COLL

- 1.1.3 G A *full-scope UK AIFM* of an *authorised AIF* is subject to the requirements in *FUND* and *COLL*. The effect of *FUND* 1.1.2R is that if a *rule* in *COLL* which applies to a *UK AIFM*, an *ICVC* that is an *AIF*, or a *UK depositary* of an *AIF* conflicts with either a *rule* in *FUND* transposing *AIFMD* or the *AIFMD level 2 regulation*, the *COLL rule* is modified to the extent necessary to be compatible with the *FUND rule* or the *AIFMD level 2 regulation*.

## 1.2 Structure of the investment funds sourcebook

### Structure of the investment funds sourcebook

- 1.2.1 G *FUND* is structured as follows:
- (1) *FUND* 1 sets out the broad application of *FUND* and describes the types of *fund manager* to whom *FUND* applies.
  - (2) [A description of *FUND* 2 will follow when this section in *FUND* is introduced]
  - (3) *FUND* 3 sets out the baseline requirements that apply to all *full-scope UK AIFM*.  
  
[A description of *FUND* 4 to 9 will follow when the relevant sections in *FUND* are introduced]
  - (10) *FUND* 10 sets out the requirements that apply to an *AIFM* that operates on a cross-border basis.

## 1.3 Types of fund manager

### Types of fund manager within the scope of European legislation

- 1.3.1 G The *UK* regulatory regime provides that an *undertaking* which manages an *AIF* or *UCITS* in the *UK* and is within the scope of *AIFMD* or the *UCITS Directive* must fall into one or both of the following categories:
- (1) an *AIFM*; or
  - (2) a *UCITS management company*.

### Types of fund manager outside the scope of European legislation

- 1.3.2 G An *authorised person* that *operates a collective investment scheme* in the *UK* and falls entirely outside the scope of *AIFMD* or the *UCITS Directive* will be a

*residual CIS operator.*

#### AIFMs

- 1.3.3 G An *AIFM* with a *Part 4A* permission of *managing an AIF* will be a *UK AIFM* and must fall into at least one of the following categories:
- (1) a *full-scope UK AIFM*;
  - (2) a *small authorised UK AIFM* of an *authorised AIF*; and
  - (3) a *small authorised UK AIFM* of an *unauthorised AIF*.

#### Full-scope UK AIFM

- 1.3.4 G (1) A *full-scope UK AIFM* is a *UK AIFM* which is authorised in accordance with *AIFMD* and, therefore, subject to its full requirements.
- (2) A *full-scope UK AIFM* must be either:
- (a) an *external AIFM*; or
  - (b) an *internally managed AIF*.
- (3) *PERG 16*, question 3.6 provides guidance on where an *AIFM* is acting as an *external AIFM* or an *internally managed AIF*.
- (4) A *full-scope UK AIFM* is permitted under *FUND 1.4.3R(3)* to (6) to provide certain additional services. Where it carries on those services it is also an *AIFM investment firm* and subject to additional requirements for those services.

#### Small AIFM

- 1.3.5 G (1) *AIFMD* provides that an *AIFM* which has assets under management below certain thresholds (a “*small AIFM*”) may be subject to limited requirements under *AIFMD*. However, this is subject to the right of *EEA States* to impose stricter requirements.
- (2) In the *UK*, the regulatory regime provides that a *small AIFM* with a registered office in the *UK* may be either:
- (a) a *small authorised UK AIFM*; or
  - (b) a *small registered UK AIFM*.

#### Small authorised UK AIFM

- 1.3.6 G (1) A *small authorised UK AIFM* will be carrying on the *regulated activity of managing an AIF* and will be subject to *FCA rules* in respect of that activity. The application of *FCA rules* to a *small authorised UK AIFM* will depend on whether it manages an *authorised AIF* or an *unauthorised AIF*. A *small authorised UK AIFM* which manages an

*authorised AIF* will be subject to the requirements in *COLL*, but a *small authorised UK AIFM* of an *unauthorised AIF* will not be subject to *COLL*.

- (2) A *small authorised UK AIFM* may also opt in to the full requirements in *AIFMD*, in which case it will become a *full-scope UK AIFM*.

#### Small registered UK AIFM

- 1.3.7 G A *small registered UK AIFM* will not be carrying on a *regulated activity* in respect of its activities as an *AIFM* for an *AIF* for which it is entitled to be registered. Regulation 10 of the *AIFMD UK regulation* provides for three categories of *small registered UK AIFM*:
- (1) to fall within the first category the *AIFM* must:
- (a) have a registered office in the *UK*;
  - (b) be a *small AIFM*;
  - (c) be an *internally managed AIF* of an *AIF* which is a *body corporate* and is not a *collective investment scheme*; and
  - (d) not be an *external AIFM*.
- (2) to fall within the second category the *AIFM* must:
- (a) have a registered office in the *UK*;
  - (b) be a *small AIFM*; and
  - (c) only manage *AIFs* which:
    - (i) are *collective investment schemes*;
    - (ii) are not *authorised AIFs*;
    - (iii) holds the majority of their assets as land, directly or indirectly, through an entity which also meets the conditions in (ii) to (iv) of this sub-paragraph (but this condition does not apply during the first 180 days and the last 180 days of the period during which the undertaking is an *AIF*); and
    - (iv) do not hold any *specified investments* other than:
      - (aa) *contracts of insurance* which relate to land held by the *AIF*; and
      - (bb) *shares* through which the *AIF* holds land.
  - (v) Are *operated*, or will be established and *operated*, by a *person* with a *Part 4A permission* to carry on the

regulated activity of *establishing, operating or winding up a collective investment scheme*.

- (3) to fall within the third category the *AIFM* must:
- (a) have a registered office in the *UK*;
  - (b) be a *small AIFM*; and
  - (c) have applied for registration as a *EuSEF manager* or *EuVECA manager* and meet the conditions for such registration.

1.3.8 G Under regulation 16 of the *AIFMD UK regulation*, a *small registered UK AIFM* may apply to the *FCA* for a *Part 4A permission to manage an AIF*. In its application, a *small registered UK AIFM* may apply to become:

- (1) a *small authorised UK AIFM*; or
- (2) a *full-scope UK AIFM*, in accordance with article 3(4) of *AIFMD*.

#### 1.4 AIFM business restrictions

##### Single AIFM

1.4.1 R A *full-scope UK AIFM* must ensure that, for each *AIF* it is appointed to manage, it is the only *AIFM* of that *AIF*, and is responsible for ensuring compliance with *AIFMD*.

[Note: article 5(1) of *AIFMD*]

##### Internally managed AIFs

1.4.2 R An *internally managed AIF* which is a *full-scope UK AIFM* must not engage in any activities other than *AIFM management functions* in respect of that *AIF*.

[Note: article 6(3) of *AIFMD*]

##### External AIFMs

1.4.3 R An *external AIFM* that is a *full-scope UK AIFM* must not engage in any activities other than:

- (1) *AIFM management functions*;
- (2) the management of *UCITS*, for which it is subject to authorisation under the *UCITS Directive*;
- (3) the management of portfolios of investments in accordance with mandates given by investors on a discretionary client-by-client basis, including portfolios of investments for pension funds and institutions for occupation retirement provisions in accordance with article 19(1) of Directive 2003/41/EC;

- (4) investment advice;
- (5) safe-keeping and administration in relation to *shares* or *units* of collective investment undertakings; and
- (6) reception and transmission of orders in relation to *financial instruments*.

[**Note:** article 6(2) and (4) of *AIFMD*]

1.4.4 R An *external AIFM* that is a *full-scope UK AIFM* must not provide:

- (1) only the services in *FUND* 1.4.3R(3) to (6); or
- (2) only the services in *FUND* 1.4.3R(4) to (6) without also having been authorised to provide the services in *FUND* 1.4.3R(3); or
- (3) only the *AIFM management functions* in point 2 of Annex I of *AIFMD*; or
- (4) the *AIFM investment management function* in point 1(a) (portfolio management) of Annex I of *AIFMD* without also providing the *AIFM investment management function* in point 1(b) (risk management) of Annex I of *AIFMD* or vice versa.

[**Note:** article 6(5) of *AIFMD*]

1.4.5 G Where a *full-scope UK AIFM* carries on the activities in *FUND* 1.4.3R(3) and (4) in relation to assets which are not *financial instruments* and it is not carrying on the activities of *managing investments* or *advising on investments*, the *FCA* will deem the *firm* as having been authorised to carry on such activities by virtue of its authorisation as an *AIFM*. However, for such an *AIFM* to be able to carry on the activity in *FUND* 1.4.3R(4) in relation to assets which are *financial instruments* or the activities in *FUND* 1.4.3R(5) and (6) it must have a *Part 4A permission to manage investments*.

1.4.6 G In the *FCA*'s view, an *AIFM* is permitted under *FUND* 1.4.3R to carry out *AIFM management functions* for a collective investment undertaking the management of which falls outside the scope of *AIFMD* or the *UCITS Directive*.

#### AIFM management functions

1.4.7 G *AIFM management functions* are set out in Annex I of *AIFMD* as follows:

- (1) the *AIFM investment management functions* of:
  - (a) portfolio management; and
  - (b) risk management; and

- (2) other functions that an *AIFM* may additionally perform in the course of the collective management of an *AIF*:
- (a) administration:
    - (i) legal and fund management accounting services;
    - (ii) *customer* enquiries;
    - (iii) valuation and pricing (including tax returns);
    - (iv) regulatory compliance monitoring;
    - (v) maintenance of *unit/share* holder register;
    - (vi) distribution of income;
    - (vii) *unit* issues and redemptions;
    - (viii) contract settlements (including certificate dispatch); and
    - (ix) record keeping;
  - (b) *marketing*; and
  - (c) activities related to the assets of *AIFs*, namely:
    - (i) services necessary to meet the fiduciary duties of the *AIFM*;
    - (ii) facilities management;
    - (iii) real estate administration activities;
    - (iv) advice to *undertakings* on capital structure, industrial strategy and related matters;
    - (v) advice and services relating to mergers and the purchase of *undertakings*; and
    - (vi) other services connected to the management of the *AIF* and the companies and other assets in which it has invested.

[**Note:** Annex I of *AIFMD*]

## 2. Authorisation

[*To follow*]

### 3. Requirements for alternative investment fund managers

#### 3.1 Application

##### Application

- 3.1.1 G The application of this chapter is summarised in the following table; the detailed application is provided in each section.

Type of firm	Applicable sections
<i>Full-scope UK AIFM of a UK AIF.</i>	All of chapter 3.
<i>Full-scope UK AIFM of an EEA AIF operating from an establishment in the UK.</i>	All of chapter 3.
<i>Full-scope UK AIFM of an EEA AIF operating from a branch in another EEA state.</i>	All of chapter 3 with the exception of <i>FUND 3.8</i> (Prime brokerage firms).
<i>Incoming EEA AIFM branch which manages a UK AIF.</i>	<i>FUND 3.8</i> (Prime brokerage firms).
<i>Full-scope UK AIFM of a non-EEA AIF marketed in the UK.</i>	All of chapter 3 with the exception of <i>FUND 3.12</i> (Marketing in the home Member State of the AIFM).
<i>Full-scope UK AIFM of a non-EEA AIF not marketed in the UK.</i>	All of chapter 3 with the exception of <i>FUND 3.3</i> (Annual report of an AIF), <i>FUND 3.11</i> (Depositaries) and <i>FUND 3.12</i> (Marketing in the home Member State of the AIFM).
<i>UK depositary of a UK AIF or a non-EEA AIF.</i>	<i>FUND 3.11</i> (Depositaries).

#### 3.2 Investor information

##### Application

- 3.2.1 R This section applies to a *full-scope UK AIFM* of:
- (1) a *UK AIF*;
  - (2) an *EEA AIF*; and

- (3) a *non-EEA AIF*.

Prior disclosure of information to investors

- 3.2.2 R An *AIFM* must, for each *UK AIF* and *EEA AIF* that it manages, and for each *AIF* it *markets* in the *EEA*, make available to *AIF* investors before they invest, in line with the *instrument constituting the fund*, the following information and any material changes to it:
- (1)
    - (a) a description of the investment strategy and objectives of the *AIF*;
    - (b) if the *AIF* is a *feeder AIF*, information on where the *master AIF* is established;
    - (c) if the *AIF* is a fund of funds, information on where the underlying funds are established;
    - (d) a description of the types of assets in which the *AIF* may invest;
    - (e) the investment techniques that the *AIF*, or the *AIFM* on behalf of the *AIF*, may employ and all associated risks;
    - (f) any applicable investment restrictions;
    - (g) the circumstances in which the *AIF* may use *leverage*;
    - (h) the types and sources of *leverage* permitted and the associated risks;
    - (i) any restrictions on the use of *leverage* and any *collateral* and asset reuse arrangements; and
    - (j) the maximum level of *leverage* which the *AIFM* is entitled to employ on behalf of the *AIF*;
  - (2) a description of the procedures by which the *AIF* may change its investment strategy or investment policy, or both;
  - (3) a description of the main legal implications of the contractual relationship entered into for the purpose of investment, including information on jurisdiction, the applicable law and the existence or absence of any legal instruments providing for the recognition and enforcement of judgments in the territory where the *AIF* is established;
  - (4) the identity of the *AIFM*, the *AIF's depositary*, the auditor and any other service providers and a description of their duties and the investors' rights;

- (5) a description of how the *AIFM* complies with the requirements referred to in *IPRU(INV)* 11.3.11G (Professional negligence) or *GENPRU* 2.1.67G (Requirements relevant to collective portfolio management investment firms) relating to professional liability risk;
- (6) a description of:
  - (a) any *AIFM management function* delegated by the *AIFM*;
  - (b) any safe-keeping function delegated by the *depository*;
  - (c) the identity of each delegate appointed in accordance with *FUND* 3.10 (Delegation); and
  - (d) any conflicts of interest that may arise from such delegations;
- (7) a description of the *AIF*'s valuation procedure and of the pricing methodology for valuing assets, including the methods used in valuing any hard-to-value assets, in line with *FUND* 3.9 (Valuation);
- (8) a description of the *AIF*'s liquidity risk management, including the redemption rights of investors in normal and exceptional circumstances, and the existing redemption arrangements with investors;
- (9) a description of all fees, charges and expenses, and the maximum amounts directly or indirectly borne by investors;
- (10) a description of how the *AIFM* ensures a fair treatment of investors;
- (11) whenever an investor obtains preferential treatment or the right to obtain preferential treatment, a description of:
  - (a) that preferential treatment;
  - (b) the type of investors who obtain such preferential treatment; and
  - (c) where relevant, their legal or economic links with the *AIF* or *AIFM*;
- (12) the procedure and conditions for the issue and sale of *units* or *shares*;
- (13) the latest net asset value of the *AIF* or the latest market price of the *unit* or *share* of the *AIF*, in line with *FUND* 3.9 (Valuation);
- (14) the latest annual report, in line with *FUND* 3.3 (Annual report of an AIF);
- (15) where available, the historical performance of the *AIF*;
- (16) (a) the identity of the *prime brokerage firm*;

- (b) a description of any material arrangements of the *AIF* with its *prime brokerage firm* and the way any conflicts of interest are managed;
  - (c) the provision in the contract with the *depository* on the possibility of transfer and reuse of *AIF* assets; and
  - (d) information about any transfer of liability to the *prime brokerage firm* that may exist; and
- (17) a description of how and when the information required under *FUND* 3.2.5R and *FUND* 3.2.6R will be disclosed.

[**Note:** article 23(1) of *AIFMD*]

- 3.2.3 R (1) An *AIFM* must inform investors before they invest in the *AIF* of any arrangement made by the *depository* to contractually discharge itself of liability, in accordance with regulation 30 of the *AIFMD UK Regulation*.
- (2) The *AIFM* must also inform investors without delay of any changes with respect to *depository* liability.

[**Note:** article 23(2) of *AIFMD*]

- 3.2.4 R Where the *AIF* is required to publish a *prospectus* under section 85 of the *Act* or the equivalent provision implementing article 3 of the *Prospectus Directive* in the *AIF's Home State*, only information referred to in *FUND* 3.2.2R and 3.2.3R that is additional to that contained in the *prospectus* needs to be disclosed, either separately or as additional information in the *prospectus*.

[**Note:** article 23(3) of *AIFMD*]

Periodic disclosure

- 3.2.5 R An *AIFM* must, for each *UK AIF* and *EEA AIF* it manages, and each *AIF* it *markets* in the *EEA*, disclose to investors periodically:
- (1) the percentage of the *AIF's* assets that are subject to special arrangements arising from their illiquid nature;
  - (2) any new arrangements for managing the liquidity of the *AIF*; and
  - (3) the current risk profile of the *AIF* and the risk management systems employed by the *AIFM* to manage those risks.

[**Note:** article 23(4) of *AIFMD*]

- 3.2.6 R An *AIFM* that manages a *UK AIF* or an *EEA AIF* or *markets* an *AIF* in the *EEA* must, for each such *AIF* that employs *leverage*, disclose on a regular

basis:

- (1) any changes to:
  - (a) the maximum level of *leverage* that the *AIFM* may employ on behalf of the *AIF*; and
  - (b) any right of reuse of *collateral* or any guarantee granted under the *leveraging* arrangement; and
- (2) the total amount of *leverage* employed by that *AIF*.

[**Note:** article 23(5) of *AIFMD*]

Subordinate measures

- 3.2.7 G Articles 108 and 109 of the *AIFMD level 2 regulation* provide detailed rules supplementing this section.

### 3.3 Annual report of an AIF

Application

- 3.3.1 R This section applies to a *full-scope UK AIFM* of:
- (1) a *UK AIF*;
  - (2) an *EEA AIF*; and
  - (3) a *non-EEA AIF marketed* in the *UK*.

Provision of an annual report

- 3.3.2 R An *AIFM* must, for each *UK AIF* and *EEA AIF* it manages and for each *AIF* it *markets* in the *UK*:
- (1) make an annual report available to investors for each financial year;
  - (2) provide the annual report to investors on request; and
  - (3) make the annual report available to the *FCA* and, in the case of an *EEA AIF*, to the *competent authority* of that *AIF*.

[**Note:** article 22(1) first paragraph and article 24(3)(a) of *AIFMD*]

- 3.3.3 R Subject to *FUND* 3.3.4R(2), an *AIFM* must make the annual report available, in line with *FUND* 3.3.2R(1), no later than six months after the end of the financial year.

[**Note:** article 22(1) first paragraph of *AIFMD*]

- 3.3.4 R (1) Where the *AIF* is required to make an annual financial report public under *DTR* 4.1.3R (Publication of annual financial reports) or an equivalent provision implementing article 4.1 of the *Transparency Directive* in the *Home State* of the *AIF*, only information referred to in *FUND* 3.3.5R that is additional to the annual financial report needs to be provided to investors on request, either separately or as an additional part of the annual financial report.
- (2) Where additional information in (1) is provided as an addition to the annual financial report, that report must be made public no later than four months following the end of the financial year, under *DTR* 4.1.3R (Publication of annual financial reports) or an equivalent provision implementing article 4.1 of the *Transparency Directive* in the *Home State* of the *AIF*.

[**Note:** second paragraph, article 22(1) of *AIFMD*]

#### Contents of the annual report

- 3.3.5 R The annual report must contain:
- (1) a balance sheet or a statement of assets and liabilities;
  - (2) an income and expenditure account for the financial year;
  - (3) a report on the activities of the financial year;
  - (4) any material changes in the information required to be made available to investors under *FUND* 3.2.2R (Prior disclosure of information to investors) during the financial year covered by the report;
  - (5)
    - (a) the total amount of *remuneration* paid by the *AIFM* to its staff for the financial year, split into fixed and variable remuneration, including, where relevant, any *carried interest* paid by the *AIF*; and
    - (b) the number of beneficiaries; and
  - (6) the aggregate amount of *remuneration* of the *AIFM Remuneration Code staff*, broken down by senior management and members of staff.

[**Note:** article 22(2) of *AIFMD*]

#### Accounting information in the annual report

- 3.3.6 R The accounting information given in the annual report must be:
- (1) prepared in accordance with the accounting standards of the *Home State* of the *AIF* (or, for a *non-EEA AIF*, the accounting standards of the third country where it is *established*) and with the accounting rules set out in the *AIF's instrument constituting the fund*; and

- (2) audited by one or more persons empowered by law to audit accounts under the *Audit Directive* (or for a *non-EEA AIF*, under international auditing standards in force in the country where the *non-EEA AIF* is established).

[Note: article 22(3) of *AIFMD*]

- 3.3.7 R The auditor's report, including any qualifications, must be reproduced in full in the annual report.

[Note: second paragraph article 22(3) of *AIFMD*]

Subordinate measures

- 3.3.8 G Articles 103 to 107 of the *AIFMD level 2 regulation* provide detailed rules supplementing this section.

### 3.4 Reporting obligations to the FCA

Application

- 3.4.1 R This section applies to a *full-scope UK AIFM* of:

- (1) a *UK AIF*;
- (2) an *EEA AIF*; and
- (3) a *non-EEA AIF*.

Reporting obligations

- 3.4.2 R An *AIFM* must regularly report to the *FCA* on behalf of each *AIF* it manages:

- (1) the main instruments in which it is trading;
- (2) the principal markets of which it is a member or where it actively trades; and
- (3) the principal exposures and most important concentrations of each *AIF* it manages.

[Note: article 24(1) of *AIFMD*]

Content of reporting information

- 3.4.3 R An *AIFM* must, for each *UK AIF* and *EEA AIF* it manages, and for each *AIF* it markets in the *EEA*, provide the following to the *FCA*:

- (1) the percentage of the *AIF's* assets that are subject to special arrangements arising from their illiquid nature;

- (2) any new arrangements for managing the liquidity of the *AIF*;
- (3) the current risk profile of the *AIF* and the risk management systems employed by the *AIFM* to manage the *market risk*, liquidity risk, *counterparty risk* and other risks, including *operational risk*;
- (4) information on the main categories of assets in which the *AIF* is invested; and
- (5) the results of the stress tests performed in accordance with *FUND* 3.6.3R(2) (Liquidity systems and procedures) and *FUND* 3.7.5R(2)(b) (Risk management systems).

[**Note:** article 24(2) of *AIFMD*]

3.4.4 R An *AIFM* must, at the *FCA*'s request, provide at the end of each quarter a detailed list of all *AIFs* which it manages.

[**Note:** article 24(3)(b) of *AIFMD*]

*AIFs* that employ leverage on a substantial basis

3.4.5 R An *AIFM* managing an *AIF* that employs *leverage* on a substantial basis must make the following information available to the *FCA* about that *AIF*:

- (1) the overall level of *leverage* employed by the *AIF*;
- (2) a breakdown of *leverage* arising from borrowing of cash or *securities* and *leverage* embedded in financial *derivatives*;
- (3) the extent to which the *AIF*'s assets have been reused under *leveraging* arrangements; and
- (4) the identity of the five largest sources of borrowed cash or *securities* for the *AIF*, and the amounts of *leverage* received from each of those sources.

[**Note:** article 24(4) of *AIFMD*]

Meaning of employing leverage on a substantial basis

3.4.6	EU	Use of leverage on a 'substantial basis'
	1.	Leverage shall be considered to be employed on a substantial basis for the purposes of Article 24(4) of Directive 2011/61/EU when the exposure of an <i>AIF</i> as calculated according to the commitment method under Article 8 of this Regulation exceeds three times its net asset value.
[ <b>Note:</b> article 111(1) of the <i>AIFMD level 2 regulation</i> ]		

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Subordinate measures

- 3.4.7 G Articles 110 and 111 of the *AIFMD level 2 regulation* provide detailed rules supplementing this section.

### 3.5 Investment in securitisation positions

Application

- 3.5.1 G This section applies to a *full-scope UK AIFM* of:
- (1) a *UK AIF*;
  - (2) an *EEA AIF*; and
  - (3) a *non-EEA AIF*.
- 3.5.2 G To ensure cross-sectoral consistency and remove misalignment between the interests of firms that repackage loans into tradable securities and *originators* within the meaning of article 4(41) of the *BCD* and *AIFMs* that invest in those securities or other *financial instruments*, the *AIFMD level 2 regulation* sets out:
- (1) requirements that must be met by the *originator*, the *sponsor* or the original lender, for an *AIFM* to be allowed to invest on behalf of the *AIF* in securities or other *financial instruments* of this type issued after 1 January 2011; and
  - (2) qualitative requirements that must be met by *AIFMs* which invest in these securities or other *financial instruments* on behalf of the *AIF*.

[**Note:** article 17 of *AIFMD*]

Subordinate measures

- 3.5.3 G Articles 50 to 56 of the *AIFMD level 2 regulation* provide detailed rules supplementing the provisions in *AIFMD* on investment in securitisation positions.

### 3.6 Liquidity

Application

- 3.6.1 R This section applies to a *full-scope UK AIFM* of:
- (1) a *UK AIF*;

- (2) an *EEA AIF*; and
- (3) a *non-EEA AIF*.

Alignment of investment strategy, liquidity profile and redemption policy

- 3.6.2 R An *AIFM* must ensure that the investment strategy, liquidity profile and redemption policy of each *AIF* it manages are consistent.

[**Note:** article 16(2) of *AIFMD*]

Liquidity systems and procedures

- 3.6.3 R An *AIFM* must, for each *AIF* it manages that is not an unleveraged closed-ended *AIF*:

- (1) employ an appropriate liquidity management system and adopt procedures which:
  - (a) enable it to monitor the liquidity risk of the *AIF*; and
  - (b) ensure that the liquidity profile of the investments of the *AIF* complies with the *AIF*'s underlying obligations; and
- (2) regularly conduct stress tests, under normal and exceptional liquidity conditions, which enable it to assess the liquidity risk of the *AIF* and monitor that risk.

[**Note:** article 16(1) of *AIFMD*]

Subordinate measures

- 3.6.4 G Articles 46 to 49 of the *AIFMD level 2 regulation* provide detailed rules supplementing this section.

### 3.7 Risk management

Application

- 3.7.1 R This section applies to a *full-scope UK AIFM* of:
- (1) a *UK AIF*;
  - (2) an *EEA AIF*; and
  - (3) a *non-EEA AIF*.

Functional and hierarchical separation

- 3.7.2 R (1) An *AIFM* must functionally and hierarchically separate the functions of risk management from the operating units, including from the

functions of portfolio management.

- (2) An *AIFM* must, in any event, be able to demonstrate that:
- (a) specific safeguards against conflicts of interest allow for the independent performance of risk management activities; and
  - (b) the risk management process satisfies the requirements of this section and is consistently effective.

[**Note:** article 15(1) of *AIFMD*]

3.7.3

EU	Functional and hierarchical separation of the risk management function	
1.	The risk management function shall be considered as functionally and hierarchically separated from the operating units, including the portfolio management function, only where all the following conditions are satisfied:	
	(a)	persons engaged in the performance of the risk management function are not supervised by those responsible for the performance of the operating units, including the portfolio management function, of the AIFM;
	(b)	persons engaged in the performance of the risk management function are not engaged in the performance of activities within the operating units, including the portfolio management function;
	(c)	persons engaged in the performance of the risk management function are compensated in accordance with the achievement of the objectives linked to that function, independently of the performance of the operating units, including the portfolio management function;
2.	The functional and hierarchical separation of the risk management function in accordance with paragraph 1 shall be ensured throughout the whole hierarchical structure of the AIFM, up to its governing body. It shall be reviewed by the governing body and, where it exists, the supervisory function of the AIFM.	
[ <b>Note:</b> article 42(1) and (2) of the <i>AIFMD level 2 regulation</i> ]		

3.7.4

EU	Safeguards against conflicts of interest	
1.	The safeguards against conflicts of interest referred to in Article 15(1) of Directive 2011/61/EU shall ensure, at least, that:	
	(a)	decisions taken by the risk management function are based on reliable data, which are subject to an appropriate degree of

		control by the risk management function;
	(b)	the remuneration of those engaged in the performance of the risk management function reflects the achievement of the objectives linked to the risk management function, independently of the performance of the business areas in which they are engaged;
	(c)	the risk management function is subject to an appropriate independent review to ensure that decisions are being arrived at independently;
	(d)	the risk management function is represented in the governing body or the supervisory function, where it has been established, at least with the same authority as the portfolio management function;
	(e)	any conflicting duties are properly segregated.
2.	Where proportionate, taking into account the nature, scale and complexity of the AIFM, the safeguards referred to in paragraph 1 shall also ensure that:	
	(a)	the performance of the risk management function is reviewed regularly by the internal audit function, or, if the latter has not been established, by an external party appointed by the governing body;
	(b)	where a risk committee has been established, it is appropriately resourced and its non-independent members do not have undue influence over the performance of the risk management function.
3.	The governing body of the AIFM and, where it exists, the supervisory function shall establish the safeguards against conflicts of interest laid down in paragraphs 1 and 2, regularly review their effectiveness and take timely remedial action to address any deficiencies.	
[Note: article 43 of the <i>AIFMD level 2 regulation</i> ]		

### Risk management systems

- 3.7.5 R (1) An *AIFM* must implement adequate risk management systems to identify, measure, manage and monitor all risks relevant to each *AIF* investment strategy and to which each *AIF* is, or may be, exposed.
- (2) An *AIFM* must, at least:

- (a) implement an appropriate, documented and regularly updated due diligence process when investing on behalf of the *AIF*, according to the investment strategy, objectives and risk profile of the *AIF*;
- (b) ensure that the risks associated with each investment position of the *AIF* and their overall effect on the *AIF*'s portfolio can be properly identified, measured, managed and monitored on an ongoing basis, including through the use of appropriate stress testing procedures; and
- (c) ensure that the risk profile of the *AIF* corresponds to the size, portfolio structure and investment strategies and objectives of the *AIF* as set out in the *instrument constituting the fund*, *prospectus* and offering documents.

[**Note:** article 15(2) first paragraph and article 15(3) of *AIFMD*]

#### Review of risk management systems

3.7.6 R An *AIFM* must:

- (1) review the risk management systems with appropriate frequency and, in any event, at least once a year; and
- (2) adapt them whenever necessary.

[**Note:** article 15(2) second paragraph of *AIFMD*]

#### Maximum leverage levels

3.7.7 R (1) An *AIFM* must:

- (a) set a maximum level of *leverage* which it may employ on behalf of each *AIF* it manages; and
  - (b) where the *leveraging* arrangement allows the right to reuse *collateral* or the granting of a guarantee, set out the extent of that right or guarantee.
- (2) An *AIFM*, in complying with (1), must take into account relevant matters including:
- (a) the type of *AIF*;
  - (b) the investment strategy of the *AIF*;
  - (c) the sources of *leverage* of the *AIF*;
  - (d) any other link or relevant relationship with other financial services institutions which could pose systemic risk;

- (e) the need to limit the exposure to any single counterparty;
- (f) the extent to which the *leverage* is *collateralised*;
- (g) the asset-liability ratio; and
- (h) the scale, nature and extent of the activity of the *AIFM* on the markets concerned.

[**Note:** article 15(4) of *AIFMD*]

- 3.7.8 R An *AIFM* must demonstrate that the *leverage* limits it sets under *FUND* 3.7.7R(1)(a) are reasonable and that it complies with those limits at all times.

[**Note:** article 25(3) first sentence of *AIFMD*]

- 3.7.9 G To comply with *FUND* 3.7.8R, an *AIFM* should report to the *FCA* any changes to the *leverage* limits it sets.

Subordinate measures

- 3.7.10 G Articles 6 to 11 of the *AIFMD level 2 regulation* provide detailed rules on the calculation of levels of leverage, articles 38 to 47 of the *AIFMD level 2 regulation* provide detailed rules on risk management and article 112 of the *AIFMD level 2 regulation* provides detailed rules on circumstances when *competent authorities* may impose leverage limits or other restrictions on the management of *AIFs*.

### 3.8 Prime brokerage firms

Application

- 3.8.1 R This section applies to:
- (1) a *full-scope UK AIFM* of:
    - (a) a *UK AIF*;
    - (b) an *EEA AIF* managed or *marketed* from an establishment in the *UK*; and
    - (c) a *non-EEA AIF*; and
  - (2) an *incoming EEA AIFM branch* which manages or *markets* a *UK AIF*.

Selection of a prime brokerage firm

- 3.8.2 R An *AIFM* must exercise due skill, care and diligence in the selection and appointment of a *prime brokerage firm*.

[**Note:** article 14(3) second paragraph of the *AIFMD*]

Prime brokerage firm contract

- 3.8.3 R Where the *AIFM*, on behalf of an *AIF*, uses the services of a *prime brokerage firm*, the terms must be in a written contract. In particular, any possibility of transfer and reuse of *AIF* assets must be provided for in that contract and must comply with the *AIF's instrument constituting the fund*. The contract must provide for the *depository* to be informed of the contract.

[**Note:** article 14(3) first paragraph of the *AIFMD*]

### 3.9 Valuation

Application

- 3.9.1 R This section applies to a *full-scope UK AIFM* of:
- (1) a *UK AIF*;
  - (2) an *EEA AIF*; and
  - (3) a *non-EEA AIF*.

Responsibility of the *AIFM*

- 3.9.2 R An *AIFM* is responsible for the proper valuation of *AIF* assets, the calculation of the net asset value and the publication of that net asset value.

[**Note:** article 19(10) first sentence first paragraph of *AIFMD*]

Standard of care of the valuation

- 3.9.3 R An *AIFM* must ensure that any valuation of an *AIF's* assets is performed impartially and with all due skill, care and diligence.

[**Note:** article 19(8) of *AIFMD*]

Establishment of procedures for valuation of assets

- 3.9.4 R An *AIFM* must ensure that, for each *AIF* it manages, appropriate and consistent procedures are established so that under the rules laid down in the applicable national law of the country where the *AIF* is *established* and the *instrument constituting the fund*:
- (1) a proper and independent valuation of the assets of the *AIF* can be performed; and
  - (2) the net asset value *per unit* or *share* of the *AIF* is calculated and disclosed to investors.

[**Note:** article 19(1), (2) and (3) first paragraph of *AIFMD*]

Frequency of valuation of assets and calculation of net asset value

- 3.9.5 R (1) An *AIFM* must ensure that the valuation procedure in *FUND 3.9.4R* provides for the assets of any *AIF* under the *AIFM*'s management to be valued and the net asset value per *unit* or *share* to be calculated at least once a year.
- (2) Where an *AIF* is open-ended, such valuations and calculations must also be carried out at a frequency that is appropriate both to the assets held by the *AIF* and its issuance and redemption frequency.
- (3) Where an *AIF* is closed-ended, such valuations and calculations must also be carried out in case of an increase or decrease of the capital by the relevant *AIF*.

[**Note:** article 19(3) second, third and fourth paragraphs of *AIFMD*]

Informing investors of valuations of assets and calculations of net asset value

- 3.9.6 R An *AIFM* must ensure that investors in the *AIFs* under its management are informed of the valuations and calculations in the manner set out in the relevant *instrument constituting the fund*.

[**Note:** article 19(3) fifth paragraph of *AIFMD*]

Performance of the valuation function

- 3.9.7 R (1) An *AIFM* may perform the valuation itself, provided that:
- (a) the valuation task is functionally independent from the portfolio management; and
- (b) the remuneration policy and other measures ensure that conflicts of interest are mitigated and that undue influence upon the employees involved is prevented.
- (2) An *AIFM* that does not perform the valuation function itself must ensure that the function is performed by an *external valuer*.
- (3) An *external valuer* appointed under (2) must be a *person* independent from:
- (a) the *AIF* in respect of which the valuation function is performed;
- (b) the *AIFM*; and
- (c) any other *persons* with *close links* to the *AIF* or the *AIFM*.

[**Note:** article 19(4) first paragraph of *AIFMD*]

## Appointment of the depositary as an external valuer

- 3.9.8 R The *depositary* appointed for an *AIF* may not be appointed as an *external valuer* of that *AIF* unless:
- (1) it has functionally and hierarchically separated the performance of its depositary functions from its tasks as an *external valuer*; and
  - (2) the potential conflicts of interests are properly identified, managed, monitored and disclosed to the investors of the *AIF*.

[**Note:** article 19(4) second paragraph of *AIFMD*]

## Appointment of an external valuer

- 3.9.9 R Where an *external valuer* performs the valuation function, the *AIFM* must be able to demonstrate that:
- (1) the *external valuer* is subject to mandatory professional registration recognised by law or legal or regulatory provisions or rules of professional conduct;
  - (2) the *external valuer* can provide sufficient professional guarantees to be able to perform the relevant valuation function effectively under this section; and
  - (3) the appointment of the *external valuer* complies with the requirements of *FUND 3.10.2R* (General delegation arrangements) and the *AIFMD level 2 regulation*.

[**Note:** article 19(5) of *AIFMD*]

## Delegation by an external valuer

- 3.9.10 G *AIFMs* should be aware that regulation 24(2) of the *AIFMD UK regulation* prohibits an *external valuer* from delegating valuation to a third party.

## Notification of appointment of an external valuer

- 3.9.11 R An *AIFM* must notify the appointment of an *external valuer* to the *FCA*.

[**Note:** article 19(7) first part of first paragraph of *AIFMD*]

- 3.9.12 G Under regulation 24(3) of the *AIFMD UK regulation*, the *FCA* may require an *AIFM* to appoint another *external valuer* where it considers that the appointment does not comply with *FUND 3.9.9R*.

## Subordinate measures

- 3.9.13 G Articles 67 to 74 of the *AIFMD level 2 regulation* provide detailed rules supplementing this section.

### 3.10 Delegation

#### Application

3.10.1 R This section applies to a *full-scope UK AIFM* of:

- (1) a *UK AIF*;
- (2) an *EEA AIF*; and
- (3) a *non-EEA AIF*

in relation to the delegation of those *AIFM management functions* for which it is responsible, other than supporting tasks such as administrative or technical functions.

[**Note:** recital 31 of *AIFMD*]

#### General delegation requirements

3.10.2 R An *AIFM* must ensure the following conditions are met when a delegate carries out any function on its behalf:

- (1) the *AIFM* has notified the *FCA* of the delegation before the delegation arrangements become effective; and
- (2)
  - (a) the *AIFM* is able to justify its entire delegation structure with objective reasons;
  - (b) the delegate has sufficient resources to perform the respective activity and the persons who effectively conduct the business of the delegate are of sufficiently good repute and experience;
  - (c) (subject to *FUND* 3.10.7G) the delegation of *AIFM investment management functions* is conferred only on a delegate that is authorised or registered for the purpose of asset management and subject to supervision;
  - (d) in addition to (c), where the delegation of *AIFM investment management functions* is conferred on a third-country delegate, cooperation between the *FCA* and the supervisory authority of the delegate is ensured;
  - (e) the delegation does not prevent the *FCA* from supervising the *AIFM* effectively and, in particular, does not prevent the *AIFM* from acting, or the *AIF* from being managed, in the best interests of its investors; and
  - (f) the *AIFM* is able to demonstrate that:

- (i) the delegate is qualified and capable of undertaking the functions in question;
- (ii) it was selected with all due care; and
- (iii) the *AIFM* can monitor the delegated activity effectively at any time, give further instructions to the delegate at any time and withdraw the delegation with immediate effect when this is in the interest of investors.

[**Note:** article 20(1) of *AIFMD*]

- 3.10.3 G For the purposes of *FUND* 3.10.2R(2)(d) cooperation is ensured between the *FCA* and the supervisory authorities of a third-country delegate where a cooperation arrangement is in place between the two authorities in accordance with *AIFMD* and article 78(3) of the *AIFMD level 2 regulation*.

Sub-delegation

- 3.10.4 R An *AIFM* must ensure the following conditions are met when any of its delegates carries out a sub-delegation:
- (1) the *AIFM* has consented to the sub-delegation before the sub-delegation arrangements become effective;
  - (2) the *AIFM* has notified the *FCA* of the sub-delegation before the sub-delegation arrangements become effective; and
  - (3) the conditions in *FUND* 3.10.2R(2) (General delegation requirements) are satisfied in relation to the sub-delegation, with references to ‘delegate’ and ‘delegation’ replaced by references to ‘sub-delegate’ and ‘sub-delegation’.

[**Note:** article 20(4) of *AIFMD*]

- 3.10.5 R An *AIFM* must comply with the *rules* in this section which are applicable to a sub-delegation in relation to any further sub-delegation of its functions by a sub-delegate.

[**Note:** article 20(6) of *AIFMD*]

Delegation of *AIFM* investment management functions

- 3.10.6 R An *AIFM* must not delegate or consent to the sub-delegation of *AIFM investment management functions* to:
- (1) the *depository* or a delegate of the *depository*; or
  - (2) any other entity whose interests may conflict with those of the *AIFM* or the investors of the *AIF*, unless:

- (a) that entity has functionally and hierarchically separated the performance of its *AIFM investment management function* from its other potentially conflicting tasks; and
- (b) the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the *AIF*.

[**Note:** article 20(2) and (5) of *AIFMD*]

- 3.10.7 G The *FCA* may consent to the delegation by a *full-scope UK AIFM* of its *AIFM investment management functions* to an entity which is not authorised or registered for the purpose of asset management and subject to supervision in accordance with regulation 26 of the *AIFMD UK regulation*.

Letterbox entity

- 3.10.8 R An *AIFM* must not delegate its functions to the extent that, in essence, it can no longer be considered to be the *AIFM* of the *AIF* and to the extent that it becomes a letter-box entity.

[**Note:** article 20(3) of *AIFMD*]

- 3.10.9 EU Letter-box entity and AIFM no longer considered to be managing an AIF

- |     |   |
|-----|---|
| 1.  | An AIFM shall be deemed a letter-box entity and shall no longer be considered to be the manager of the AIF at least in any of the following situations:   |
| (a) | the AIFM no longer retains the necessary expertise and resources to supervise the delegated tasks effectively and manage the risks associated with the delegation;  |
| (b) | the AIFM no longer has the power to take decisions in key areas which fall under the responsibility of the senior management or no longer has the power to perform senior management functions in particular in relation to the implementation of the general investment policy and investment strategies;  |
| (c) | the AIFM loses its contractual rights to inquire, inspect, have access or give instructions to its delegates or the exercise of such rights becomes impossible in practice;   |
| (d) | the AIFM delegates the performance of investment management functions to an extent that exceeds by a substantial margin the investment management functions performed by the AIFM itself. When assessing the extent of delegation, competent authorities shall assess the entire delegation structure taking into account not only the assets managed under delegation but also the following qualitative criteria: |

- (i) the types of assets the AIF or the AIFM acting on behalf of the AIF is invested in, and the importance of the assets managed under delegation for the risk and return profile of the AIF;
- (ii) the importance of the assets under delegation for the achievement of the investment goals of the AIF;
- (iii) the geographical and sectoral spread of the AIF's investments;
- (iv) the risk profile of the AIF;
- (v) the type of investment strategies pursued by the AIF or the AIFM acting on behalf of the AIF;
- (vi) the types of tasks delegated in relation to those retained; and
- (vii) the configuration of delegates and their sub-delegates, their geographical sphere of operation and their corporate structure, including whether the delegation is conferred on an entity belonging to the same corporate group as the AIFM.

[**Note:** Article 82(1) of the *AIFMD level 2 regulation*]

#### Liability for delegated functions

- 3.10.10 G An *AIFM*'s liability towards the *AIF* and its investors is not affected by the *AIFM* delegating functions to a third party, or by any further sub-delegation (see regulation 28(1) of the *AIFMD UK regulation*).

#### Review of delegation and sub-delegation

- 3.10.11 R An *AIFM* must review on an ongoing basis the services provided by each:
- (1) delegate appointed under *FUND* 3.10.2R; and
  - (2) sub-delegate appointed under *FUND* 3.10.4R.

[**Note:** article 20(1) and 20(4) of *AIFMD*]

- 3.10.12 G An *AIFM* should make each of its delegates aware of the requirement to review the services provided by each of its sub-delegates on an ongoing basis (see regulation 28(2) of the *AIFMD UK regulation*).

#### Subordinate measures

- 3.10.13 G Articles 75 to 82 of the *AIFMD level 2 regulation* provide detailed rules supplementing this section.

### 3.11 Depositories

#### Application

3.11.1 R This section applies in accordance with the table in *FUND* 3.11.2R and *FUND* 3.11.3R.

3.11.2 R This table belongs to *FUND* 3.11.1R.

<i>Rule</i>	<i>Full-scope UK AIFM of a UK AIF or an EEA AIF</i>	<i>Full-scope UK AIFM of a non-EEA AIF which is marketed in the UK</i>	<i>UK depositary of a UK AIF managed by a full-scope UK AIFM or an EEA AIFM</i>	<i>UK depositary of a non-EEA AIF</i>
3.11.4R	x			
3.11.5R	x		x	
3.11.7R	x			
3.11.9R			x	
3.11.10R	x			
3.11.12R	x			
3.11.14R	x			
3.11.16R			x	
3.11.18R	x			
3.11.19R	x		x	
3.11.20R			x	x
3.11.21R			x	x
3.11.23R			x	x
3.11.24R			x	
3.11.25R			x	x
3.11.26R			x	
3.11.28R			x	

3.11.29R			x	
3.11.30R			x	
3.11.33R		x		
<b>Note:</b> "x" means "applies".				

3.11.3 R A *UK depositary* of a *non-EEA AIF* that does not perform all of the functions of cash monitoring, safekeeping and oversight for the *AIF* need only comply with the following *rules* that are applicable to the functions it performs:

- (1) *FUND* 3.11.20R if it performs only the cash monitoring function;
- (2) *FUND* 3.11.21R and *FUND* 3.11.23R if it performs only the safekeeping function;
- (3) *FUND* 3.11.25R if it performs only the oversight function;
- (4) *FUND* 3.11.20R, *FUND* 3.11.21R and *FUND* 3.11.23R if it performs only the cash monitoring and safekeeping functions;
- (5) *FUND* 3.11.20R and *FUND* 3.11.25R if it performs only the cash monitoring and oversight functions; and
- (6) *FUND* 3.11.21R, *FUND* 3.11.23R and *FUND* 3.11.25R if it performs only the safekeeping and oversight functions.

#### Appointment of a single depositary

3.11.4 R An *AIFM* must, for each *AIF* it manages, ensure that:

- (1) a single *depositary* is appointed; and
- (2) the assets of the *AIF* are entrusted to the *depositary* for safekeeping in accordance with *FUND* 3.11.21R and *FUND* 3.11.23R.

[**Note:** article 21(1) and (8) of *AIFMD*]

#### General obligations

3.11.5 R An *AIFM* and a *depositary* must, in the context of their respective roles, act honestly, fairly, professionally, independently and in the interest of the *AIF* and its investors.

[**Note:** article 21(10) first paragraph of *AIFMD*]

3.11.6 G The *Act* specifies that the *trustee* of an *AUT* and the *depositary* of an *ACS* must be independent of its *authorised fund manager*, and the *OEIC Regulations* specify that the *depositary* of an *ICVC* must be independent of the *ICVC* and its *directors*. However, these requirements do not apply to *AIFs* which are not *authorised funds*, and, therefore, an *AIFM* and a *depositary* of an *unauthorised*

*AIF* may be from within the same *group*, but only if conflicts of interest are avoided and there is sufficient organisational separation between the two entities.

Conflicts of interest: AIFM

- 3.11.7 R To avoid conflicts of interest between the *depository*, the *AIFM*, the *AIF* and its investors, an *AIFM* must ensure that:
- (1) it does not act as a *depository* or a delegate of a *depository*; and
  - (2) a *prime brokerage firm* acting as counterparty to an *AIF* does not act as the *depository* for that *AIF*, unless:
    - (a) the *prime brokerage firm* has functionally and hierarchically separated the performance of its depository functions from its tasks as a *prime brokerage firm*; and
    - (b) potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the *AIF* by the *AIFM*.

[**Note:** article 21(4) of *AIFMD*]

- 3.11.8 G A *depository* may delegate custody tasks to one or more *prime brokerage firms* provided the *depository* complies with *FUND* 3.11.26R to *FUND* 3.11.30R. In addition to the delegated custody tasks, *prime brokerage firms* are allowed to provide *prime brokerage services* to the *AIF*. Those *prime brokerage services* do not form part of the delegation arrangement.

[**Note:** recital 43 of *AIFMD*]

Conflicts of interest: depositories

- 3.11.9 R A *depository* must not carry out activities with regard to the *AIF*, or the *AIFM* on behalf of the *AIF*, that may create conflicts of interest between the *AIF*, the investors in the *AIF*, the *AIFM* and itself, unless:
- (1) the *depository* has properly identified any such potential conflicts of interest;
  - (2) the *depository* has functionally and hierarchically separated the performance of its *depository* tasks from its other potentially conflicting tasks; and
  - (3) the potential conflicts of interest are properly managed, monitored and disclosed to the investors of the *AIF*.

[**Note:** article 21(10) second paragraph of *AIFMD*]

Eligible depositories for UK AIFs

- 3.11.10 R Subject to *FUND 3.11.12R*, an *AIFM* must, for each *UK AIF* it manages, ensure the appointment of a *depository* which is a *firm established* in the *UK* and which is one of the following:
- (1) a *credit institution*; or
  - (2) a *MiFID investment firm* which:
    - (a) has *own funds* of not less than €730,000; and
    - (b) provides the *ancillary service* of safe-keeping and administration of *financial instruments* for the account of clients; or
  - (3) another category of institution that is subject to prudential regulation and ongoing supervision and which, on 21 July 2011, fell within the categories of institution eligible to be a *trustee* of an *AUT* or a *depository* of an *ICVC*.

[**Note:** article 21(3)(a) to (c) and (5)(a) of *AIFMD*]

- 3.11.11 G For a *depository* to be *established* in the *UK*, it must have its registered office or branch in the *UK*. A *MiFID investment firm* that has its registered office in the *UK* must be a *full scope BIPRU investment firm* to meet the requirements of *FUND 3.11.10R(2)*. A *MiFID investment firm* that has a *branch* in the *UK* is not subject to the requirements of *GENPRU* and *BIRPU*, but must meet the equivalent capital requirements to a *full scope BIPRU investment firm* in its *Home State* to meet the requirements of *FUND 3.11.10R(2)*.

- 3.11.12 R An *AIFM* that manages a *UK AIF* which:
- (1) has no redemption rights exercisable during the period of five years from the date of the initial investments; and
  - (2) in accordance with its core investment policy:
    - (a) does not generally invest in *AIF custodial assets*; or
    - (b) generally invests in issuers or non-listed companies in order to potentially acquire *control* over such companies in accordance with regulation 35 of the *AIFMD UK regulation*

may appoint, as its *depository*, a *firm* which is *established* in the *UK* and which complies with *FUND 3.11.14R*.

- 3.11.13 G For the purposes of *FUND 3.11.12R(2)(a)*, an *AIF* does not generally invest in *AIF custodial assets* if it invests in such assets on a temporary basis or if those assets do not constitute a significant proportion of its overall assets. However, in line with *FUND 3.11.12R(2)(b)*, an *AIF* may invest in *AIF custodial assets* if it invests in issuers to acquire control of such companies in accordance with regulation 35 of the *AIFMD UK regulation* or if it is in the process of

divesting its investment in an issuer which it controls or previously controlled.

- 3.11.14 R An *AIFM* must ensure that a *depository* appointed in line with *FUND* 3.11.12R is a *firm*:
- (1) which has the *Part 4A permission* of acting as trustee or depository of an *AIF*; and
  - (2) which has *own funds* of at least €125,000.

[**Note:** article 21(3) second paragraph after (c) and (5)(a) of *AIFMD*]

- 3.11.15 G For certain types of closed-ended *AIFs* (such as private equity, venture capital and real estate funds) a wider range of entities than those specified in *FUND* 3.11.10R may perform the relevant *depository* functions. The *FCA* requires such entities to obtain authorisation as a *depository* to demonstrate that they can meet the commitments inherent in those functions, but imposes a lower level of capital requirements in recognition of the different degree of risk implied by the characteristics of the *AIF*. The capital requirements of such *firms* are contained in *IPRU(INV)* 5 (particularly *IPRU(INV)* 5.2.3R(3)(a)(ia) (Own funds requirement)) or in *GENPRU* and *BIPRU* if the *firm* undertakes *MiFID business*.

[**Note:** recital 34 of *AIFMD*]

Additional requirements for depositaries of authorised AIFs

- 3.11.16 R A *MiFID investment firm* (other than a *PRA-authorised person*) which is appointed as a *depository* for an *authorised AIF* in accordance with *FUND* 3.11.10R(2) must maintain *own funds* of at least £4 million.
- 3.11.17 G Where the *firm* referred to in *FUND* 3.11.16R is a *full scope BIPRU investment firm* which is a *depository* for an *authorised AIF* appointed in line with *FUND* 3.11.10R(2), it is subject to the capital requirements of *GENPRU* and *BIPRU*. However, these requirements are not in addition to *FUND* 3.11.16R and, therefore, a *firm* subject to this *rule* may use the *own funds* required under *GENPRU* and *BIPRU* to meet the £4 million requirement.

Eligible depositaries for EEA AIFs

- 3.11.18 R An *AIFM* must, for each *EEA AIF* it manages, ensure the appointment of a *depository* which is *established* in the *Home State* of the *AIF* and which is eligible to be a *depository* in that *Home State* in accordance with article 21(3) of *AIFMD*.

[**Note:** article 21(3) and (5)(a) of *AIFMD*]

Written contract

- 3.11.19 R An *AIFM* and a *depository* must ensure that the appointment of the *depository* is evidenced by a written contract. The contract must regulate the flow of information deemed necessary to allow the *depository* to perform its functions

for the *AIF* for which it has been appointed as *depository*.

[**Note:** article 21(2) of *AIFMD*]

Depository functions: cash monitoring

- 3.11.20 R A *depository* must ensure that the *AIF*'s cash flows are properly monitored and that:
- (1) all payments made by, or on behalf of, investors upon the subscription of *units* or *shares* of an *AIF* have been received;
  - (2) all cash of the *AIF* has been booked in cash accounts opened:
    - (a) in the name of:
      - (i) the *AIF*; or
      - (ii) the *AIFM* acting on behalf of the *AIF*; or
      - (iii) the *depository* acting on behalf of the *AIF*; and
    - (b) at:
      - (i) a central bank; or
      - (ii) a *BCD credit institution*; or
      - (iii) a bank authorised in a third country; or
      - (iv) another entity of the same nature, in the relevant market where cash accounts are required, provided such an entity is subject to effective prudential regulation and supervision which have the same effect as *EU* law and are effectively enforced and in accordance with the principles set out in article 16 (safeguarding of client financial instruments and funds) of the *MiFID implementing directive*; and
  - (3) where cash accounts are opened in the name of the *depository* acting on behalf of the *AIF* in accordance with (2)(a)(iii), the *depository* must ensure that no cash of the entity referred to in (2)(b), and none of the *depository*'s own cash, is booked on such accounts.

[**Note:** article 21(7) of *AIFMD*]

Depository functions: safekeeping of financial instruments

- 3.11.21 R (1) A *depository* must hold in custody all *AIF custodial assets*.
- (2) The *depository* must ensure that all *AIF custodial assets* that can be registered in a *financial instruments* account are registered in the *depository*'s books within segregated accounts opened in the name of

the *AIF*, or the *AIFM* acting on behalf of the *AIF*, so that they can be clearly identified as belonging to the *AIF* at all times in accordance with the applicable law and *CASS* 6.1.16IAR (Depositories of AIFs).

[**Note:** article 21(8)(a) of *AIFMD*]

3.11.22	EU	Financial instruments to be held in custody	
		1.	Financial instruments belonging to the <i>AIF</i> or to the <i>AIFM</i> acting on behalf of the <i>AIF</i> which are not able to be physically delivered to the depository shall be included in the scope of the custody duties of the depository where all of the following requirements are met:
		(a)	they are transferable securities including those which embed derivatives as referred to in the last subparagraph of Article 51(3) of Directive 2009/65/EC and Article 10 of Commission Directive 2007/16/EC, money market instruments or units of collective investment undertakings;
		(b)	they are capable of being registered or held in an account directly or indirectly in the name of the depository.
		2.	Financial instruments which, in accordance with applicable national law, are only directly registered in the name of the <i>AIF</i> with the issuer itself or its agent, such as a registrar or a transfer agent, shall not be held in custody.
		3.	Financial instruments belonging to the <i>AIF</i> or the <i>AIFM</i> acting on behalf of the <i>AIF</i> which are able to be physically delivered to the depository shall always be included in the scope of the custody duties of the depository.
		[ <b>Note:</b> Article 88 of the <i>AIFMD level 2 regulation</i> ]	

Depository functions: safekeeping of other assets

- 3.11.23 R For assets of the *AIF* that are not *AIF custodial assets*, a *depository* must:
- (1) verify that the *AIF*, or the *AIFM* acting on behalf of the *AIF*, is the owner of the assets based on information or documents provided by the *AIF* or the *AIFM* and, where available, on external evidence; and
  - (2) maintain, and keep up to date, a record of those assets for which it is satisfied that the *AIF*, or the *AIFM* acting on behalf of the *AIF*, is the owner.

[**Note:** article 21(8)(b) of *AIFMD*]

Reuse of assets

- 3.11.24 R A *depository* must not reuse the assets of the *AIF* without the prior consent of

the *AIF* or the *AIFM* acting on behalf of the *AIF*.

[**Note:** article 21(10) third paragraph of *AIFMD*]

Depository functions: oversight

- 3.11.25 R A *depository* must:
- (1) ensure that the sale, issue, repurchase, redemption and cancellation of *units* or *shares* of the *AIF* are carried out in accordance with the applicable national law and the *instrument constituting the fund*;
  - (2) ensure that the value of the *units* or *shares* of the *AIF* is calculated in accordance with the applicable national law, the *instrument constituting the fund* and *FUND 3.9 (Valuation)*;
  - (3) carry out the instructions of the *AIFM*, unless they conflict with the applicable national law or the *instrument constituting the fund*;
  - (4) ensure that in transactions involving the *AIF*'s assets, any consideration is remitted to the *AIF* within the usual time limits; and
  - (5) ensure that an *AIF*'s income is applied in accordance with the applicable national law and the *instrument constituting the fund*.

[**Note:** article 21(9) of *AIFMD*]

Delegation: general prohibition

- 3.11.26 R A *depository* must not delegate its functions to third parties, except as permitted by *FUND 3.11.28R*.

[**Note:** article 21(11) first paragraph of *AIFMD*]

- 3.11.27 G The use of services provided by securities settlement systems, as specified in the *Settlement Finality Directive*, or similar services provided by third-country securities settlement systems, does not constitute a delegation by the *depository* of its functions.

[**Note:** article 21(11) fifth paragraph of *AIFMD*]

Delegation: safekeeping

- 3.11.28 R A *depository* may delegate the functions in *FUND 3.11.21R* and *FUND 3.11.23R* to third parties, subject to the following conditions:
- (1) the tasks are not delegated with the intention of avoiding the requirements of *AIFMD*;
  - (2) the *depository* can demonstrate that there is an objective reason for the delegation;

- (3) the *depository*:
- (a) has exercised all due skill, care and diligence in the selection and appointment of any third party to whom it wants to delegate parts of its tasks; and
  - (b) continues to exercise all due skill, care and diligence in the periodic review and ongoing monitoring:
    - (i) of any third party to whom it has delegated parts of its tasks; and
    - (ii) of the arrangements of that third party in respect of the matters delegated to it;
- (4) the *depository* ensures that the third party delegate meets the following conditions at all times:
- (a) the third party has structures and expertise that are adequate and proportionate to the nature and complexity of the assets of the *AIF*, or the *AIFM* acting on behalf of the *AIF*, that have been entrusted to it;
  - (b) (subject to *FUND* 3.11.29R) for custody tasks in relation to *AIF custodial assets*, the third party is subject to:
    - (i) effective prudential regulation, including minimum capital requirements, and supervision in the jurisdiction concerned; and
    - (ii) an external periodic audit to ensure that the *financial instruments* remain in its custody;
  - (c) the third party segregates the assets of the *depository's* clients from its own assets and from the assets of the *depository* in such a way that they can, at any time, be clearly identified as belonging to clients of a particular *depository*;
  - (d) the third party does not make use of the assets unless it has:
    - (i) obtained the prior consent of the *AIF*, or the *AIFM* acting on behalf of the *AIF*; and
    - (ii) given prior notification to the *depository*; and
  - (e) the third party complies with the general obligations and prohibitions relating to the *depository* in *FUND* 3.11.5R, *FUND* 3.11.9R, *FUND* 3.11.21R, *FUND* 3.11.23R and *FUND* 3.11.24R.

[**Note:** article 21(11) second paragraph of *AIFMD*]

## Delegation: third countries

- 3.11.29 R A *depository* may delegate custody tasks in relation to *AIF custodial assets* to an entity in a third country that does not satisfy the conditions in *FUND* 3.11.28R(4)(b), provided that:
- (1) the law of that third country requires those *AIF custodial assets* to be held in custody by a local entity;
  - (2) no local entity satisfies the conditions in *FUND* 3.11.28R(4)(b);
  - (3) the *depository* delegates its functions to such a local entity only to the extent required by the law of that third country and only for as long as there is no local entity that satisfies the delegation conditions in *FUND* 3.11.28R(4)(b);
  - (4) the investors of the relevant *AIF* are informed before their investment that such delegation is required due to legal constraints in the third country and of the reasons as to why the delegation is necessary; and
  - (5) the *AIF*, or the *AIFM* on behalf of the *AIF*, has consented to the delegation arrangements before they become effective.

[**Note:** article 21(11) third paragraph of *AIFMD*]

## Delegation: sub-delegation

- 3.11.30 R A *depository* must ensure that a third party to whom the *depository* has delegated functions does not, in turn, sub-delegate those functions unless the delegate complies with the same requirements that apply to the *depository*, with any necessary changes, in relation to the delegation by the *depository* of its functions in *FUND* 3.11.26R to *FUND* 3.11.29R.

[**Note:** article 21(11) fourth paragraph of *AIFMD*]

## Delegation: omnibus account

- 3.11.31 G A *depository* may delegate the safe-keeping of assets to a third party that maintains a common account for multiple *AIFs*, a so-called ‘omnibus account’, provided it is a segregated common account that is segregated from the third party’s own assets.

[**Note:** recital 40 of *AIFMD*]

## Provision of information

- 3.11.32 G The requirements of *SUP* 2 (Information gathering by the *FCA* on its own initiative) apply to the *depository*, under which it must enable the *FCA* to obtain, on request, all information that the *depository* has obtained while discharging its duties and that the *FCA* considers necessary.

[**Note:** article 21(16) of *AIFMD*]

AIFM of a non-EEA AIF

- 3.11.33 R An *AIFM* of a *non-EEA AIF* which is *marketed* in the *UK* must:
- (1) ensure that the duties referred to in *FUND* 3.11.20R, *FUND* 3.11.21R, *FUND* 3.11.23R and *FUND* 3.11.25R are carried out in relation to that *AIF* by one or more:
    - (a) *firms* that are *established* in the *UK* and which have the *Part 4A permission* of acting as trustee or depositary of an *AIF*, where the duties are carried out in the *UK*; or
    - (b) entities that are not *established* in the *UK*, where the duties are not carried out in the *UK*;
  - (2) not perform the duties referred to in (1) itself; and
  - (3) provide the *FCA* with information about the identity of those entities responsible for carrying out the duties referred to in (1).

[**Note:** article 36(1)(a) of *AIFMD*]

Subordinate measures

- 3.11.34 G Articles 83 to 102 of the *AIFMD level 2 regulation* provide detailed rules supplementing this section.

### **3.12 Marketing in the home Member State of the AIFM**

Application

- 3.12.1 G This section applies to:
- (1) a *full-scope UK AIFM* of:
    - (a) a *UK AIF*; and
    - (b) an *EEA AIF*; and
  - (2) a *full-scope EEA AIFM* of:
    - (a) a *UK AIF*; and
    - (b) an *EEA AIF*.

Marketing application

- 3.12.2 D [*Direction in relation to marketing application to follow*]

- 3.12.3 G If the *UK AIF* or *EEA AIF* is a *feeder AIF*, the *master AIF* needs to be an *AIF* that is not managed by a *non-EEA AIFM* or is not a *non-EEA AIF* for it to be *marketed* in accordance with regulation 54 of the *AIFMD UK regulation*. If the *master AIF* is managed by a *non-EEA AIFM* or is a *non-EEA AIF*, the *AIF* may be *marketed* in the *UK* in accordance with regulation 57 (Marketing under article 36 of the directive) of the *AIFMD UK regulation* (see *FUND 10.5.3G* (Marketing under article 36 of AIFMD)).
- 3.12.4 G (1) A *full-scope UK AIFM* may use the form set out in *FUND 3 Annex 1D* to apply to *market* a *UK AIF* or *EEA AIF* (that is not a *feeder AIF*, the *master AIF* of which is managed by a *non-EEA AIFM* or is a *non-EEA AIF*) to *professional clients* and/or *retail clients*.
- (2) A *full-scope UK AIFM* may inform the *FCA* of its intention to *market* such an *AIF* in the *UK* in its application to become authorised as a *full-scope UK AIFM*, in which case the *firm* does not also have to submit the form in *FUND 3 Annex 1D* in respect of that *marketing*.
- 3.12.5 G (1) A *full-scope EEA AIFM* that wishes to *market* a *UK AIF* or *EEA AIF* (that is not a *feeder AIF*, the *master AIF* of which is managed by a *non-EEA AIFM* or is a *non-EEA AIF*) to *professional clients* should do so using the *marketing* passport provided for under *AIFMD* and should, therefore, apply to its *Home State* regulator for permission to do so.
- (2) In accordance with regulation 49 (Marketing by full-scope EEA AIFMs of certain AIFs) of the *AIFMD UK regulation*, a *full-scope EEA AIFM* may *market* such an *AIF* to *retail clients* in the *UK* if the *FCA* has received a regulator's notice in relation to the *marketing* in accordance with Schedule 3 to the *Act* (EEA Passport rights) or if the *AIFM* has applied to the *FCA* for permission to *market* the *AIF* using the form in *FUND 3 Annex 1D* and the *FCA* has approved such *marketing*.
- (3) As such, a *full-scope EEA AIFM* may use the form in *FUND 3 Annex 1D* to apply to *market* such an *AIF* in the *UK* to *retail clients*, but should not use this form to apply to *market* such an *AIF* to *professional clients* in the *UK*.
- 3.12.6 G A *full-scope UK AIFM* or a *full-scope EEA AIFM* that intends to *market* to *retail clients* should consider the application of the *financial promotions* regime and ensure it is compliant with the relevant requirements (see *PERG 8.37.14G* (Application of the financial promotion and scheme promotion restrictions)).

#### 4. Common requirements for all retail funds

[To follow]

#### 5. Additional requirements for retail alternative investment funds

[*To follow*]

**6. Additional requirements for qualified investor alternative investment funds**

[*To follow*]

**7. Additional requirements for UCITS funds**

[*To follow*]

**8. Additional requirements for UCITS and AIF master-feeder arrangements**

[*To follow*]

**9. Suspension of dealings and termination of authorised funds**

[*To follow*]

**10. Operating on a cross-border basis**

**10.1 Application and purpose**

Application

10.1.1 G (1) This chapter applies to the following types of *firm* in relation to the activities in (2):

- (a) a *full-scope UK AIFM*;
- (b) a *full-scope EEA AIFM*;
- (c) a *small non-EEA AIFM*; and
- (d) an *above-threshold non-EEA AIFM*.

(2) The activities to which this chapter relates are the management and *marketing* on a cross-border basis, into or from the *UK* of:

- (a) a *UK AIF*;
- (b) an *EEA AIF*; and

- (c) a *non-EEA AIF*.

#### Purpose

- 10.1.2 G The purpose of this chapter is to provide *guidance* on the requirements that apply to the types of *firm* set out in *FUND* 10.1.1G when operating on a cross-border basis into or from the *UK*.

#### Introduction

- 10.1.3 G An *AIFM* operates on a cross-border basis when it manages or *markets* an *AIF* in an *EEA State* other than the state in which it has its registered office (which may include, in certain cases, a state which is a *non-EEA State*).

- 10.1.4 G (1) *AIFMD* allows certain types of *AIFM* to operate on a cross-border basis using a passport. There are two types of passport that are provided for in *AIFMD*:
- (a) a management passport, which allows an *AIFM* to establish a *branch* in, or provide *cross-border services* into, another *EEA State* to manage an *AIF*; and
  - (b) a *marketing* passport, which allows an *AIFM* to provide *cross-border services* into another *EEA State* to *market* an *AIF* to investors that are *professional clients*.
- (2) The following types of *AIFM* are allowed to operate on a cross-border basis using the management and *marketing* passport:
- (a) a *full-scope UK AIFM* of:
    - (i) a *UK AIF*; and
    - (ii) an *EEA AIF*; and
  - (b) a *full-scope EEA AIFM* of:
    - (i) a *UK AIF*; and
    - (ii) an *EEA AIF*.

- 10.1.5 G (1) *AIFMD* also contains specific provisions for third country *AIFs* and *AIFMs* (ie, in relation to *non-EEA AIFs* and *non-EEA AIFMs*) and the *marketing* of a *UK AIF* or an *EEA AIF* that is a *feeder AIF*, the *master AIF* of which is managed by a *non-EEA AIFM* or is a *non-EEA AIF*.
- (2) In line with these provisions, the following types of *AIFM* are allowed to manage a *non-EEA AIF* from an *EEA State*:
- (a) a *full-scope UK AIFM*; and
  - (b) a *full-scope EEA AIFM*.

- (3) In addition, *EEA States* may allow the *marketing* by the following types of *AIFM* in their territory only:
- (a) a *full-scope UK AIFM* of:
    - (i) a *UK AIF* or an *EEA AIF* that is a *feeder AIF*, the *master AIF* of which is managed by a *non-EEA AIFM* or is a *non-EEA AIF*; and
    - (ii) a *non-EEA AIF*;
  - (b) a *full-scope EEA AIFM* of:
    - (i) a *UK AIF* or an *EEA AIF* that is a *feeder AIF*, the *master AIF* of which is managed by a *non-EEA AIFM* or is a *non-EEA AIF*; and
    - (ii) a *non-EEA AIF*; and
  - (c) a *non-EEA AIFM* of:
    - (i) a *UK AIF*;
    - (ii) an *EEA AIF*; and
    - (iii) a *non-EEA AIF*.

## 10.2 AIFM management passport

### Application

10.2.1 G This section applies to:

- (1) a *full-scope UK AIFM* that intends to manage an *EEA AIF*:
  - (a) by establishing a *branch* in another *EEA State*; or
  - (b) under the freedom to provide *cross-border services*; and
- (2) a *full-scope EEA AIFM* that intends to manage a *UK AIF*:
  - (a) by establishing a *branch* in the *UK* (an *incoming EEA AIFM branch*); or
  - (b) under the freedom to provide *cross-border services*.

### Management passport for full-scope UK AIFMs

10.2.2 G Information on the use of the management passport by a *full-scope UK AIFM* is contained in *SUP 13* (exercise of passport rights by UK firms), which

includes:

- (1) *guidance* on the conditions for establishing a *branch* to manage an *AIF* in an *EEA State* other than the *UK* (*SUP* 13.3.2G);
- (2) *guidance* on the conditions for providing *cross-border services* to manage an *AIF* in an *EEA State* other than the *UK* (*SUP* 13.4.2G);
- (3) the *notice of intention* that a *full-scope UK AIFM* must submit to establish a *branch* in an *EEA State* other than the *UK* (*SUP* 13 Annex 1R);
- (4) the *notice of intention* that a *full-scope UK AIFM* must submit to provide *cross-border services* to manage an *AIF* in an *EEA State* other than the *UK* (*SUP* 13 Annex 8AR);
- (5) *guidance* on changes to *branches* (*SUP* 13.6.9CG); and
- (6) *guidance* on changes to *cross-border services* to manage an *AIF* in an *EEA State* other than the *UK* (*SUP* 13.7.13BG).

Management passport for full-scope EEA AIFMs

- 10.2.3 G Information on the use of the management passport by a *full-scope EEA AIFM* is contained in *SUP* 13A (Qualifying for authorisation under the Act) and *SUP* 14 (Incoming EEA firms changing details, and cancelling qualification for authorisation), which include:
- (1) *guidance* on the conditions for establishing a *branch* to manage an *AIF* in the *UK* (*SUP* 13A.4.1G);
  - (2) *guidance* on the conditions for providing *cross-border services* to manage an *AIF* in the *UK* (*SUP* 13A.5.3G);
  - (3) *guidance* on *Handbook* provisions that apply to an *incoming EEA AIFM branch* (*SUP* 13A Annex 1G);
  - (4) *guidance* on the matters that are reserved to a *firm's Home State regulator* (*SUP* 13A Annex 2G);
  - (5) *guidance* on changes to *branches* (*SUP* 14.2.15G and *SUP* 14.2.16G); and
  - (6) *guidance* on changes to *cross-border services* to manage an *AIF* (*SUP* 14.3.8G to *SUP* 14.3.10G).

### 10.3 AIFM marketing passport

Application

- 10.3.1 G This section applies to:
- (1) a *full-scope UK AIFM* of:
    - (a) a *UK AIF*; and
    - (b) an *EEA AIF*;
 that intends to *market* the *AIF* it manages in an *EEA State* other than the *UK*; and
  - (2) a *full-scope EEA AIFM* of:
    - (a) a *UK AIF*; and
    - (b) an *EEA AIF*;
 that intends to *market* the *AIF* it manages in the *UK*.

#### Feeder AIFs

- 10.3.2 G If the *UK AIF* or *EEA AIF* is a *feeder AIF*, the *full-scope UK AIFM* or *full-scope EEA AIFM* may only *market* the *AIF* using the *marketing passport* if the *master AIF* is a *UK AIF* or an *EEA AIF* that is managed by a *full-scope UK AIFM* or a *full-scope EEA AIFM*. However, the *AIFM* of such an *AIF* will be entitled to *market* the *AIF* if it meets the conditions in regulation 57 (Marketing under Article 36 of the directive) of the *AIFMD UK regulation*, as explained in *FUND 10.5.3G* to *FUND 10.5.5G*.

#### Marketing passport for full-scope UK AIFMs

- 10.3.3 G Information on the use of the *marketing passport* by a *full-scope UK AIFM* is contained in *SUP 13* (exercise of passport rights by UK firms), which includes:
- (1) *guidance* on the conditions for providing *cross-border services to market* an *AIF* in an *EEA State* other than the *UK* (*SUP 13.4.2FG*);
  - (2) the *notice of intention* that a *full-scope UK AIFM* must submit to provide *cross-border services to market* an *AIF* (*SUP 13 Annex 8BR*); and
  - (3) *guidance* on changes to *cross-border services to market* an *AIF* in an *EEA State* other than the *UK* (*SUP 13.7.14G*).

#### Marketing passport for full-scope EEA AIFMs

- 10.3.4 G Information on the use of the *marketing passport* by a *full-scope EEA AIFM* is contained in *SUP 13A* (Qualifying for authorisation under the Act) and *SUP 14* (Incoming EEA firms changing details, and cancelling qualification for authorisation), which include:

- (1) *guidance on the conditions for providing cross-border services to market an AIF into the UK (SUP 13A.5.3G); and*
- (2) *guidance on changes to cross-border services to market an AIF in the UK (SUP 14.3.9G and SUP 14.3.10G).*

10.3.5 G In accordance with article 32(5) of *AIFMD* arrangements for the *marketing* of *AIFs* (referred to in point (h) of Annex IV of *AIFMD*) are subject to the laws and supervision of the *Host State* of the *AIFM*. This means that a *full-scope EEA AIFM* that is *marketing* an *AIF* in the *UK* using the *marketing* passport should have regard to the *financial promotions* regime, as explained in *PERG* 8.37.6G(3) (Communications with investors in relation to draft documentation).

Further guidance on marketing an AIF

10.3.6 G Further guidance on marketing an *AIF* can be found in *PERG* 8.37 (AIFMD Marketing).

## 10.4 AIFM third country management

Application

10.4.1 G This section applies to a *full-scope UK AIFM* of a *non-EEA AIF* that is not *marketed* in the *EEA* to *EEA* investors.

Applicable requirements

10.4.2 G A *full-scope UK AIFM* may manage a *non-EEA AIF* subject to the satisfaction of certain conditions. If the *AIF* is not *marketed*, these conditions are that:

- (1) the *AIFM* complies with the full requirements of *AIFMD* in respect of that *AIF*, except article 21 (Depositaries) and article 22 (Annual reporting); and
- (2) (in accordance with regulation 33 of the *AIFMD UK regulation*) appropriate cooperation arrangements are in place between the *competent authorities* of the *Home State* of the *AIFM* and the *supervisory authorities* of the third country where the *non-EEA AIF* is *established* in order to ensure an efficient exchange of information that allows the *competent authority* of the *Home State* of the *AIFM* to carry out its duties in accordance with *AIFMD*.

10.4.3 G As a result, a *full-scope UK AIFM* of a *non-EEA AIF* that is not *marketed* is required to comply with:

- (1) all of *FUND* 3 with the exception of *FUND* 3.3 (Annual report of an AIF), *FUND* 3.11 (Depositaries) and *FUND* 3.12 (Marketing in the home Member State of the AIFM); and

- (2) such other provisions of the *FCA Handbook* as are applicable to a *full-scope UK AIFM*.

10.4.4 G If a *full-scope UK AIFM* wishes to market in the *UK* a *non-EEA AIF* that it manages, the *AIFM* must comply with the relevant requirements, as explained in *FUND* 10.5.3G to *FUND* 10.5.5G (Marketing under article 36 of AIFMD).

## 10.5 National private placement

### Application

10.5.1 G This section applies to the following types of *AIFM* that intend to market an *AIF* in the *UK*:

- (1) a *full-scope UK AIFM* of:
  - (a) a *feeder AIF* that is a *UK AIF* or an *EEA AIF*, the *master AIF* of which is managed by a *non-EEA AIFM* or is a *non-EEA AIF*; and
  - (b) a *non-EEA AIF*;
- (2) a *full-scope EEA AIFM* of:
  - (a) a *feeder AIF* that is a *UK AIF* or an *EEA AIF*, the *master AIF* of which is managed by a *non-EEA AIFM* or is a *non-EEA AIF*; and
  - (b) a *non-EEA AIF*;
- (3) a *small non-EEA AIFM* of:
  - (a) a *UK AIF*;
  - (b) an *EEA AIF*; and
  - (c) a *non-EEA AIF*; and
- (4) an *above-threshold non-EEA AIFM* of:
  - (a) a *UK AIF*;
  - (b) an *EEA AIF*; and
  - (c) a *non-EEA AIF*.

### Introduction

10.5.2 G *AIFMD* permits *EEA States* to allow the *marketing* in their territory only of the types of *AIF* set out in *FUND* 10.5.1G, subject to certain conditions. This

has been implemented in the *UK* by Part 6 (Marketing) of the *AIFMD UK regulation*. In accordance with these provisions, an *AIFM* of the type set out in *FUND 10.5.1G* may *market* an *AIF* in the *UK* providing it has notified the *FCA* of its intention to *market*, it meets the relevant conditions in the *AIFMD UK regulation* and the *FCA* has not suspended or revoked the *AIFM's* entitlement to *market* the *AIF*. The *AIFM* is entitled to *market* the *AIF* as soon as a notification containing all of the required information has been sent to the *FCA*.

#### Marketing under article 36 of AIFMD

- 10.5.3 G In accordance with regulation 57 (Marketing under Article 36 of the directive) of the *AIFMD UK regulation*, a *full-scope UK AIFM* and a *full-scope EEA AIFM* that manages the following types of *AIF* may *market* those *AIFs* in the *UK* by submitting a notification to the *FCA* in the form in *FUND 10 Annex 1D*:
- (1) a *feeder AIF* that is a *UK AIF* or an *EEA AIF*, the *master AIF* of which is managed by a *non-EEA AIFM* or is a *non-EEA AIF*; and
  - (2) a *non-EEA AIF*.
- 10.5.4 G To allow the *AIFM* to comply with regulation 57(4), the notification includes a statement from the *AIFM* confirming that the following conditions are met:
- (1) subject to (2), the *AIFM* complies with the requirements of *AIFMD* in respect of that *AIF*;
  - (2) the *AIFM* is not required to comply with the requirements of article 21 (Depositaries) of *AIFMD* provided the *AIFM*:
    - (a) ensures that one or more entities, other than the *AIFM*, are appointed to carry out the duties in article 21(7) to (9) of *AIFMD*; and
    - (b) informs the *FCA* about the identity of each entity;
  - (3) appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards are in place between the *FCA* and the *supervisory authorities* of the relevant third country to ensure an efficient exchange of information that enables the *FCA* to carry out its duties in accordance with *AIFMD*; and
  - (4) the third country where the *non-EEA AIF* is *established* is not listed as a Non-Cooperative Country and Territory by the Financial Action Task Force (FATF).
- 10.5.5 G (1) As a result of *marketing* an *AIF* in the *UK*, a *full-scope UK AIFM* is required to comply with:
- (a) all of *FUND 3*, except certain sections of *FUND 3.11* (Depositaries) (as set out in *FUND 3.11.33R* (*AIFM* of a non-

EEA AIF)) and *FUND* 3.12 (Marketing in the home Member State of the AIFM); and

- (b) such other provisions of the *FCA Handbook* that apply to a *full-scope UK AIFM* of a *UK AIF*.
- (2) A *full-scope UK AIFM* managing a *non-EEA AIF* that is not *marketed* should note that the *rules* it needs to comply with will change in relation to that *AIF* as a result of the *AIF* being *marketed* (see *FUND* 10.4.3G for details of the *rules* that apply to a *full-scope UK AIFM* managing a *non-EEA AIF* that is not *marketed*). In particular, an *AIFM* will be subject to the annual report requirements in *FUND* 3.3 (Annual report of an *AIF*) and some of the depositary provisions in *FUND* 3.11 (Depositaries) (as set out in *FUND* 3.11.33R (*AIFM* of a non-EEA *AIF*)).

#### Marketing of AIFs managed by small third-country AIFMs

- 10.5.6 G In accordance with regulation 58 (Marketing of AIFs managed by small third country AIFMs) of the *AIFMD UK regulation*, a *small non-EEA AIFM* may *market* an *AIF* in the *UK* managed by it by submitting a notification to the *FCA* in the form set out in *FUND* 10 Annex 1D.
- 10.5.7 G To allow the *AIFM* to comply with the requirements of regulation 58(2), the notification includes a statement from the *AIFM* confirming that the following conditions are met:
  - (1) the *AIFM* is the person responsible for complying with the implementing provisions relating to the *marketing* of the *AIF* (as explained in *FUND* 10.5.8G); and
  - (2) the *AIFM* is a *small non-EEA AIFM*.
- 10.5.8 G As a result of *marketing* an *AIF* in the *UK*, a *small non-EEA AIFM* is required to provide the *FCA* with information on:
  - (1) the main instruments in which the *AIFM* trades; and
  - (2) the principal exposures and most important concentrations of the *AIFs* it manages,

in accordance with *SUP* 16.18 (*AIFMD* reporting).

#### Marketing under Article 42 of the directive

- 10.5.9 G In accordance with regulation 59 (Marketing under article 42 of the directive) of the *AIFMD UK regulation*, an *above-threshold non-EEA AIFM* may *market* a *UK AIF*, an *EEA AIF* or a *non-EEA AIF* in the *UK* managed by it by submitting a notification to the *FCA* in the form in *FUND* 10 Annex 1D.
- 10.5.10 G To allow the *AIFM* to comply with the requirements of regulation 59(2), the notification includes a statement from the *AIFM* confirming that the following

conditions are met:

- (1) the *AIFM* is the person responsible for complying with the implementing provisions relating to the *marketing* of the *AIF* (see *FUND* 10.5.11G);
- (2) the *AIFM* complies with the requirements of articles 22 to 24 *AIFMD* in so far as such provisions are relevant to the *AIFM* and the *AIF* to be *marketed*;
- (3) if applicable, the *AIFM* complies with Part 5 (AIFs which acquire control of non-listed companies and issuers) of the *AIFMD UK regulation* in relation to the *AIF* to be *marketed*;
- (4) appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards are in place between:
  - (a) the *FCA* and, if applicable, the *competent authorities* of the other *EEA State* where the *AIF* is *established*; and
  - (b) the *supervisory authorities* of the country where the *non-EEA AIFM* is *established* and, if applicable, of the country where the *non-EEA AIF* is *established*,

to ensure an efficient exchange of information that enables the *FCA* to carry out its duties in accordance with *AIFMD*; and

- (5) the third country where the *non-EEA AIF* is *established* is not listed as a Non-Cooperative Country and Territory by the Financial Action Task Force (FATF).

10.5.11 G As a result of *marketing* an *AIF* in the *UK*, an *above-threshold non-EEA AIFM* is required to comply with:

- (1) the requirements that apply to a *full-scope UK AIFM* in *FUND* 3.2 (Investor information), *FUND* 3.3 (Annual report of an *AIF*) and *FUND* 3.4 (Reporting obligations to the *FCA*) in so far as such provisions are relevant to the *AIFM* and the *AIF*; and
- (2) if applicable, Part 5 (AIFs which acquire control of non-listed companies and issuers) of the *AIFMD UK regulation*.

Further guidance on marketing an *AIF*

10.5.12 G Further *guidance* on marketing an *AIF* can be found in *PERG* 8.37 (*AIFMD marketing*).

## 10 Annex 1 National private placement notification

D [to follow]

**11. Recognised funds**

[To follow]

**Appendices**

[To follow]

**Transitional Provisions and Schedules****TP 1 Transitional Provisions**

TP 1.1

(1)	(2)	(3)	(4)	(5)	(6)
	Material to which the transitional provision applies		Transitional provision	Transitional provision: date in force	Handbook provisions: coming into force
1	FUND 3.11.2R	R	A credit institution established in the UK and appointed as a <i>depository</i> of an <i>EEA AIF</i> managed by a <i>full-scope UK AIFM</i> or a <i>full-scope EEA AIFM</i> in accordance with article 61(5) of <i>AIFMD</i> must comply with the provisions of <i>FUND 3.11</i> that apply to a <i>UK depository</i> of a <i>UK AIF</i> managed by a <i>full-scope UK AIFM</i> or an <i>EEA AIFM</i> .	From 22 July 2013 until 22 July 2017.	22 July 2013
2	FUND 3.11.10R	R	An <i>AIFM</i> may ensure the appointment of a <i>credit institution</i> that is	From 22 July 2013 until 22	22 July 2013

			<i>established in an EEA State other than the UK for each UK AIF it manages that is an unauthorised AIF.</i>	July 2017.	
3	<i>FUND 3.11.14R(1)</i>	R	<i>An AIFM may ensure the appointment of a depositary in line with FUND 3.11.12R of a firm that does not have a Part 4A permission of acting as trustee or depositary of an AIF.</i>	From 22 July 2013 until 21 July 2014.	22 July 2013
4	<i>FUND 3.11.18R</i>	R	<i>An AIFM may ensure the appointment of a depositary that is a credit institution established in an EEA State other than the Home State of the AIF for each EEA AIF it manages if this is permitted by the laws and regulations of the Home State of the AIF.</i>	From 22 July 2013 until 22 July 2017.	22 July 2013
5	<i>FUND 3.11.33R(1)(a)</i>	R	<i>An AIFM may ensure the duties referred to in FUND 3.11.20R, FUND 3.11.21R, FUND 3.11.23R and FUND 3.11.25R are carried out in relation to that AIF by one or more firms that do not have a Part 4A permission of acting as trustee or depositary of an AIF.</i>	From 22 July 2013 until 21 July 2014.	22 July 2013

## Schedule 1 Record keeping requirements

Sch 1.1 G 1 Record keeping requirements

[to follow]

## Schedule 2 Notification requirements

Sch 2.1 G 1 Notification requirements

[to follow]

**Schedule 3 Rights of action for damages**

Sch 3.1 G

<p>The table below sets out the rules in <i>FUND</i> where contravention by an authorised person may be actionable under section 138D of the Act (Actions for damages) by a person who suffers loss as a result of the contravention.</p>	
<p>If a Yes appears in the column headed ‘For private person’, the rule may be actionable by a private person under section 138D, unless a Yes appears in the column headed ‘Removed’. A Yes in the column headed ‘Removed’ indicates that the <i>FCA</i> has removed the right of action under section 138F(3) of the Act. If so, a reference to the rule in which it is removed is also given.</p>	
<p>In accordance with The Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001 (SI 2001/2256), a private person is:</p>	
(1)	any individual, except when acting in the course of carrying on a regulated activity; and
(2)	any person who is not an individual, except when acting in the course of carrying on business of any kind;
<p>but does not include a government, a local authority or an international organisation.</p>	
<p>The column headed For other person indicates whether the rule is actionable by a person other than a private person, in accordance with those Regulations. If so, an indication of the type of person by whom the rule is actionable is given.</p>	

Sch 3.2 G

1. Actions for damages: Investment Funds sourcebook

Chapter/ Appendix	Section/ Annex	Paragraph	Right of action section 138D		
			For private person?	Removed	For other person
All rules in <i>FUND</i>			Yes	No	No

**Schedule 4 Rules that can be waived**

The *FCA* has the formal power to waive *rules* under sections 138A or section 250 of the Act (Modification or waiver of rules). However, the large majority of the *rules* in *FUND* are derived from *AIFMD* and it is not possible for the *FCA* to grant a *waiver* that would be incompatible with the *UK's* responsibilities under that directive. In practice, the ability of the *FCA* to *waive rules* in *FUND* is, therefore, severely constrained.

## Annex B

### Amendments to the Glossary of definitions

In this Annex, underlining indicates new text and striking through indicates deleted text, unless otherwise stated.

Insert the following new definitions in the appropriate alphabetical position. The text is not underlined.

<i>above-threshold non-EEA AIFM</i>	a <i>non-EEA AIFM</i> that is not a <i>small AIFM</i> .
<i>acting as trustee or depositary of an AIF</i>	<p>the <i>regulated activity</i>, specified in article 51ZD of the <i>Regulated Activities Order</i>, which is, in summary, acting as:</p> <ul style="list-style-type: none"> <li>(a) a depositary of an <i>AIF</i> falling within article 51ZD(2) of the <i>Regulated Activities Order</i>;</li> <li>(b) the <i>trustee</i> of an <i>authorised unit trust</i> which is an <i>AIF</i> that does not fall within article 51ZD(2) of the <i>Regulated Activities Order</i>;</li> <li>(c) the depositary of an <i>open-ended investment company</i> or of an <i>authorised contractual scheme</i> which is an <i>AIF</i> that does not fall within article 51ZD(2) of the <i>Regulated Activities Order</i>.</li> </ul>
<i>acting as trustee or depositary of a UCITS</i>	<p>the <i>regulated activity</i>, specified in article 51ZB of the <i>Regulated Activities Order</i> which is, in summary, acting as:</p> <ul style="list-style-type: none"> <li>(a) a trustee of an <i>authorised unit trust scheme</i>; or</li> <li>(b) a depositary of an <i>open-ended investment company</i>; or</li> <li>(c) a depositary of an <i>authorised contractual scheme</i>;</li> </ul> <p>where that company or <i>scheme</i> is a <i>UCITS</i>.</p>
<i>AIF</i>	<i>alternative investment fund</i> .
<i>AIF custodial assets</i>	<p><i>financial instruments</i> of an <i>AIF</i> that can be:</p> <ul style="list-style-type: none"> <li>(a) registered in a <i>financial instruments</i> account opened in the <i>depositary's</i> books; or</li> <li>(b) physically delivered to the <i>depositary</i>.</li> </ul>

[**Note:** recital 100 and articles 88 (Financial instruments to be held in custody) and 89(3) (Safekeeping duties with regard to assets

	held in custody) of the <i>AIFMD level 2 regulation</i> .]
<i>AIFM</i>	<i>alternative investment fund manager</i> .
<i>AIFM investment firm</i>	a <i>firm</i> which: <ul style="list-style-type: none"> <li>(a) is:           <ul style="list-style-type: none"> <li>(i) a <i>full-scope UK AIFM</i>; or</li> <li>(ii) an <i>incoming EEA AIFM branch</i>; and</li> </ul> </li> <li>(b) has a <i>Part 4A permission</i> (or an equivalent permission from its <i>Home State regulator</i>) for <i>managing investments</i> where:           <ul style="list-style-type: none"> <li>(i) the <i>investments</i> managed include one or more <i>financial instruments</i>; and</li> <li>(ii) the <i>permission</i> is limited to the activities permitted by article 6(4) of <i>AIFMD</i>.</li> </ul> </li> </ul>
<i>AIFM investment management functions</i>	investment management functions of an <i>AIFM</i> as set out in 1(a) (portfolio management) or (b) (risk management) of Annex I to <i>AIFMD</i> .
<i>AIFM management functions</i>	the management functions of an <i>AIFM</i> listed in Annex I to <i>AIFMD</i> .
<i>AIFM qualifier</i>	an <i>EEA AIFM</i> which is <i>marketing</i> , or has <i>marketed</i> , an <i>AIF</i> in the <i>UK</i> by: <ul style="list-style-type: none"> <li>(a) exercising its <i>EEA right to market</i> under Schedule 3 of the <i>Act</i> (<i>EEA Passport Rights</i>); and</li> <li>(b) is not exercising a right to manage a <i>UK AIF</i> under Schedule 3 of the <i>Act</i>.</li> </ul>
<i>AIFM Remuneration Code</i>	as set out in <i>SYSC 19B</i> ( <i>AIFM Remuneration Code</i> ).
<i>AIFM Remuneration Code staff</i>	(for an <i>AIFM</i> ) has the meaning given in <i>SYSC 19B.1.3R</i> .
<i>AIFM remuneration principles</i>	the principles set out in <i>SYSC 19B.1.5R</i> to <i>SYSC 19B.1.24R</i> .
<i>AIFMD</i>	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 ( <a href="http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:174:0001">http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:174:0001</a> )

:0073:EN:PDF) .

*AIFMD host state requirements*

*Handbook rules* transposing articles 12 and 14 of *AIFMD* and which fall under the responsibility of the *Host State* to supervise where an *AIFM* manages or *markets* an *AIF* through a *branch* in that *EEA State*, namely:

- (a) *FUND* 3.8;
- (b) *SYSC* 4.1.2CR;
- (c) *SYSC* 10.1.22R to *SYSC* 10.1.26R; and
- (d) *COBS* 2.1.4R.

*AIFMD level 2 regulation*

Commission delegated regulation (EU) No 231/2013 supplementing Directive 2011/16/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:083:0001:0095:en:PDF>) .

*AIFMD UK regulation*

the Alternative Investment Fund Managers Regulations 2013 (SI 2013/....)

*alternative investment fund*

(in accordance with article 4(1)(a) of *AIFMD*) a collective investment undertaking, including investment compartments thereof, which:

- (a) raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and
- (b) does not require authorisation pursuant to article 5 of the *UCITS Directive*.

*authorised AIF*

an *AIF* which is an *authorised fund*.

*carried interest*

a share in the profits of the *AIF* accrued to the *AIFM* as compensation for the management of the *AIF*, and excluding any share in the profits of the *AIF* accrued to the *AIFM* as a return on any investment by the *AIFM* into the *AIF*.

*charity AIF*

an *AIF* constituted under:

- (a) the Church Funds Investment Measure 1958; or
- (b) section 96 of the Charities Act 2011; or
- (c) section 25 of the Charities Act (Northern Ireland) 1964; or

	(d)	section 100 of the Charities Act 2011.
<i>closed-ended corporate AIF</i>		an <i>AIF</i> which is a <i>body corporate</i> and not a <i>collective investment scheme</i> .
<i>collective portfolio management investment firm</i>		a <i>firm</i> which has a <i>Part 4A permission</i> for <i>managing investments</i> and which is: <ul style="list-style-type: none"> <li>(a) an <i>AIFM investment firm</i>; or</li> <li>(b) a <i>UCITS investment firm</i>.</li> </ul>
<i>collective portfolio management firm</i>		a <i>firm</i> which: <ul style="list-style-type: none"> <li>(a) <ul style="list-style-type: none"> <li>(i) is a <i>full-scope UK AIFM</i>; and</li> <li>(ii) does not have a <i>Part 4A permission</i> to carry on any <i>regulated activities</i> other than those in connection with, or for the purpose of, managing collective investment undertakings; or</li> </ul> </li> <li>(b) is a <i>UCITS firm</i> that has a <i>Part 4A permission</i> for <i>managing a UCITS</i>.</li> </ul>
<i>EEA AIF</i>		an <i>AIF</i> , other than a <i>UK AIF</i> , which: <ul style="list-style-type: none"> <li>(a) is authorised or registered in an <i>EEA State</i> under the applicable national law; or</li> <li>(b) is not authorised or registered in an <i>EEA State</i> but has its registered office or head office in an <i>EEA State</i>.</li> </ul>
<i>EEA AIFM</i>		an <i>AIFM</i> which has its registered office in an <i>EEA State</i> other than the <i>UK</i> .
<i>ESMA AIFMD key concepts guidelines</i>		<i>ESMA</i> 's guidelines on key concepts of the <i>AIFMD</i> .
<i>established</i>		(in accordance with article 4(1)(j) <i>AIFMD</i> ): <ul style="list-style-type: none"> <li>(a) for <i>AIFMs</i>, 'having its registered office in';</li> <li>(b) for <i>AIFs</i>, 'being authorised or registered in' or, if the <i>AIF</i> is not authorised or registered, 'having its registered office in'; or</li> <li>(c) for <i>depositories</i>, 'having its registered office or branch in'.</li> </ul>
<i>EuSEF manager</i>		the manager of a qualifying social entrepreneurship fund (as defined in the <i>EuSEF Regulation</i> ) that is registered in accordance

with article 15 of the *EuSEF Regulation*.

<i>EuSEF regulation</i>	Regulation (EU) No 346/2013 of the European Parliament and the Council of 17 April 2013 on European social entrepreneurship funds.
<i>EuVECA manager</i>	the manager of a qualifying venture capital fund (as defined in the <i>EuVECA Regulation</i> ) that is registered in accordance with article 14 of the <i>EuVECA Regulation</i> .
<i>EuVECA regulation</i>	Regulation (EU) No 345/2013 of the European Parliament and the Council of 17 April 2013 on European venture capital funds.
<i>external AIFM</i>	(in accordance with regulation 4(3)(a) of the <i>AIFMD UK regulation</i> ) an <i>AIFM</i> appointed by, or on behalf of, an <i>AIF</i> and which, through that appointment, is responsible for managing the <i>AIF</i> .
<i>external valuer</i>	a person who performs the valuation function described in article 19 of the <i>AIFMD</i> in respect of an <i>AIF</i> managed by a <i>full-scope UK AIFM</i> , and is not the <i>AIFM</i> of that <i>AIF</i> .
<i>feeder AIF</i>	(in accordance with article 4(1)(m) of <i>AIFMD</i> ) an <i>AIF</i> which: <ul style="list-style-type: none"> <li>(a) invests at least 85% of its assets in <i>units</i> or <i>shares</i> of another <i>AIF</i> (the ‘<i>master AIF</i>’); or</li> <li>(b) invests at least 85 % of its assets in two or more <i>AIFs</i> where those <i>AIFs</i> (the ‘<i>master AIFs</i>’) have identical investment strategies; or</li> <li>(c) otherwise has an exposure of at least 85% of its assets to such a <i>master AIF</i>.</li> </ul>
<i>full-scope EEA AIFM</i>	an <i>EEA AIFM</i> which is authorised by its <i>Home State</i> in accordance with article 6(1) of <i>AIFMD</i> .
<i>full-scope UK AIFM</i>	a <i>UK AIFM</i> which: <ul style="list-style-type: none"> <li>(a) is not a <i>small AIFM</i>; or</li> <li>(b) is a <i>small AIFM</i> but has opted in to <i>AIFMD</i> in accordance with article 3(4) of <i>AIFMD</i>.</li> </ul>
<i>fund</i>	an <i>AIF</i> or a <i>collective investment scheme</i> .
<i>funds under management requirement</i>	<ul style="list-style-type: none"> <li>(1) (in <i>IPRU(INV)</i> 11) an amount of <i>own funds</i> that a <i>collective portfolio management firm</i> must hold under <i>IPRU(INV)</i> 11.3.2R (Funds under management requirement).</li> <li>(2) (in <i>GENPRU</i>) an amount of <i>own funds</i> that a <i>collective</i></li> </ul>

*portfolio management investment firm* must hold under GENPRU 2.1.66R (Requirements for collective portfolio management investment firms).

<i>incoming EEA AIFM</i>	an <i>incoming EEA firm</i> which is an <i>AIFM</i> and exercising its rights under <i>AIFMD</i> .
<i>incoming EEA AIFM branch</i>	an <i>incoming EEA firm</i> which is an <i>AIFM</i> and exercising its right to establish a <i>branch</i> under <i>AIFMD</i> .
<i>internally managed AIF</i>	(in accordance with regulation 4(3)(b) of the <i>AIFMD UK regulation</i> ) an <i>AIF</i> where the legal form permits internal management and where the <i>AIF</i> 's governing body chooses not to appoint an <i>external AIFM</i> .
<i>internally managed corporate AIF</i>	a <i>closed-ended corporate AIF</i> which is an <i>internally managed AIF</i> .
<i>leverage</i>	(in accordance with article 4(1)(v) of <i>AIFMD</i> ) any method by which an <i>AIFM</i> increases the exposure of an <i>AIF</i> it manages whether through borrowing of cash or <i>securities</i> , or leverage embedded in <i>derivative</i> positions or by any other means.
<i>managing a UCITS</i>	the <i>regulated activity</i> , specified in article 51ZA of the <i>Regulated Activities Order</i> of carrying on collective portfolio management within the meaning of the <i>UCITS Directive</i> , in relation to a <i>UCITS</i> .
<i>managing an AIF</i>	the <i>regulated activity</i> , specified in article 51ZC of the <i>Regulated Activities Order</i> , which is, in summary, performing at least risk management or portfolio management for an <i>AIF</i> .
<i>master AIF</i>	(in accordance with article 4(1)(y) of <i>AIFMD</i> ) an <i>AIF</i> in which another <i>AIF</i> (a <i>feeder AIF</i> ) invests or has an exposure in accordance with the definition of ' <i>feeder AIF</i> '.
<i>non-EEA AIF</i>	an <i>AIF</i> which is not a <i>UK AIF</i> or an <i>EEA AIF</i> .
<i>non-EEA AIFM</i>	an <i>AIFM</i> which is not a <i>UK AIFM</i> or an <i>EEA AIFM</i> .
<i>non-listed company</i>	(in accordance with article 4(1)(ac) of <i>AIFMD</i> ) a <i>company</i> which has its registered office in the <i>EEA</i> and the <i>shares</i> of which are not <i>admitted to trading</i> on a <i>regulated market</i> .
<i>PII capital requirement</i>	(1) (in <i>IPRU(INV)</i> 11) an amount of <i>own funds</i> that a <i>collective portfolio management firm</i> must hold in relation to its professional indemnity insurance policy to cover any defined excess (as set out in article 15 of the <i>AIFMD level 2 regulation</i> (professional indemnity insurance) (as replicated in <i>IPRU(INV)</i> 11.3.15EU)) and exclusions to that policy (see <i>IPRU(INV)</i> 11.3.16R (Professional negligence)).

	(2)	(in <i>GENPRU</i> ) an amount of <i>own funds</i> that a <i>collective portfolio management investment firm</i> must hold in relation to its professional indemnity insurance policy to cover any defined excess (as set out in article 15 of the <i>AIFMD level 2 regulation</i> (professional indemnity insurance) (as replicated in <i>GENPRU</i> 2.1.71EU)) and exclusions to that policy (as set out in <i>GENPRU</i> 2.1.72R (Requirements for collective portfolio management investment firms)).
<i>professional negligence capital requirement</i>	(1)	(in <i>IPRU(INV)</i> 11) an amount of <i>own funds</i> that a <i>collective portfolio management firm</i> must hold professional liability risks as set out in article 14 of the <i>AIFMD level 2 regulation</i> (additional own funds) (as replicated in <i>IPRU(INV)</i> 11.3.14EU) (Professional negligence).
	(2)	(in <i>GENPRU</i> ) an amount of <i>own funds</i> that a <i>collective portfolio management investment firm</i> must hold for professional liability risks as set out in article 14 of the <i>AIFMD level 2 regulation</i> (additional own funds) (as replicated in <i>GENPRU</i> 2.1.70EU (Requirements for collective portfolio management investment firms)).
<i>residual CIS operator</i>		a <i>firm</i> with a <i>Part 4A permission</i> to carry on the activity specified in article 51ZE (Establishing etc. a collective investment scheme) of the <i>Regulated Activities Order</i> .
<i>Settlement Finality Directive</i>		Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems.
<i>small AIFM</i>		an <i>AIFM</i> which meets the conditions in regulation 9 (meaning of “small AIFM”) of the <i>AIFMD UK regulation</i> .
<i>small authorised UK AIFM</i>		a <i>UK AIFM</i> which:
	(a)	is a <i>small AIFM</i> ; and
	(b)	has not opted in to <i>AIFMD</i> in accordance with article 3(4) of <i>AIFMD</i> to become a <i>full-scope UK AIFM</i> .
<i>small non-EEA AIFM</i>		a <i>non-EEA AIFM</i> that is a <i>small AIFM</i> .
<i>small registered UK AIFM</i>		a <i>small AIFM</i> that is registered by the <i>FCA</i> in accordance with regulation 10 of the <i>AIFMD UK regulation</i> .
<i>supervisory authority</i>	(1)	(in accordance with article 4(1)(al) of <i>AIFMD</i> ) (for a <i>non-EEA AIF</i> ) the national authority or authorities of the <i>non-EEA State</i> empowered by law or regulation to supervise

*AIFs in that non-EEA State.*

- (2) (in accordance with article 4(1)(am) of *AIFMD*) (for a *non-EEA AIFM*) the national authority or authorities of the *non-EEA State* empowered by law or regulation to supervise *AIFMs* in that *non-EEA State*.

*UK AIF*

an *AIF* that is:

- (a) an *authorised fund*; or
- (b) not an *authorised fund* but has its registered office or head office in the *UK*;

*UK AIFM*

an *AIFM* established in the *UK* and with a *Part 4A permission* to carry on the *regulated activity* of *managing an AIF*.

*UK depositary*

a *depositary* established in the *UK*.

*unauthorised AIF*

an *AIF* which is not an *authorised fund*.

*unauthorised fund*

a *fund* which is not an *authorised fund*.

Amend the following existing definitions as shown.

*advising on investments* (1) (except in SUP 10A (Approved Persons) and APER) the regulated activity, specified in article 53 of the Regulated Activities Order (Advising on investments), which is in summary: advising a person if the advice is:

...

- (2) (in SUP 10A (Approved Persons) and APER) the regulated activity specified in article 53 (Advising on investments) of the Regulated Activities Order. For these purposes, advising on investments includes any activities that would be included but for the exclusion in article 72AA (Managers of UCITS and AIFs) of the Regulated Activities Order.

*alternative investment fund manager*

- (1) (in GENPRU 3.1) a manager of alternative investment funds within the meaning of Article 4(1)(b), (l) and (ab) of Directive 2011/61/EU or an undertaking which is outside the EEA and which would require authorisation in accordance with Directive 2011/61/EU if it had its registered office within the EEA.

- (2) (except in GENPRU 3.1 and in accordance with article 4(1)(b) of AIFMD) a legal person whose regular business is performing AIFM investment management functions for one

	<u>or more AIF.</u>
<i>applicable asset</i>	...  (b) in relation to <i>safeguarding and administering investments</i> that is not <i>MiFID business</i> , <u>acting as trustee or depositary of a UCITS</u> , and/or <u>acting as trustee or depositary of an AIF</u> , a <i>designated investment</i> .
<i>authorised contractual scheme manager</i>	a <i>firm</i> , including, if relevant, an <i>EEA UCITS management company</i> or <u>incoming EEA AIFM</u> , which is the <i>authorised fund manager</i> of the <i>ACS</i> in accordance with the <i>contractual scheme deed</i> .
<i>authorised corporate director</i>	the director of an <i>ICVC</i> who is the <i>authorised corporate director</i> of the <i>ICVC</i> in accordance with <i>COLL 6.5.3R</i> (Appointment of an <i>ACD</i> ) including, if relevant, an <i>EEA UCITS management company</i> or <u>incoming EEA AIFM</u> .
<i>base capital resources requirement</i>	(1) <u>(except in IPRU(INV))</u> an amount of <i>capital resources</i> that an <i>insurer</i> must hold as set out in <i>GENPRU 2.1.30R</i> (Table: Base capital resources requirement for an insurer) or a <i>BIPRU firm</i> must hold under <i>GENPRU 2.1.41R</i> (Base capital resources requirement for a BIPRU firm) and <i>GENPRU 2.1.48R</i> (Table: Base capital resources requirement for a BIPRU firm) or, as the case may be, <i>GENPRU 2.1.60R</i> (Calculation of the base capital resources requirement for banks authorised before 1993).  (2) <u>(in IPRU(INV))</u> an amount of <i>own funds</i> that a <i>collective portfolio management firm</i> must hold in line with <u>IPRU(INV) 11.3.1R</u> (Base capital resources requirement).
<i>BIPRU 125k firm</i>	has the meaning in <i>BIPRU 1.1.19R</i> (Types of investment firm: BIPRU 125K firm) which in summary is a <i>BIPRU investment firm</i> that satisfies the following conditions:  ...  (4) it is not a <del><i>UCITS investment firm</i></del> <u><i>collective portfolio management investment firm</i></u> ; and  ...
<i>BIPRU 50k firm</i>	has the meaning in <i>BIPRU 1.1.20R</i> (Types of investment firm: BIPRU 50K firm) which in summary is a <i>BIPRU investment firm</i> that satisfies the following conditions:  ...  (c) it is not a <del><i>UCITS investment firm</i></del> <u><i>collective portfolio management investment firm</i></u> ; and

	...
<i>BIPRU 730k firm</i>	has the meaning in <i>BIPRU</i> 1.1.21R (Types of investment firm: <i>BIPRU</i> 730K firm) which in summary is a <i>BIPRU investment firm</i> that is not a <u><i>UCITS investment firm collective portfolio management investment firm</i></u> , a <i>BIPRU 50K firm</i> or a <i>BIPRU 125K firm</i> .
<i>BIPRU investment firm</i>	has the meaning set out <i>BIPRU</i> 1.1.8R (Definition of a <i>BIPRU investment firm</i> ), which is in summary one of the following types of <i>BIPRU firm</i> :  ...  including a <u><i>UCITS investment firm collective portfolio management investment firm</i></u> that is not excluded under <i>BIPRU</i> 1.1.7R (Exclusion of certain types of <i>firm</i> from the definition of <i>BIPRU firm</i> ).
<i>branch</i>	...  (j) <u>(in relation to an <i>AIFM</i>)</u>  (i) <u>a place of business which is a part of an <i>AIFM</i> that has no legal personality and provides the services for which the <i>AIFM</i> has been authorised;</u>  (ii) <u>for the purpose of (i), all places of business established in the same <i>EEA State</i> by an <i>AIFM</i> with its registered office in another <i>EEA State</i> shall be regarded as a single branch.</u>  [ <b>Note:</b> article 4(1)(c) of <i>AIFMD</i> ]
<i>client</i>	(1) (except in <i>PROF</i> and except in relation to a <i>home finance transaction</i> ) has the meaning....  ...  (b) “client” includes:  ...  (iii) a <u><i>collective investment scheme fund</i></u> even if it does not have separate legal personality.  ...
<i>client money</i>	...  (2A) (in <i>CASS</i> 6, <i>CASS</i> 7, <i>CASS</i> 7A and <i>CASS</i> 10 and, in so far as it relates to matters covered by <i>CASS</i> 6, <i>CASS</i> 7, or

*COBS, GENPRU or IPRU(INV) 11*) subject to the *client money rules, money* of any currency:

...

*close links* (1) (in relation to *MiFID business* or in *FUND*) a situation in which two or more persons are linked by:

...

[~~Note: article 4(1)(31) of MiFID~~]

A situation in which two or more persons are permanently linked to one and the same person by a control relationship is also to be regarded as constituting a close link between such persons.

[~~Note: article 4(1)(31) of MIFID and article 4(1)(e) of AIFMD~~]

...

*collateral* (1) (in *COLL* and *FUND*) any form of security, guarantee or indemnity provided by way of security for the discharge of any liability arising from a transaction.

...

*competent authority* ...

(8) (for an AIF) the national authorities of an EEA State which are empowered by law or regulation to supervise AIFs.

(9) (for an AIFM) a national authority in an EEA State which is empowered by law or regulation to supervise AIFMs.

*control* ...

(2A) (in relation to a *management company* carrying on *collective portfolio management* or an *AIFM*) control as defined in articles 1 and 2 of the Seventh Council Directive 83/349/EEC (The Seventh Company Law Directive).

*counterparty risk* (in *COLL* and *FUND* and ~~in accordance with article 3(7) of the UCITS implementing Directive~~) the risk of loss for a *UCITS* or *AIF* resulting from the fact that the counterparty to a transaction may default on its obligations prior to the settlement of the transaction's cash flow.

*custody asset* (A) (in the FCA Handbook)

(1) other than when acting as trustee or depositary of an AIF:

- (a) a *designated investment* held for or on behalf of a *client*;
- (b) any other asset which is or may be held with a *designated investment* held for, or on behalf of, a *client*
- (2) in relation to acting as trustee or depositary of an AIF in CASS 6:
- (a) an AIF custodial asset held by a depositary in line with FUND 3.11.21R (Depositary functions: safekeeping of financial instruments); or
- (b) any other asset of an AIF in respect of which a depositary exercises safe-keeping functions in line with FUND 3.11.23R (Depositary functions: safekeeping of other assets).
- depositary* (1) ...
- (c) (in relation to any other *unit trust scheme* other than an AIF specified in (e)) the *person* holding the property of the *scheme* on trust for the *participants*;
- ...
- (d) (in relation to any other *collective investment scheme fund* other than an *AIF* specified in (e)) any *person* to whom the *fund* property ~~subject to the~~ *scheme* is entrusted for safekeeping;
- (e) (for an AIF managed by a full-scope UK AIFM or a full-scope EEA AIFM (other than an AIF which is an ICVC, an AUT or an ACS)) the person fulfilling:
- (i) the function of a depositary in accordance with article 21(1) of AIFMD; or
- (ii) one or more of the functions of cash monitoring, safekeeping or oversight for a non-EEA AIF, in line with FUND 3.11.33R(1)(a) (AIFM of a non-EEA AIF).
- ...
- designated investment business* any of the following activities, specified in Part II of the *Regulated Activities Order* (Specified Activities), which is carried on by way of business:
- ...

- (n) *agreeing to carry on a regulated activity* in (a) to (h) and (m) (article 64);
- (o) [deleted]
- (p) *managing a UCITS*;
- (q) *acting as trustee or depositary of a UCITS*;
- (r) *managing an AIF*;
- (s) *acting as trustee or depositary of an AIF*;
- (t) *establishing, operating or winding up a collective investment scheme*.

*EEA firm*

(in accordance with paragraph 5 of Schedule 3 to the Act (EEA Passport Rights)) any of the following, if it does not have its relevant office in the *United Kingdom*:

...

- (hh) *an AIFM which is authorised (under article 6 of AIFMD) by its Home State regulator*;

in this definition, relevant office means:

...

*establishing, operating or winding up a collective investment scheme*

the *regulated activity*, specified in article 51(1)(a) or 51ZE of the *Regulated Activities Order* (Establishing etc. a collective investment scheme), of establishing, operating or winding up a *collective investment scheme*.

*fixed overheads requirement*

- (1) (except in *IPRU(INV)*) the part of the *capital resources requirement* calculated in accordance with *GENPRU* 2.1.53R (Calculation of the fixed overheads requirement).
- (2) (in *IPRU(INV)*) the part of the *own funds requirement* calculated in accordance with *IPRU(INV)* 11.3.3R (Fixed overheads requirement).

*funds under management*

- (1) (in *UPRU* and *GENPRU*)
  - (+) (a) *collective investment schemes* other than *OEICs* managed by the *firm* including *schemes* where it has delegated the management function but excluding *schemes* that it is *managing* as delegate; and

~~(2)~~ (b) *OEICs* for which the *firm* is the designated management company.

(2) (in *IPRU(INV)* and *GENPRU*) funds managed by the *firm*, calculated as the sum of the absolute value of all assets of all funds managed by the *firm*, including assets acquired through the use of leverage and, for such purpose, derivative instruments shall be converted into their equivalent positions in the underlying assets using the conversion methodologies in article 10 of the *AIFMD level 2 regulation* and valued on the basis of that equivalent position. This includes funds where the *firm* has delegated the management function but excludes funds that it is managing as a delegate.

*Home State*

...

(13) (for an *AIF*) the *EEA State* in which:

(a) the *AIF* is authorised or registered under applicable national law; or

(b) if the *AIF* is neither authorised nor registered in an *EEA State*, the *EEA State* in which the *AIF* has its registered office and/or head office.

[Note: article 4(1)(p) of *AIFMD*]

(14) (for an *AIFM*) the *EEA State* in which the *AIFM* has its registered office.

[Note: article 4(1)(q) of *AIFMD*]

*Host State*

...

(5) (for an *AIFM*) means:

(a) an *EEA state*, other than the *Home State*, in which an *EEA AIFM* or *UK AIFM* manages *EEA AIFs* or *UK AIFs*; or

(b) an *EEA state*, other than the *Home State*, in which an *EEA AIFM* or *UK AIFM* markets units or shares of an *EEA AIF* or *UK AIF*;

[Note: article 4(1)(r) of *AIFMD*]

*initial capital*

...

(3A) (in *IPRU(INV)* 11) capital calculated in line with *IPRU(INV)* Table 11.4 (Method of calculating initial capital and own funds) composed of the specified items in that

Table.

...	
<i>instrument constituting the <del>scheme</del> fund</i>	<p>...</p> <p>(b) <u>(for an AIF other than an ICVC, an AUT or an ACS) the fund rules, instrument of incorporation or other constituting documents of such an AIF;</u></p> <p>...</p> <p>(c) (in relation to a <i>collective investment scheme</i> other than an <i>authorised fund AIF</i> or an <del>EEA UCITS scheme</del> a <i>UCITS</i>) any instrument to which the <i>operator</i> is a party setting out any arrangements with any other <i>person</i> relating to any aspect of the operation or management of the scheme.</p> <p>...</p>
<i>investment management firm</i>	<p>(subject to BIPRU TP 1.3R (Revised definition of investment management firm for certain transitional purposes)), a <i>firm</i> whose <i>permitted activities</i> include <i>designated investment business</i>, which is not an <i>authorised professional firm</i>, <i>bank</i>, <i>BIPRU investment firm</i>, <i>building society</i>, <u><i>collective portfolio management firm</i></u>, <i>credit union</i>, <i>energy market participant</i>, <i>friendly society</i>, <i>ICVC</i>, <i>insurer</i>, <i>media firm</i>, <i>oil market participant</i>, <i>service company</i>, <del><i>incoming EEA firm</i></del> <u><i>incoming EEA firm</i></u> (without a <i>top-up permission</i>), <i>incoming Treaty firm</i> (without a <i>top-up permission</i>), <del><i>UCITS management company</i></del> or <i>UCITS qualifier</i> (without a <i>top-up permission</i>), whose <i>permission</i> does not include a <i>requirement</i> that it comply with IPRU-INV 3 or IPRU-INV 13 (Personal investment firms) and which is within (a), (b) or (c):</p> <p>...</p> <p>(c) ...</p> <p style="padding-left: 20px;">(ii) ...</p> <p style="padding-left: 40px;">(Ca) <u><i>managing an AIF;</i></u></p> <p style="padding-left: 40px;">...</p> <p style="padding-left: 40px;">(Db) <u><i>acting as trustee or depositary of an AIF;</i></u></p> <p style="padding-left: 40px;">(Dc) <u><i>acting as trustee or depositary of a UCITS;</i></u></p> <p style="padding-left: 40px;">...</p>

- issuer*
- (A) (in the *FCA Handbook*)
- (1) (except in ~~*LR, PR and DTR*~~ as otherwise provided for below):
- ...
- ...
- (6) (in *FUND*) means an issuer within the meaning of article 2(1)(d) of the *Transparency Directive* where that issuer has its registered office in the *EEA* and where its shares are admitted to trading on a *regulated market*.
- manager*
- (1) (in relation to an *AUT*) the *firm*, including, if relevant an *EEA UCITS management company* or *incoming EEA AIFM*, which is the manager of the *AUT* in accordance with the *trust deed*.
- (1A) (in relation to an *OEIC* which is an undertaking for collective investment in transferable securities within the meaning of the *UCITS Directive* or which is an *AIF*, and which has appointed a *person* to manage the scheme) the *person* appointed to manage the scheme.
- ...
- market risk*
- (1) ~~(in *COLL* and *FUND* and in accordance with article 3(9) of the *UCITS implementing Directive*)~~ the risk of loss of a *UCITS* or *AIF* resulting from fluctuation in the market value of positions in the *scheme's fund's* portfolio attributable to changes in market variables, such as interest rates, foreign exchange rates, equity and commodity prices or an issuer's credit worthiness.
- (2) (except in *COLL* and *FUND*) (in relation to a *firm*) the risks that arise from fluctuations in values of, or income from, assets or in interest or exchange rates.
- marketing*
- (1) (in *COLL*) (in relation to marketing *units* in a *regulated collective investment scheme* in a particular country or territory):
- ...
- (2) (except in *COLL*) a direct or indirect offering or placement, at the initiative of the *AIFM* or on behalf of the *AIFM* of *units* or *shares* of an *AIF* it manages, to or with investors domiciled or with a registered office in the *EEA*.

**[Note: article 4(1)(x) of *AIFMD*]**

- MiFID investment firm* (in summary) a *firm* to which *MiFID* applies including, for some purposes only, a *credit institution* and *UCITS investment firm collective portfolio management investment firm*.  
(in full) a *firm* which is:
- ...
- (3) a *UCITS investment firm collective portfolio management investment firm* (only when providing the services referred to in article 6(4) AIFMD or Article 6(3) of the *UCITS Directive* in relation to the *rules* implementing the articles of *MiFID* referred to in article 6(6) of AIFMD or Article 6(4) of ~~that Directive~~ the UCITS Directive and for a full-scope UK AIFM the rules implementing article 12(2)(b) of AIFMD);
- unless, and to the extent that, *MiFID* does not apply to it as a result of Article 2 (Exemptions) or Article 3 (Optional exemptions) of *MiFID*.
- operational risk*
- (1) ~~(in COLL and in accordance with article 3(10) of the UCITS implementing Directive and FUND)~~ the risk of loss for a *UCITS* or *AIF* resulting from inadequate internal processes and failures in relation to the people and systems of the *management company* or *AIFM* or from external events, and it includes legal and documentation risk and risk resulting from the trading, settlement and valuation procedures operated on behalf of the *scheme fund*.
- (2) (except in *COLL* and *FUND*) (in accordance with Article 4(22) of the *Banking Consolidation Directive*) the risk of loss resulting from inadequate or failed internal processes, people and systems or from external events, including legal risk.
- own funds*
- ...
- (2A) (in IPRU(INV) 11) the own funds of a firm calculated in line with IPRU(INV) Table 11.4 (Method of calculating initial capital and own funds).
- ...
- participant firm*
- (1) (except in *FEES* 1 and *FEES* 6) a *firm* or a *member* other than:
- (a) ...
- (vi) an AIFM managing an unauthorised AIF or providing the services in article 6(4) of AIFMD;

...

(k) an AIFM qualifier.

...

*personal investment firm*

(subject to *BIPRU* TP 1 (Revised definition of personal investment firm for certain transitional purposes)) a *firm* whose *permitted activities* include *designated investment business*, which is not an *authorised professional firm*, *bank*, *BIPRU investment firm*, ~~building society~~ *building society*, *collective portfolio management firm*, ~~credit union~~ *credit union*, ~~energy market participant~~ *energy market participant*, ~~friendly society~~ *friendly society*, ~~ICVC~~ *ICVC*, ~~insurer~~ *insurer*, ~~media firm~~ *media firm*, ~~oil market participant~~ *oil market participant*, ~~service company~~ *service company*, ~~incoming EEA firm~~ *incoming EEA firm* (without a *top-up permission*), *incoming Treaty firm* (without a *top-up permission*), ~~UCITS management company~~ or *UCITS qualifier* (without a *top-up permission*), whose *permission* does not include a *requirement* that it comply with *IPRU(INV)* 3 (Securities and futures firms) or 5 (Investment management firms), and which is within (a), (b) or (c):

...

*prime brokerage firm*

- (1) (except in *FUND*) a firm that provides *prime brokerage services* to a *client* and which may do so acting as *principal*.
- (2) (in *FUND*) a *credit institution*, *regulated investment firm* or another entity subject to prudential regulation and ongoing supervision, offering services to *professional clients* primarily to finance or execute transactions in *financial instruments* as counterparty and which may also provide other services, such as clearing and settlement of trades, custodial services, *stock lending*, customised technology and operational support facilities.

[Note: article 4(1)(af) of *AIFMD*]

*proprietary trading*

(in *SUP* 10A (Approved Persons) and *APER*) *dealing in investments as principal* as part of a business of trading in *specified investments*. For these purposes *dealing in investments as principal* includes any activities that would be included but for the exclusion in Article 15 (Absence of holding out), ~~or~~ Article 16 (Dealing in contractually based investments) or, for a *UK AIFM* or *UK UCITS management company*, article 72AA (Managers of UCITS and AIFs) of the *Regulated Activities Order*.

*prospectus*

- (1) (in *LR*, *PR*, ~~and~~ *FEES* and *FUND* 3 (Requirements for managers of alternative investment funds)) a prospectus required under the *prospectus directive*.

	...
<i>qualifying capital instrument</i>	(in <i>UPRU</i> and <i>IPRU(INV)</i> ) means that part of a <i>firm's</i> capital which is a security of indeterminate duration, or other instrument, that fulfils the following conditions:
	...
<i>qualifying capital item</i>	(in <i>UPRU</i> and <i>IPRU(INV)</i> ) means that part of a <i>firm's</i> capital which has the following characteristics:
	...
<i>qualifying subordinated loan</i>	(1) (in <i>UPRU</i> ) has the meaning given in <i>IPRU(INV)</i> 5.2.5(1) to (7) (Qualifying subordinated loans).
	(2) <u>(in <i>IPRU(INV)</i> 11) has the meaning given in <i>IPRU(INV)</i> 11.5 (Qualifying subordinated loans).</u>
<i>readily realisable investment</i>	(1) (except in <i>UPRU</i> and <i>IPRU(INV)</i> )
	(a) a <i>packaged product</i> ;
	(b) a <i>readily realisable security</i> .
	(2) (in <i>UPRU</i> and <i>IPRU(INV)</i> ) means a <i>unit</i> in a <i>regulated collective investment scheme</i> , a <i>life policy</i> or any <i>marketable investment</i> other than one which is traded on or under the rules of a <i>recognised</i> or <i>designated investment exchange</i> so irregularly or infrequently:
	...
<i>regulated activity</i>	(A) in the <i>PRA Handbook</i> :
	(in accordance with section 22 of the <i>Act</i> (Regulated activities)) any of the following activities specified in Part II of the <i>Regulated Activities Order</i> (Specified Activities):
	...
	(n) <i>acting as the depositary or sole director of an open-ended investment company</i> (article 51(1)(c))
	(na) <u><i>managing a UCITS</i> (article 51ZA);</u>
	(nb) <u><i>acting as trustee or depositary of a UCITS</i> (article 51ZB);</u>
	(nc) <u><i>managing an AIF</i> (article 51ZC);</u>
	(nd) <u><i>acting as trustee or depositary of an AIF</i> (article 51ZD);</u>

- (ne) establishing, operating or winding up a collective investment scheme (51ZE).
- ...
- safe custody asset
- (a) ~~in relation to MiFID business, a financial instrument; or~~
- (b) in relation to safeguarding and administering investments that is not MiFID business and/or acting as trustee or depositary of a UCITS, a safe custody investment, or
- (c) when acting as trustee or depositary of an AIF, an AIF custodial asset.
- securities and futures firm
- (subject to BIPRU TP 1 (Revised definition of securities and futures firm for certain transitional purposes)) a firm whose permitted activities include designated investment business or bidding in emissions auctions, which is not an authorised professional firm, bank, BIPRU investment firm (unless it is an exempt BIPRU commodities firm), building society, collective portfolio management firm, credit union, friendly society, ICVC, insurer, media firm, service company, incoming EEA firm (without a top-up permission), incoming Treaty firm (without a top-up permission), UCITS management company or UCITS qualifier (without a top-up permission), whose permission does not include a requirement that it comply with IPRU(INV) 5 (Investment management firms) or 13 (Personal investment firms), and which is within (a), (b), (c), (d), (e), (f), (g) or (h):
- ...
- Single Market Directives
- ...
- (d) the Insurance Mediation Directive; ~~and~~
- (e) the UCITS Directive; and
- (f) AIFMD.
- sponsor
- (1) ...
- (2) (in BIPRU and FUND), in accordance with Article 4(42) of the Banking Consolidation Directive (Definitions) and in relation to a securitisation within the meaning of paragraph (2) of the definition of securitisation) an undertaking other than an originator that establishes and manages an asset backed commercial paper programme or other securitisation scheme that purchases exposures from third party entities.

<i>sub-fund</i>	<p>...</p> <p>(b) (in relation to a <del>collective investment scheme</del> <u>fund</u> that is not an <i>authorised fund</i> or an <i>EEA UCITS scheme</i>) any part of that scheme that is equivalent to (a).</p>
<i>top-up cover</i>	<p>cover provided by the <i>compensation scheme</i> for <i>claims</i> against an <i>incoming EEA firm</i> (which is a <i>credit institution</i>, an <i>IMD insurance intermediary</i>, an <i>IMD reinsurance intermediary</i> <del>or</del>, a <i>MiFID investment firm</i>, <del>or</del> a <i>UCITS management company</i> <u>or an AIFM</u>) in relation to the <i>firm's passported activities</i> and in addition to, or due to the absence of, the cover provided by the <i>firm's Home State compensation scheme</i> (see <i>COMP 14</i> (Participation by EEA firms))</p>
<i>trading book</i>	<p>...</p> <p>(2) (in <i>BIPRU</i>, <i>GENPRU</i> <del>and</del>, <i>BSOCS</i> <u>and</u> <i>IPRU(INV) 11</i> and in relation to a <i>BIPRU firm</i>) has the meaning in <i>BIPRU 1.2</i> (Definition of the trading book) which is in summary, all that <i>firm's positions</i> in <i>CRD financial instruments</i> and <i>commodities</i> held either with trading intent or in order to hedge other elements of the <i>trading book</i>, and which are either free of any restrictive covenants on their tradability or able to be hedged.</p> <p>...</p>
<i>UCITS firm</i>	<p>a <i>firm</i> which:</p> <p>(a) is a <i>management company</i>, including where in addition the <i>firm</i> is also <del>the operator of a collective investment scheme which is not a UCITS scheme</del> <u>an AIFM</u>; and</p> <p>(b) does not have a <i>Part 4A permission</i> (or an equivalent permission from its <i>Home State regulator</i>) to carry on any <i>regulated activities</i> other than those which are in connection with, or for the purpose of, <del>such schemes</del> <u>managing collective investment undertakings</u>.</p>
<i>unit</i>	<p>(1) (in relation to a <i>collective investment scheme</i>) the investment, specified in article 81 of the <i>Regulated Activities Order</i> (Units in a collective investment scheme) and defined in section 237(2) of the <i>Act</i> (Other definitions)), which is the right or interest (however described) of the <i>participants</i> in a <i>collective investment scheme</i>; this includes:</p> <p>...</p> <p>(b) (in relation to an <i>ICVC</i>) a <i>share</i> in the <i>ICVC</i>; <u>and</u></p>

- (2) (in relation to an *alternative investment fund*) the right or interest (however described) of an investor in an *alternative investment fund*.

## Part II – to come into force on 22 July 2014

<i>designated investment business</i>	<p>any of the following activities, specified in Part II of the <i>Regulated Activities Order</i> (Specified Activities), which is carried on by way of business:</p> <p>...</p> <p>(i) <del>establishing, operating or winding up a collective investment scheme (article 51(1)(a)); for the purposes of the permission regime, this is sub-divided into:</del></p> <p style="padding-left: 40px;">(i) <del><i>establishing, operating or winding up a regulated collective investment scheme;</i></del></p> <p style="padding-left: 40px;">(ii) <del><i>establishing, operating or winding up an unregulated collective investment scheme;</i></del></p> <p>(j) <del>acting as trustee of an authorised unit trust scheme (article 51(1)(b));</del></p> <p>(k) <del>acting as the depositary or sole director of an open-ended investment company (article 51(1)(c));</del></p> <p>(ka) <del><i>acting as the depositary of an authorised contractual scheme (article 51(1)(bb));</i></del></p> <p>...</p>
<i>establishing, operating or winding up a collective investment scheme</i>	<p>the <i>regulated activity</i>, specified in article 51(1)(a) or 51ZE of the <i>Regulated Activities Order</i> (Establishing etc. a collective investment scheme), of establishing, operating or winding up a <i>collective investment scheme</i>.</p>

## Annex C

### Amendments to the Principles for Businesses (PRIN)

In this Annex, underlining indicates new text and striking through indicates deleted text.

#### 1.1 Application and purpose

##### Application

- 1.1.1 G The *Principles* (see *PRIN 2*) apply in whole or in part to every *firm*. The application of the *Principles* is modified for *firms* conducting *MiFID business, incoming EEA firms, incoming Treaty firms*, ~~and~~ *UCITS qualifiers and AIFM qualifiers*. *PRIN 3* (Rules about application) specifies to whom, to what and where the *Principles* apply.

...

#### 3 Rules about application

##### 3.1 Who?

- 3.1.1 R *PRIN* applies to every *firm*, except that:

...

- (4) for a *UCITS qualifier* and *AIFM qualifier*, only *Principles 1, 2, 3, 7, and 9* apply, and only with respect to the activities in *PRIN 3.2.2R* (Communication and approval of financial promotions);

...

## Annex D

**Amendments to the Senior Management Arrangements, Systems and Controls  
sourcebook (SYSC)**

In this Annex, underlining indicates new text and striking through indicates deleted text except where indicated otherwise.

### 1 Annex 1 Detailed application of SYSC

...

Part 2	Application of the common platform requirements (SYSC 4 to 10)			
	Who?			
...				
2.6A	...			
<u>2.6B</u>	<u>R</u>	<u>Subject to SYSC 1 Annex 1 2.6CR, the common platform requirements do not apply to a full-scope UK AIFM of an unauthorised AIF except for:</u>		
		<u>(1)</u>	<u>SYSC 4.1.1R to SYSC 4.1.2R and SYSC 4.1.2BR to SYSC 4.1.2DR;</u>	
		<u>(2)</u>	<u>SYSC 4.2.1R, SYSC 4.2.1BR, SYSC 4.2.2R to 4.2.5G, SYSC 4.2.7R and SYSC 4.2.8G;</u>	
		<u>(3)</u>	<u>SYSC 6.1.1R, which only applies to the extent that it relates to the obligation to establish, implement and maintain adequate policies and procedures for countering the risk that the firm (including its managers and employees) might be used to further financial crime;</u>	
		<u>(4)</u>	<u>SYSC 6.1.4-AG;</u>	
		<u>(5)</u>	<u>SYSC 6.3;</u>	
		<u>(6)</u>	<u>SYSC 7.1.7BG;</u>	
		<u>(7)</u>	<u>SYSC 10.1.1R and SYSC 10.1.22R to 10.1.26R; and</u>	
		<u>(8)</u>	<u>SYSC 10.2.</u>	
<u>2.6C</u>	<u>R</u>	<u>The common platform requirements apply to an AIFM investment firm which is a full-scope UK AIFM in respect of its MiFID business in line with Column A of Part 3.</u>		
<u>2.6D</u>	<u>R</u>	<u>The common platform requirements apply to a full-scope UK AIFM of an authorised AIF in line with column A++ of Part 3.</u>		

<u>2.6E</u>	<u>G</u>	<u>The common platform requirements apply to a small authorised UK AIFM in line with Column B of Part 3 (unless such a firm is also a common platform firm, in which case they must comply with Column A).</u>		
<u>2.6F</u>	<u>R</u>	<u>The common platform requirements do not apply to an incoming EEA AIFM branch in respect of its management of a UK AIF, except for:</u>		
		<u>(1)</u>	<u>those common platform requirements which are AIFMD host state requirements;</u>	
		<u>(2)</u>	<u>SYSC 6.1.1R which only applies to the extent that it relates to the obligation to establish, implement and maintain adequate policies and procedures for countering the risk that the firm (including its managers and employees) might be used to further financial crime; and</u>	
		<u>(3)</u>	<u>SYSC 6.3.</u>	
...				
	Where?			
	...			
<u>2.16C</u>	<u>R</u>	<u>The common platform requirements apply to a full-scope UK AIFM in respect of its management of an AIF where carried on from an establishment in the UK.</u>		
<u>2.16D</u>	<u>R</u>	<u>The common platform requirements, except those which are AIFMD host state requirements, apply to a full-scope UK AIFM in respect of its management of an EEA AIF from a branch in another EEA State.</u>		
<u>2.16E</u>	<u>R</u>	<u>The common platform requirements apply to an AIFM investment firm which is a full-scope UK AIFM in respect of its MiFID business where carried on from an establishment in the UK.</u>		
<u>2.16F</u>	<u>R</u>	<u>The common platform requirements, except the common platform requirements on financial crime and the common platform record-keeping requirements, apply to an AIFM investment firm in respect of its MiFID business where carried on from a branch in another EEA State.</u>		
...				

<b>Part 3</b>	<b>Tables summarising the application of the common platform requirements to different types of firm</b>		
3.1	<u>G</u>	<u>The common platform requirements apply in the following <del>three</del> <u>four</u> ways (subject to the provisions in Part 2 of this Annex).</u>	

	...			
<u>3.2B</u>	<u>R</u>	<u>For a full-scope UK AIFM of an authorised AIF, they apply in line with Column A++ in the table below.</u>		
3.3	G	For all other firms apart from insurers, managing agents, and the Society and full-scope UK AIFMs of unauthorised AIFs, they apply in line with Column B in the table below. For these firms, where a rule is shown modified in Column B as 'Guidance', it should be read as guidance (as it "should" appeared in that rule instead if "must") and should be applied in a proportionate manner, taking into account the nature, scale and complexity of the firm's business.		
...				

<b>Provision SYSC 4</b>	<b>COLUMN A Application to a common platform firm other than to a UCITS investment firm</b>	<b>COLUMN A+ Application to a UCITS management company</b>	<b><u>COLUMN A++ Application to a full-scope UK AIFM of an authorised AIF</u></b>	<b>COLUMN B Application to all other firms apart from insurers, managing agents and the Society, and full-scope UK AIFMs of unauthorised AIFs</b>
<i>SYSC 4.1.1R</i>	Rule but <i>SYSC 4.1.1R(2)</i> applies only to a <i>BIPRU firm</i>	Rule but <i>SYSC 4.1.1R(2)</i> applies only to a <i>BIPRU firm</i>	<u>Rule but <i>SYSC 4.1.1R(2)</i> applies only to a <i>BIPRU firm</i></u>	Rule but <i>SYSC 4.1.1R(2)</i> applies only to a <i>third country BIPRU firm</i>
<u><i>SYSC 4.1.1AR</i></u>	<u>Not applicable</u>	<u>Not applicable</u>	<u>Rule</u>	<u>Not applicable</u>
<u><i>SYSC 4.1.1BR</i></u>	<u>Not applicable</u>	<u>Not applicable</u>	<u>Rule</u>	<u>Not applicable</u>
<i>SYSC 4.1.2R</i>	...	...	<u>Rule</u>	...
<i>SYSC 4.1.2AG</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 4.1.2BR</i>	...	...	<u>Rule</u>	...
<i>SYSC 4.1.2CR</i>	...	...	<u>Rule</u>	...
<u><i>SYSC 4.1.2DR</i></u>	<u>Not applicable</u>	<u>Not applicable</u>	<u>Rule</u>	<u>Not applicable</u>

<i>SYSC 4.1.3R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 4.1.4R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 4.1.4AG</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 4.1.5R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 4.1.6R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 4.1.7R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 4.1.7AG</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 4.1.8G</i>	...	...	<u>Guidance</u>	...
<i>SYSC 4.1.9R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 4.1.10R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 4.1.10AG</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 4.1.11G</i>	...	...	<u>Guidance</u>	...
<i>SYSC 4.1.13G</i>	...	...	<u>Guidance</u>	...
<i>SYSC 4.1.14G</i>	...	...	<u>Guidance</u>	...
<i>SYSC 4.2.1R</i>	...	...	<u>Rule</u>	...
<i>SYSC 4.2.1AG</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 4.2.2R</i>	...	...	<u>Rule</u>	...
<i>SYSC 4.2.3G - SYSC 4.2.5G</i>	...	...	<u>Guidance</u>	...
<i>SYSC 4.2.6R</i>	...	...	<u>Not applicable</u>	...
<u><i>SYSC 4.2.7R</i></u>	<u>Not applicable</u>	<u>Not applicable</u>	<u>Rule</u>	<u>Not applicable</u>
<u><i>SYSC 4.2.8R</i></u>	<u>Not applicable</u>	<u>Not applicable</u>	<u>Rule</u>	<u>Not applicable</u>
<u><i>SYSC 4.2.9G</i></u>	<u>Not applicable</u>	<u>Not applicable</u>	<u>Guidance</u>	<u>Not applicable</u>
<i>SYSC 4.3.1R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 4.3.2R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 4.3.2AG</i>	...	...	<u>Not applicable</u>	...

<i>SYSC 4.3.3G</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 4.4.1R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 4.4.2G</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 4.4.3R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 4.4.4G</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 4.4.5R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 4.4.6G</i>	...	...	<u>Not applicable</u>	...

<b>Provision</b>	<b>COLUMN A</b>	<b>COLUMN A+</b>	<b>COLUMN A++</b>	<b>COLUMN B</b>
<b>SYSC 5</b>	<b>Application to a common platform firm other than to a UCITS investment firm</b>	<b>Application to a UCITS management company</b>	<b><u>Application to a full-scope UK AIFM of an authorised AIF</u></b>	<b>Application to all other firms apart from insurers, managing agents and the Society, and <u>full-scope UK AIFMs of unauthorised AIFs</u></b>
<i>SYSC 5.1.1R</i>	...	...	<u>Not applicable</u>	..
<i>SYSC 5.1.2G</i>	...	...	<u>Guidance</u>	...
<i>SYSC 5.1.3G</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 5.1.4G</i>	...	...	<u>Guidance</u>	...
<i>SYSC 5.1.4AG</i>	...	...	<u>Guidance</u>	...
<i>SYSC 5.1.5G</i>	...	...	<u>Guidance</u>	...
<i>SYSC 5.1.5AG</i>	...	...	<u>Guidance</u>	...
<i>SYSC 5.1.6R</i>	...	...	<u>Guidance</u>	...
<i>SYSC 5.1.7R</i>	...	...	<u>Guidance</u>	...
<i>SYSC 5.1.7AG</i>	...	...	<u>Guidance</u>	...
<i>SYSC 5.1.8G</i>	...	...	<u>Guidance</u>	...

SYSC 5.1.9G	...	...	<u>Guidance</u>	...
SYSC 5.1.10G	...	...	<u>Guidance, but not applicable for the segregation of risk management functions</u>	...
SYSC 5.1.11G	...	...	<u>Guidance</u>	...
SYSC 5.1.12R	...	...	<u>Not applicable</u>	...
SYSC 5.1.12AG	...	...	<u>Not applicable</u>	...
SYSC 5.1.13R	...	...	<u>Not applicable</u>	...
SYSC 5.1.14R	...	...	<u>Not applicable</u>	...
SYSC 5.1.15G	...	...	<u>Not applicable</u>	...

<b>Provision</b>	<b>COLUMN A</b>	<b>COLUMN A+</b>	<b><u>COLUMN A++</u></b>	<b>COLUMN B</b>
<b>SYSC 6</b>	<b>Application to a common platform firm other than to a UCITS investment firm</b>	<b>Application to a UCITS management company</b>	<b><u>Application to a full-scope UK AIFM of an authorised AIF</u></b>	<b>Application to all other firms apart from insurers, managing agents, and the Society and full-scope UK AIFMs of unauthorised AIFs</b>
SYSC 6.1.1R	...	...	<u>Rule but only for the obligation to establish, implement and maintain adequate policies and procedures for countering the risk that the firm (including its</u>	...

			<u>managers and employees) might be used to further <i>financial crime</i></u>	
<u>SYSC 6.1.1AG</u>	<u>Guidance</u>	<u>Guidance</u>	<u>Guidance</u>	<u>Guidance</u>
SYSC 6.1.2R	...	...	<u>Not applicable</u>	...
SYSC 6.1.2AG	...	...	<u>Not applicable</u>	...
SYSC 6.1.3R	...	...	<u>Not applicable</u>	...
SYSC 6.1.3AG	...	...	<u>Not applicable</u>	...
SYSC 6.1.4R	...	...	<u>Not applicable</u>	...
SYSC 6.1.4-AG	...	...	<u>Not applicable</u>	...
<u>SYSC 6.1.4-BG</u>	<u>Not applicable</u>	<u>Not applicable</u>	<u>Guidance</u>	<u>Not applicable</u>
SYSC 6.1.4AR	...	...	<u>Not applicable</u>	...
SYSC 6.1.5R	...	...	<u>Not applicable</u>	...
SYSC 6.1.6G	...	...	<u>Not applicable</u>	...
<u>SYSC 6.1.7R</u>	<u>Rule</u>	<u>Rule for a <i>UCITS investment firm</i>; otherwise not applicable</u>	<u>Not applicable</u>	<u>Guidance</u>
SYSC 6.2.1R	...	...	<u>Not applicable</u>	...
SYSC 6.2.1AG	...	...	<u>Not applicable</u>	...
SYSC 6.2.2G	...	...	<u>Not applicable</u>	...
SYSC 6.3.1R	...	...	<u>Rule</u>	...
SYSC 6.3.2G	...	...	<u>Guidance</u>	...
SYSC 6.3.3R	...	...	<u>Rule</u>	...
SYSC 6.3.4G	...	...	<u>Guidance</u>	...
SYSC 6.3.5G	...	...	<u>Guidance</u>	...
SYSC 6.3.6G	...	...	<u>Guidance</u>	...

<i>SYSC 6.3.7G</i>	...	...	<u>Guidance</u>	...
<i>SYSC 6.3.8R</i>	...	...	<u>Rule</u>	...
<i>SYSC 6.3.9R</i>	...	...	<u>Rule</u>	...
<i>SYSC 6.3.10G</i>	...	...	<u>Guidance</u>	...
<i>SYSC 6.3.11G</i>	<u>Guidance</u>	<u>Guidance</u>	<u>Guidance</u>	<u>Guidance</u>

<b>Provision</b>	<b>COLUMN A</b>	<b>COLUMN A+</b>	<b>COLUMN A++</b>	<b>COLUMN B</b>
<b>SYSC 7</b>	<b>Application to a common platform firm other than to a UCITS investment firm</b>	<b>Application to a UCITS management company</b>	<b><u>Application to a full-scope UK AIFM of an authorised AIF</u></b>	<b>Application to all other firms apart from insurers, managing agents, and the Society, and full-scope UK AIFMs of <u>unauthorised AIFs</u></b>
<i>SYSC 7.1.1G</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 7.1.2R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 7.1.2AG</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 7.1.2BG</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 7.1.3R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 7.1.4R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 7.1.4AG</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 7.1.4BG</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 7.1.5R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 7.1.6R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 7.1.7R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 7.1.7AG</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 7.1.7BG</i>	...	...	<u>Guidance.</u>	...

<u>SYSC 7.1.7BA</u>	Not applicable	Not applicable	<u>Guidance</u>	Not applicable
<u>SYSC 7.1.7CG</u>	...	...	<u>Guidance</u>	...
<u>SYSC 7.1.8G(1), (2)</u>	...	...	<u>Not applicable</u>	...
<u>SYSC 7.1.9R</u>	...	...	<u>Not applicable</u>	...
<u>SYSC 7.1.10R</u>	...	...	<u>Not applicable</u>	...
<u>SYSC 7.1.11R</u>	...	...	<u>Not applicable</u>	...
<u>SYSC 7.1.12G</u>	...	...	<u>Not applicable</u>	...
<u>SYSC 7.1.13R - 7.1.16R</u>	...	...	<u>Not applicable</u>	...
<u>SYSC 7.1.16AG</u>	<u>Guidance applies to a BIPRU firm</u>	<u>Guidance for a UCITS investment firm otherwise not applicable</u>	<u>Not applicable</u>	<u>Not applicable</u>
<u>SYSC 7.1.16BG</u>	<u>Guidance applies to a BIPRU firm</u>	<u>Guidance for a UCITS investment firm otherwise not applicable</u>	<u>Not applicable</u>	<u>Not applicable</u>

<b>Provision</b>	<b>COLUMN A</b>	<b>COLUMN A+</b>	<b>COLUMN A++</b>	<b>COLUMN B</b>
<b>SYSC 8</b>	<b>Application to a common platform firm other than to a UCITS investment firm</b>	<b>Application to a UCITS management company</b>	<b><u>Application to a full-scope UK AIFM of an authorised AIF</u></b>	<b>Application to all other firms apart from insurers, managing agents, and the Society, and full-scope <u>UK AIFMs of unauthorised AIFs</u></b>
<u>SYSC 8.1.1R</u>	...	...	<u>Not applicable</u>	...
<u>SYSC 8.1.1AG</u>	...	...	<u>Not applicable</u>	...
<u>SYSC 8.1.2G</u>	...	...	<u>Not applicable</u>	...
<u>SYSC 8.1.3G</u>	...	...	<u>Not applicable</u>	...

<i>SYSC 8.1.4R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 8.1.5R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 8.1.5AG</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 8.1.6R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 8.1.7R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 8.1.8R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 8.1.9R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 8.1.10R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 8.1.11R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 8.1.11AG</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 8.1.12G</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 8.1.13R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 8.1.14G</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 8.2</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 8.3</i>	...	...	<u>Not applicable</u>	...

<b>Provision</b>	<b>COLUMN A</b>	<b>COLUMN A+</b>	<b>COLUMN A++</b>	<b>COLUMN B</b>
<b>SYSC 9</b>	<b>Application to a common platform firm other than to a UCITS investment firm</b>	<b>Application to a UCITS management company</b>	<b><u>Application to a full-scope UK AIFM of an authorised AIF</u></b>	<b>Application to all other firms apart from insurers, managing agents, and the Society, and full-scope UK AIFMs of unauthorised AIFs</b>
<i>SYSC 9.1.1R</i>	...	...	<u>Rule but only for the requirement to arrange for</u>	...

			<u>orderly records to be kept of its business and internal organisation which do not relate to portfolio transactions and subscription and redemptions orders</u>	
SYSC 9.1.2R	...	...	<u>Rule but only for records specified by the modified application of SYSC 9.1.1R</u>	...
SYSC 9.1.3R	...	...	<u>Not applicable</u>	...
SYSC 9.1.4G	...	...	<u>Guidance</u>	...
SYSC 9.1.5G	...	...	<u>Not applicable</u>	...
SYSC 9.1.6G	...	...	<u>Not applicable</u>	...
SYSC 9.1.7G	...	...	<u>Not applicable</u>	...

<b>Provision</b>	<b>Column A</b>	<b>COLUMN A+</b>	<b><u>COLUMN A++</u></b>	<b>Column B</b>
<b>SYSC 10</b>	<b>Application to a common platform firm other than to a UCITS investment firm</b>	<b>Application to a UCITS management company</b>	<b><u>Application to a full-scope UK AIFM of an authorised AIF</u></b>	<b>Application to all other firms apart from insurers, managing agents, and the Society, and full-scope <u>UK AIFMs of unauthorised AIFs</u></b>
SYSC 10.1.1R	...	...	<u>Not applicable</u>	...
<u>SYSC 10.1.1AR</u>	<u>Not applicable</u>	<u>Not applicable</u>	<u>Rule</u>	<u>Not applicable</u>

<i>SYSC 10.1.2G</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 10.1.3R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 10.1.4R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 10.1.4AG</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 10.1.5G</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 10.1.6R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 10.1.6AG</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 10.1.7R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 10.1.8R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 10.1.8AR</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 10.1.9G</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 10.1.10R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 10.1.11R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 10.1.11AG</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 10.1.12G - SYSC 10.1.15G</i>	...	...	<u>Guidance for SYSC 10.1.12G; not applicable for SYSC 10.1.13G to SYSC 10.1.15G</u>	...
<i>SYSC 10.1.16R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 10.1.17R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 10.1.18G</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 10.1.19R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 10.1.20R</i>	...	...	<u>Not applicable</u>	...
<i>SYSC 10.1.21R</i>	...	...	<u>Not applicable</u>	...

<u>SYSC 10.1.22R</u>	<u>Not applicable</u>	<u>Rule</u>	<u>Rule</u>	<u>Not applicable</u>
<u>SYSC 10.1.23R to SYSC 10.1.26</u>	<u>Not applicable</u>	<u>Not applicable</u>	<u>Rule</u>	<u>Not applicable</u>
<u>SYSC 10.2.1R</u>	...	...	<u>Rule</u>	...
<u>SYSC 10.2.2R</u>	...	...	<u>Rule</u>	...
<u>SYSC 10.2.3G</u>	...	...	<u>Guidance</u>	...
<u>SYSC 10.2.4R</u>	...	...	<u>Rule</u>	...
<u>SYSC 10.2.5G</u>	...	...	<u>Guidance</u>	...

...

...

#### 4.1 General requirements

4.1.1 R ...

[**Note:** article 22(1) of the *Banking Consolidation Directive*, article 13(5) second paragraph of *MiFID* and, article 12(1)(a) of the *UCITS Directive*, and article 18(1) of *AIFMD*]

4.1.1A R A full-scope UK AIFM must comply with the *AIFM Remuneration Code*.

[**Note:** article 13(1) of *AIFMD*]

4.1.1B R A full-scope UK AIFM must, in particular:

- (1) have rules for personal transactions by its *employees* or for the holding or management of investments it invests on its own account;
- (2) ensure that each transaction involving the *AIFs* may be reconstructed according to its origin, the parties to it, its nature, and the time and place at which it was effected; and
- (3) ensure that the assets of the *AIFs* managed by the *AIFM* are invested in accordance with the *instrument constituting the fund* and the legal provisions in force.

[**Note:** article 18(1) second paragraph of *AIFMD*]

4.1.2 R For a *common platform firm*, the arrangements, processes and mechanisms referred to in SYSC 4.1.1R must be comprehensive and proportionate to the nature, scale and complexity of the *common platform firm's* activities and

must take into account the specific technical criteria described in SYSC 4.1.7R, SYSC 5.1.7R, SYSC 7 and (for a *BIPRU firm* and a *third country BIPRU firm*) SYSC 19A, or (for a *full-scope UK AIFM*) SYSC 19B.

...

- 4.1.2B R For a *management company* or a *full-scope UK AIFM*, the arrangements, processes and mechanisms referred to in SYSC 4.1.1R and SYSC 4.1.1AR must also take account of the *UCITS schemes* and *EEA UCITS schemes* managed by the *management company* or the *AIFs* managed by the *full-scope UK AIFM*.

[**Note:** article 12(1) second paragraph of the *UCITS Directive* and article 18(1) second paragraph of *AIFMD*]

Resources for management companies and *AIFMs*

- 4.1.2C R A *management company*, a *full-scope UK AIFM* and an *incoming EEA AIFM branch* must have, and employ effectively, the resources and procedures that are necessary for the proper performance of its business activities.

[**Note:** articles 12(1)(a) and 14(1)(c) of the *UCITS Directive* and article 12(1)(c) of *AIFMD*]

- 4.1.2D R A *full-scope UK AIFM* must use, at all times, adequate and appropriate human and technical resources that are necessary for the proper management of *AIFs*.

[**Note:** article 18(1) first paragraph of *AIFMD*]

Subordinate measures relating to provisions implementing article 12(1) of *AIFMD*

- 4.1.2E G Articles 16 to 29 of the *AIFMD level 2 regulation* provide detailed rules supplementing the provisions of article 12(1) of *AIFMD*, articles 57 to 66 of the *AIFMD level 2 regulation* provide detailed rules supplementing articles 12 and 18 of *AIFMD*.

...

- 4.2.1 R The *senior personnel* of a *common platform firm*, a *management company*, a *full-scope UK AIFM*, or of the *UK branch* of a *non-EEA bank* must be of sufficiently good repute and sufficiently experienced as to ensure the sound and prudent management of the *firm*.

[**Note:** article 9(1) of *MiFID*, article 7(1)(b) of the *UCITS Directive*, article 8(1)(c) of *AIFMD* and article 11(1) second paragraph of the *Banking Consolidation Directive*]

...

Responsibility of senior personnel of an AIFM

- 4.2.1B R For a full-scope UK AIFM, the senior personnel must, in complying with SYSC 4.2.1R, be sufficiently experienced in relation to the investment strategies pursued by the AIFs it manages.

[**Note:** article 8(1)(c) of *AIFMD*]

- 4.2.2 R A common platform firm, a management company, a full-scope UK AIFM and the UK branch of a non-EEA bank must ensure that its management is undertaken by at least two persons meeting the requirements laid down in SYSC 4.2.1R and, for a full-scope UK AIFM, SYSC 4.2.7R.

[**Note:** article 9(4) first paragraph of *MiFID*, article 7(1)(b) of the *UCITS Directive*, article 8(1)(c) of *AIFMD* and article 11(1) first paragraph of the *Banking Consolidation Directive*]

...

- 4.2.4 G At least two independent minds should be applied to both the formulation and implementation of the policies of a common platform firm, a management company, a full-scope UK AIFM and the UK branch of a non-EEA bank. Where such a firm nominates just two individuals to direct its business, the appropriate regulator will not regard them as both effectively directing the business where one of them makes some, albeit significant, decisions relating to only a few aspects of the business ...

- 4.2.5 G Where there are more than two individuals directing the business of a common platform firm, a management company, a full-scope UK AIFM or the UK branch of a non-EEA bank, the appropriate regulator does not regard it as necessary for all of these individuals to be involved in all decisions relating to the determination of strategy and general direction ...

...

- 4.2.6 R If a common platform firm, (other than a credit institution or AIFM investment firm) or the UK branch of a non-EEA bank, is:

- (1) a natural person; or
- (2) a legal person managed by a single natural person

it must have alternative arrangements in place which ensure sound and prudent management of the firm.

...

- 4.2.7 R A full-scope UK AIFM must notify the FCA of the names of the senior personnel of the firm and of every person succeeding them in office.

[**Note:** article 8(1)(c) of *AIFMD*]

4.2.8 G Where the *senior personnel* of a *full-scope UK AIFM* will carry out a *governing function* and the *firm* has applied for the *FCA's* approval under section 59 of the *Act*, this will be considered sufficient to comply with *SYSC 4.2.8R*.

...

6.1.4-B G In setting the method of determining the *remuneration of relevant persons* involved in the compliance function, *full-scope UK AIFMs* will need to comply with the *AIFM Remuneration Code*.

...

7.1.2C G *Full-scope UK AIFMs* should be aware that *FUND 3.7* and articles 38 to 47 of the *AIFMD level 2 regulation* contain further requirements in relation to *risk management*.

...

7.1.7BA G In setting the method of determining the *remuneration of employees* involved in the risk management function *full-scope UK AIFMs* will need to comply with the *AIFM Remuneration Code*.

...

## 10 Conflicts of interest

### 10.1 Application

...

10.1.1A R This section also applies to:

(1) a *full-scope UK AIFM* of:

(i) a *UK AIF*;

(ii) an *EEA AIF* managed or *marketed* from an establishment in the *UK*; and

(iii) a *non-EEA AIF*; and

(2) an *incoming EEA AIFM branch* which manages or *markets* a *UK AIF*.

...

Collective portfolio management investment firms

- 10.1.22 R A collective portfolio management investment firm which manages investments other than for an AIF or UCITS for which it has been appointed as manager, must obtain approval from its client before it invests all or part of the client's portfolio in units or shares of an AIF or UCITS it manages.

[**Note:** article 12(2)(a) of the *UCITS Directive* and article 12(2)(a) of *AIFMD*]

Additional requirements for an AIFM

- 10.1.23 R An AIFM must take all reasonable steps to identify conflicts of interest that arise, in the course of managing AIFs, between:
- (1) the AIFM, including its managers, employees or any person directly or indirectly linked to the AIFM by control, and an AIF managed by the AIFM or the investors in that AIF; or
  - (2) an AIF or the investors in that AIF, and another AIF or the investors in that AIF; or
  - (3) an AIF or the investors in that AIF, and another client of the AIFM; or
  - (4) an AIF or the investors in that AIF, and a UCITS managed by the AIFM or the investors in that UCITS; or
  - (5) two clients of the AIFM.

[**Note:** article 14(1) first paragraph of *AIFMD*]

- 10.1.24 R An AIFM must take all reasonable steps to avoid conflicts of interest and, when they cannot be avoided, manage, monitor and (where applicable) disclose those conflicts of interest in order to prevent them from adversely affecting the interests of the AIFs and their investors, and to ensure that the AIFs it manages are fairly treated.

[**Note:** article 12(1)d of *AIFMD*]

- 10.1.25 R An AIFM must:
- (1) maintain and operate effective organisational and administrative arrangements, with a view to taking all reasonable steps designed to identify, prevent, manage and monitor conflicts of interest in order to prevent them from adversely affecting the interests of the AIFs and their investors;
  - (2) segregate, within its own operating environment, tasks and responsibilities which may be regarded as incompatible with each other or which may potentially generate systematic conflicts of interest; and
  - (3) assess whether its operating conditions may involve any other material conflicts of interest and disclose them to the AIF's investors.

[Note: article 14(1) second and third paragraphs of AIFMD]

- 10.1.26 R If the organisational arrangements made by the AIFM to identify, prevent, manage and monitor conflicts of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to investors' interests will be prevented, the AIFM must:
- (1) clearly disclose the general nature or sources of conflicts of interest to the investors before undertaking business on their behalf; and
  - (2) develop appropriate policies and procedures.

[Note: article 14(2) of AIFMD]

Subordinate measures for alternative investment fund managers

- 10.1.27 G Articles 30 to 37 of the AIFMD level 2 regulation provide detailed rules supplementing the provisions of article 14 of AIFMD.

...

## **19A Remuneration Code**

### **19A.1 General application and purpose**

Who? What? Where?

19A.1.1 ...

- 19A.1.1 G The AIFM Remuneration Code (SYSC 19B) also applies to a BIPRU firm which is a full-scope UK AIFM (ie a full-scope UK AIFM that is an AIFM investment firm). Such a full-scope UK AIFM that complies with all of SYSC 19B will also comply with all of the provisions of SYSC 19A. In such cases, the FCA will not require the full-scope UK AIFM to demonstrate compliance with SYSC 19A.
- A

Insert the following section after SYSC 19A. The following text is all new and is not underlined.

## **19B AIFM Remuneration Code**

### **19B.1 Application**

- 19B.1.1 R The AIFM Remuneration Code applies to a full-scope UK AIFM of:

- (1) a *UK AIF*;
- (2) an *EEA AIF*; and
- (3) a *non-EEA AIF*.

#### Remuneration policies and practices

- 19B.1.2 R An *AIFM* must establish, implement and maintain *remuneration* policies and practices for *AIFM Remuneration Code staff* that are consistent with, and promote, sound and effective risk management and do not encourage risk-taking which is inconsistent with the risk profile of the *instrument constituting the fund* of the *AIFs* it manages.

[**Note:** article 13(1) of *AIFMD*]

- 19B.1.3 R *AIFM Remuneration Code staff* comprise those categories of staff whose professional activities have a material impact on the risk profiles of the *AIFMs* or of the *AIFs* the *AIFM* manages. This includes senior management, risk takers, control functions, and any *employees* receiving total *remuneration* that takes them into the same *remuneration* bracket as senior management and risk takers.

[**Note:** article 13(1) of *AIFMD*]

- 19B.1.4 R (1) When establishing and applying the total *remuneration* policies for *AIFM Remuneration Code staff* (inclusive of salaries and discretionary pension benefits), an *AIFM* must comply with the *AIFM remuneration principles* in a way and to the extent that is appropriate to its size, internal organisation and the nature, scope and complexity of its activities.
- (2) Paragraph (1) does not apply to the requirement for significant *AIFMs* to have a *remuneration* committee (*SYSC* 19B.1.9R).
- (3) The *AIFM remuneration principles* apply to remuneration of any type paid by the *AIFM*, to any amount paid directly by the *AIF* itself, including *carried interest*, and to any transfer of *units* or *shares* of the *AIF* made to the benefits of *AIFM Remuneration Code staff*.

[**Note:** paragraph 1 and 2 of Annex II of *AIFMD*]

#### AIFM Remuneration Principle 1: Risk management

- 19B.1.5 R An *AIFM* must ensure that its *remuneration* policy is consistent with, and promotes, sound and effective risk management and does not encourage risk-taking which is inconsistent with the risk profiles of the *instrument constituting the fund* of the *AIFs* it manages.

[**Note:** paragraph 1(a) of Annex II of *AIFMD*]

AIFM Remuneration Principle 2: Supporting business strategy, objectives, values and interests, and avoiding conflicts of interest

- 19B.1.6 R An *AIFM* must ensure that its *remuneration* policy is in line with the business strategy, objectives, values and interests of the *AIFM* and the *AIFs* it manages or the investors of such *AIFs*, and includes measures to avoid conflicts of interest.

[**Note:** paragraph 1(b) of Annex II of *AIFMD*]

AIFM Remuneration Principle 3: Governance

- 19B.1.7 R An *AIFM* must ensure that the *governing body* of the *AIFM*, in its supervisory function, adopts and periodically reviews the general principles of the *remuneration* policy and is responsible for its implementation.

[**Note:** paragraph 1(c) of Annex II of *AIFMD*]

- 19B.1.8 R An *AIFM* must ensure the implementation of the *remuneration* policy is, at least annually, subject to central and independent internal review for compliance with policies and procedures for *remuneration* adopted by the *governing body* in its supervisory function.

[**Note:** paragraph 1(d) of Annex II of *AIFMD*]

- 19B.1.9 R (1) An *AIFM* that is significant in terms of its size, internal organisation and the nature, the scope and the complexity of its activities must establish a *remuneration* committee.
- (2) The *remuneration* committee must be constituted in a way that enables it to exercise competent and independent judgment on *remuneration* policies and practices, and the incentives created for managing risk.
- (3) The chairman and the members of the *remuneration* committee must be members of the *governing body* who do not perform any executive function in the *AIFM*.
- (4) The *remuneration* committee must be responsible for the preparation of decisions regarding *remuneration*, including those which have implications for the risk and risk management of the *AIFM* or the *AIF* concerned and which are taken by the *governing body* in its supervisory function.

[**Note:** paragraph 3 of Annex II of *AIFMD*]

AIFM Remuneration Principle 4: Control functions

- 19B.1.10 R An *AIFM* must ensure that *employees* engaged in control functions are compensated according to the achievement of the objectives linked to their functions, independent of the performance of the business areas they control.

[**Note:** paragraph 1(e) of Annex II of *AIFMD*]

- 19B.1.11 R An *AIFM* must ensure the *remuneration* of the senior officers in the risk management and compliance functions is directly overseen by the *remuneration* committee, or, if such a committee has not been established, by the *governing body* in its supervisory function.

[**Note:** paragraph 1(f) of Annex II of *AIFMD*]

AIFM Remuneration Principle 5(a): Remuneration structures – assessment of performance

- 19B.1.12 R An *AIFM* must ensure that, where *remuneration* is performance related, the total amount of *remuneration* is based on a combination of the assessment of the performance of the individual and of the business unit or *AIF* concerned and of the overall results of the *AIFM*. When assessing individual performance, financial and non-financial criteria are taken into account.

[**Note:** paragraph 1(g) of Annex II of *AIFMD*]

- 19B.1.13 R An *AIFM* must ensure that the assessment of performance is set in a multi-year framework appropriate to the life-cycle of the *AIFs* managed by the *AIFM* to ensure that:
- (1) the assessment process is based on longer term performance; and
  - (2) the actual payment of performance-based components of remuneration is spread over a period which takes account of the redemption policy of the *AIFs* it manages and their investment risks.

[**Note:** paragraph 1(h) of Annex II of *AIFMD*]

AIFM Remuneration Principle 5(b): Remuneration structures – guaranteed variable remuneration

- 19B.1.14 R An *AIFM* must not award, pay or provide guaranteed variable remuneration unless it;
- (1) is exceptional;
  - (2) occurs only in the context of hiring new staff; and
  - (3) is limited to the first year of service.

[**Note:** paragraph 1(i) of Annex II of *AIFMD*]

AIFM Remuneration Principle 5(c): Remuneration structures – ratios between fixed and variable components of total remuneration

- 19B.1.15 R An *AIFM* must set appropriate ratios between the fixed and variable components of total *remuneration* and ensure that:

- (1) fixed and variable components of total *remuneration* are appropriately balanced; and
- (2) the fixed component represents a sufficiently high proportion of the total *remuneration* to allow the operation of a fully flexible policy on variable *remuneration* components, including the possibility to pay no variable *remuneration* component.

[**Note:** paragraph 1(j) of Annex II of *AIFMD*]

AIFM Remuneration Principle 5(d): Remuneration structures – payments related to early termination

- 19B.1.16 R An *AIFM* must ensure that payments related to the early termination of a contract reflect performance achieved over time and are designed in a way that does not reward failure.

[**Note:** paragraph 1(k) of Annex II of *AIFMD*]

AIFM Remuneration Principle 5(e): Remuneration structures – retained units, shares or other instruments

- 19B.1.17 R (1) Subject to the legal structure of the *AIF* and the *instrument constituting the fund*, an *AIFM* must ensure that a substantial portion, and in any event at least 50% of any variable *remuneration*, consists of *units* or *shares* of the *AIF* concerned, or equivalent ownership interests, or share-linked instruments or equivalent non-cash instruments. However, if the management of *AIFs* accounts for less than 50% of the total portfolio managed by the *AIFM*, the minimum of 50 % does not apply.
- (2) The instruments in (1) must be subject to an appropriate retention policy designed to align incentives with the long-term interests of the *AIFM* and the *AIFs* it manages and the investors of such *AIFs*.
- (3) This *rule* applies to the portion of the variable *remuneration* component deferred in line with SYSC 19B.1.18R(1) and the portion not deferred.

[**Note:** paragraph 1(m) of Annex II of *AIFMD*]

AIFM Remuneration Principle 5(f): Remuneration structures – deferral

- 19B.1.18 R (1) An *AIFM* must not award, pay or provide a variable *remuneration* component unless a substantial portion, and in any event at least 40%, of the variable *remuneration* component, is deferred over a period which is appropriate in view of the life cycle and redemption policy of the *AIF* concerned and is correctly aligned with the nature of the risks of the *AIF* in question
- (2) The period referred to in (1) must be at least three to five years, unless

the life cycle of the *AIF* concerned is shorter.

- (3) *Remuneration* payable under (1) must vest no faster than on a pro-rata basis.
- (4) In the case of a variable remuneration component of a particularly high amount, at least 60 % of the amount must be deferred.

[**Note:** paragraph 1(n) of Annex II of *AIFMD*]

AIFM Remuneration Principle 5(g): Remuneration structures – performance adjustment, etc.

- 19B.1.19 R An *AIFM* must ensure that any variable *remuneration*, including a deferred portion, is paid or vests only if it is sustainable according to the financial situation of the *AIFM* as a whole and justified according to the performance of the *AIF*, the business unit and the individual concerned.

[**Note:** paragraph 1(o) first sub-paragraph of Annex II of *AIFMD*]

- 19B.1.20 G The total variable *remuneration* should generally be considerably contracted where subdued or negative financial performance of the *AIFM* or of the *AIF* concerned occurs, taking into account both current compensation and reductions in payouts of amounts previously earned, including through malus or clawback arrangements.

[**Note:** paragraph 1(o) second sub-paragraph of Annex II of *AIFMD*]

AIFM Remuneration Principle 6: Measurement of performance

- 19B.1.21 R An *AIFM* must ensure the measurement of performance used to calculate variable *remuneration* components, or pools of variable *remuneration* components, includes a comprehensive adjustment mechanism to integrate all relevant types of current and future risks.

[**Note:** paragraph 1(l) of Annex II of *AIFMD*]

AIFM Remuneration Principle 7: Pension policy

- 19B.1.22 R An *AIFM* must ensure that:
- (1) its pension policy is in line with its business strategy, objectives, values and long-term interests of the *AIFs* it manages;
  - (2) when an *employee* leaves the *firm* before retirement, any *discretionary pension benefits* are held by the *firm* for a period of five years in the form of instruments in SYSC 19B.1.17R(1); and
  - (3) in the case of an *employee* reaching retirement, *discretionary pension benefits* are paid to the *employee* in the form of instruments referred to in SYSC 19B.1.17R(1) and subject to a five-year retention period.

[**Note:** paragraph 1(p) of Annex II of *AIFMD*]

AIFM Remuneration Principle 8: Personal investment strategies

- 19B.1.23 R An *AIFM* must ensure that its *employees* undertake not to use personal hedging strategies or *remuneration*- and liability-related insurance to undermine the risk alignment effects embedded in their *remuneration* arrangements.

[**Note:** paragraph 1(q) of Annex II of *AIFMD*]

AIFM Remuneration Principle 9: Avoidance of the remuneration code

- 19B.1.24 R An *AIFM* must ensure that variable remuneration is not paid through vehicles or methods that facilitate the avoidance of the requirements of the *AIFM Remuneration Code*.

[**Note:** paragraph 1(r) of Annex II of *AIFMD*]

...

Amend the following as shown.

Additional guidance on governance arrangements

- 21.1.1 G (1) This chapter provides additional guidance on risk-centric governance arrangements for effective risk management. It expands upon the general organisational requirements in *SYSC 2*, *SYSC 3*, *SYSC 4*, ~~and *SYSC 7*~~ and *FUND 3.7*, and so applies to the same extent as *SYSC 3.1.1R* (for *insurers*, *managing agents* and the *Society*), ~~and *SYSC 4.1.1R*~~ (for every other *firm*) and *FUND 3.7* (for a *full-scope UK AIFM* of an *authorised AIF*).
- (2) *Firms* should, taking account of their size, nature and complexity, consider whether in order to fulfil the general organisational requirements in *SYSC 2*, *SYSC 3*, *SYSC 4*, ~~and *SYSC 7*~~ and (for a *full-scope UK AIFM* of an *authorised AIF*) *FUND 3.7* their risk control arrangements should include:

...

**TP 2 Firms other than common platform firms, insurers, managing agents and the Society**

(1)	(2)	(3)	(4)	(5)	(6)
-----	-----	-----	-----	-----	-----

	Material to which the transitional provision applies		Transitional provision	Transitional provision: dates in force	Handbook provisions: Coming into force
...					
<u>2.2</u>	<u>The changes to SYSC set out in Annex D of the Alternative Investment Fund Managers Directive Instrument 2013</u>	<u>R</u>	<p>(1) Where a <i>firm</i> meets the conditions in (2) the changes effected by the Annex listed in column (2) do not apply and, therefore, the provisions in SYSC amended by that Annex will continue to apply as they were in force as at 21 July 2013.</p> <p>(2) the conditions are: (a) the <i>firm</i> falls within regulation 72(1) of the <i>AIFMD UK regulation</i>; and (b) the <i>firm</i> does not have a <i>Part 4A permission to manage an AIF</i>.</p>	<u>From 22 July 2013 until 21 July 2014</u>	<u>22 July 2013</u>
<u>2.3</u>	<u>SYSC 4.2.2R to SYSC 4.2.5G, SYSC 9.1.2R and SYSC 9.1.3R</u>	<u>R</u>	<u>A small authorised UK AIFM of an unauthorised AIF which, prior to 22 July 2013, was a common platform firm must continue to comply with column (2) in respect of its activities as an AIFM.</u>	<u>From 22 July 2013 until 31 July 2015</u>	<u>22 July 2013</u>

## Annex E

## Amendments to the General Provisions sourcebook (GEN)

After GEN TP 2.2 insert TP 3, as set out below. The following text is all new and not underlined.

**TP 3 Transitional Provision in relation to the Alternative Investment Fund Managers Directive Instrument 2013**

Table: 1 Transitional Provisions applying across the FCA Handbook

(1)	On 22 July 2013, the Alternative Investment Fund Managers Directive Instrument 2013 came into force. This instrument transposed provisions contained in the <i>AIFMD</i> into UK national law through provisions in the <i>FCA Handbook</i> .
(2)	The entry into force of the Alternative Investment Fund Managers Directive Instrument 2013 requires a number of further consequential changes to be made to the <i>FCA Handbook</i> . These will be made in due course.
(3)	Until that time, all provisions in the <i>FCA Handbook</i> must be interpreted in the light of the amendments made to the <i>FCA Handbook</i> by the Alternative Investment Fund Managers Directive Instrument 2013, unless the context requires otherwise. This is necessary to comply with the <i>rule</i> in GEN 2.2.1R. It should achieve the result that most people would probably expect to apply in any event.

Table: 2 Transitional Provision applying across the FCA and PRA Handbooks

(1)	(2) Material to which the transitional provision applies	(3)	(4) Transitional provision	(5) Transitional provision: dates in force	(6) Handbook provision: coming into force
1	Every provision in the <i>FCA Handbook</i> , unless the context requires otherwise	R	All provisions in the <i>FCA Handbook</i> must be interpreted as far as possible in a manner giving effect to, or achieving the purpose of, the amendments made to the <i>FCA Handbook</i> by the Alternative Investment Fund Managers Directive	From 22 July 2013 until 21 July 2014	22 July 2013

			Instrument 2013 (so far as the context permits and according to the context).		
2	Paragraph 1	G	For example, where a provision of the <i>FCA Handbook</i> refers (or is to be read as referring) to a provision or a <i>Glossary</i> term which was replaced by the Alternative Investment Fund Managers Directive Instrument 2013 with a provision(s) or <i>Glossary</i> term(s) relating to substantially the same subject matter, the provision making the reference should be read, so far as the context permits, as if it was referring to the replacement provision(s) or <i>Glossary</i> term(s).	From 22 July 2013 until 21 July 2014	22 July 2013
3	Amendments made to the <i>FCA Handbook</i> by the Alternative Investment Fund Managers Directive Instrument 2013	R	References to the “ <i>EEA</i> ” must be read as references to the “ <i>EU</i> ”.	From 22 July 2013 until such time as <i>AIFMD</i> is annexed to the EEA Agreement in accordance with article 102 of the EEA Agreement	22 July 2013

## Annex F

## Amendments to the Fees manual (FEES)

In this Annex, underlining indicates new text and striking through indicates deleted text.

## 1 Fees Manual

Application

...

1.1.2 R This manual applies in the following way:

...

(2) FEES 1, 2 and 4 apply to:

(a) every *firm* (except an AIFM qualifier, *ICVC* or *UCITS* *qualifier*)

...

...

## 3 Application, Notification and Vetting Fees

...

### 3.2 Obligation to pay fees

...

3.2.7 R Table of application, notification and vetting fees payable to the FCA

(1) Fee payer	(2) Fee payable	Due date
...	...	..
(d) Applicants for an <i>authorisation order</i> for, or recognition <u>under section 272 of the Act</u> of, a collective investment scheme	FEES 3 Annex 2R, <del>part 1</del> <u>part 2</u>	On or before the application is made
(e) The <del>operator</del> <u>management company</u> of a <i>scheme</i> making a notification under	FEES 3 Annex 2R, <del>part 2</del> <u>part 3</u>	On or before the date the application is made

section 264 <del>or section 270</del> of the <i>Act</i>		
...	...	...

...

### 3 Annex 1R Authorisation fees payable

...

Moderately complex cases	
Activity grouping	Description
...	
A.7	<del>Fund managers</del> <u>Portfolio managers</u>
A.9	<del>Operators, trustees and depositaries of collective investment schemes, operators of personal pensions schemes and operators of stakeholder pension schemes</del> <u>Managers and depositaries of investment funds, and operators of collective investment schemes or pension schemes</u>
...	

...

### 3 Annex 2R Application and notification fees payable in relation to collective investment schemes

Legislative provision	Nature and purpose of fee	Payable by	Amount of fee (£)	Umbrell a factor
...	...	...	...	...
Part 2 Application fees payable for firms to be subject to <i>COLL</i>				
...	...	...	...	...
Section 272 of the <i>Act</i>	<del>On application for an order declaring a scheme to be an individually recognised overseas scheme</del>	An applicant	14,000	2

	<u>On application for an order declaring a scheme to be recognised where the scheme is:</u>			
	<u>an EEA AIF equivalent to a non-UCITS retail scheme</u>		<u>1,500</u>	<u>2</u>
	<u>an EEA AIF equivalent to a qualified investor scheme</u>		<u>2,400</u>	<u>2</u>
	<u>a non-EEA AIF equivalent to a non-UCITS retail scheme or a qualified investor scheme</u>		<u>8,000</u>	<u>2</u>
Part 3 – (notifications)				
...				
Section 270 of the Act	On giving notice under section 270 of the Act	The operator	600	2
...				

...

**4 Periodic fees**

...

**4.2 Obligation to pay periodic fees**

...

Modifications for persons becoming subject to periodic fees during the course of a fee year

4.2.6 R (1) ...

- (a) *firms* (other than *AIFM qualifiers*, *ICVCs* and *UCITS qualifiers*) in accordance with *FEES* 4.2.7R and *FEES*

4.2.8R;

...

- 4.2.7 R A *firm* (other than an *AIFM qualifier*, *ICVC* or *UCITS qualifier*) which becomes authorised or registered, or whose *permission* and/or *payment service* activities are extended, during the course of the *fee year* must pay a fee which is calculated by:

...

...

4.2.11 R	1 Fee payer	2 Fee payable	3 Due date	4 Events occurring during the period leading to modified periodic fee
	Any <i>firm</i> (except an <i>AIFM qualifier</i> , <i>ICVC</i> , or a <i>UCITS qualifier</i> )	...	...	...
	...			
	Any <i>manager</i> of an <i>authorised unit trust</i> ;	In relation to each unit trust, the amount specified in <u>part 1 of FEES 4 Annex 4R</u>	...	...
	Any <i>authorised fund manager</i> of an <i>authorised contractual scheme</i> ;	For each <i>authorised contractual scheme</i> the amount specified in <u>part 1 of FEES 4 Annex 4R</u>		
	Any <i>ACD</i> of an <i>ICVC</i> ; and	In relation to each <i>ICVC</i> , the amount specified in <u>part 1 of FEES 4 Annex 4R</u>		
	<i>Persons</i> who, under	In relation to		The relevant

the constitution or founding arrangements of a <i>recognised scheme</i> , is responsible for the management of the property held for or within the <i>scheme</i>	each <i>recognised scheme</i> the amount specified in <u>part 1 of FEES 4</u> Annex 4R		<i>scheme</i> becomes a <u>recognised collective investment scheme</u> <i>recognised scheme</i>
...	...	...	

...

**4.3 Periodic fee payable by firms (other than AIFM qualifiers, ICVCs and UCITS qualifiers)**

4.3.1 R The periodic fee payable by a *firm* (except an AIFM qualifier, ICVC or a UCITS *qualifier*) is:

...

...

**4 Annex FCA Activity groups, tariff bases and valuation dates  
1AR**

Part 1

This table shows how the *FCA* links the *regulated activities* for which a *firm* has *permission* to activity groups (fee-blocks). A *firm* can use the table to identify which fee-blocks it falls into based on its *permission*.

Activity group	Fee payer falls in the activity group if
...	...
<b>A.7 <del>Fund managers</del> <u>Portfolio managers</u></b>	... (3) the <i>firm</i> is a <i>venture capital firm</i> (a <i>firm</i> falling within this category is a <i>class (3) firm</i> if it is not a class (1) or (2) <i>firm</i> ). <b>OR</b> (4) its <i>permission</i> includes <u>managing an AIF or managing a UCITS</u> <u>Note:</u>

	<p><b>Class (1) firms</b> are subdivided into three classes:</p> <p>...</p>
<p><b>A.9</b>  <b>Operators, Trustees and Depositaries of collective investment schemes and Operators of personal pension schemes or stakeholder pension schemes</b>  <b><u>Managers and depositaries of investment funds, and operators of collective investment schemes or pension schemes</u></b></p>	<p>(1) its <i>permission</i>:</p> <p>(a) includes one or more of the following:  <u>managing an AIF</u>;  <u>managing a UCITS</u>;  <u>acting as trustee or depositary of an AIF</u>;  <u>acting as trustee or depositary of a UCITS</u>;                      ...                      AND                      (b) PROVIDED the <i>firm</i> is NOT one of the following:                      ...  <u>a firm which would be a venture capital firm but for the inclusion of <i>managing an AIF on its permission</i>; but only where the firm is <i>managing an AIF</i> exclusively in respect of <i>AIFs</i> which only invest in <i>venture capital investments</i>.</u>                      OR                      ...</p>
...	

...

Part 3

This table indicates the tariff base for each fee-block set out in Part 1.

Activity group	Tariff base
...	
A.7	<p><b>FUNDS UNDER MANAGEMENT (FuM)</b></p> <p>...</p>
	<p><b>Notes on FuM</b></p> <p>(a) <del>For</del> <u>Except for funds under management where the <i>fund</i> is an <i>AIF</i>, for</u> the purposes of calculating the value of funds under management, assets means all assets that consist of or include any <i>investment</i> which is a <i>designated investment</i> or those assets in respect of which the arrangements for their management are such that the assets may consist of or include such <i>investments</i>, and either the assets have at any time since 29 April 1988 done</p>

	<p>so or the arrangements have at any time (whether before or after that date) been held out as arrangements under which the assets would do so.</p> <p><u>(aa) for funds under management, where the <i>fund</i> is an <i>AIF</i>, assets means all assets or property of any description of the <i>fund</i>.</u></p> <p>...</p>
A.9	<p><b>GROSS INCOME</b></p> <p><u>(1) For <i>AIFMs</i> (excluding <i>internally managed AIFs</i>), <i>management companies</i>, <i>operators</i> (including <i>ACDs</i> and <i>authorised fund managers</i> of <i>unit trusts</i> or <i>authorised contractual schemes</i> but excluding <i>operators</i> of a <i>personal pension scheme</i> or a <i>stakeholder pension scheme</i>) and <i>residual CIS operators</i>, gross income from the activity relating to fee-block A.9 is defined as:</u></p> <p>the amount of the annual charge on <del>funds invested in regulated or unregulated collective investment scheme</del> <u>investments in the <i>fund</i></u> received or receivable in the latest accounting period (this is calculated as a % of funds invested, typically 1% p.a.);</p> <p>...</p> <p><u>(2) For <i>depositaries</i> (including <i>trustees</i> of <i>collective investment schemes</i> and <i>ICVC</i> or <i>ACS depositaries</i>):</u></p> <p>The amount of the annual charge levied on <del>funds in regulated collective investment schemes</del> <u>investments in <i>funds</i></u> for which they act as <i>depository</i> (typically a % of the total funds for which they act as <i>depository</i>).</p> <p><u>(3) For <i>operators</i> of a <i>personal pension scheme</i> or a <i>stakeholder pension scheme</i> <u>gross income from the activity relating to fee block A.9 is defined as:</u></u></p> <p>...</p> <p>Note: Only the gross income corresponding to <i>United Kingdom</i> business is relevant.</p> <p><u>(4) <i>Internally managed AIFs</i> must use a proxy for gross income for the activities relating to fee block A.9. This is the total value of funds under management (as defined in fee block A.7) multiplied by 0.01.</u></p>
...	

## Part 1 – Periodic fees payable

Scheme type	Basic fee	Total funds/ sub-funds aggregate	Fund factor	Fee (£)
<i>ICVC,</i> <i>AUT,</i> <i>ACS,</i> Section 264 of the <i>Act</i> , <del>Section 270 of the <i>Act</i></del> (for fee year 2013/2014 only), <i>schemes</i> formerly recognised under section 270 of the <i>Act</i> , as in force immediately before 22 July 2013, <del><i>schemes</i> other than non-            EEA AIFs recognised            under section 272 of the  <i>Act</i>,</del>	...	...	...	...
<del>Section 272 of the <i>Act</i></del> <del><i>Non-EEA AIFs</i></del> <del>recognised under section            272 of the <i>Act</i>,</del> (from fee year 2014/2015), <i>schemes</i> formerly recognised under section 270 of the <i>Act</i> , as in force immediately before 22 July 2013	...	...	...	...
		...	...	...
		...	...	...
		...	...	...
		...	...	...

...

## 5 Financial Ombudsman Service Funding

...

### 5 Annex 1R Annual General Levy Payable in relation to the Compulsory Jurisdiction for 2013/2014

...

**Compulsory jurisdiction – general levy**

Industry block	Tariff base	General levy payable by firm
...	...	...
<del>5. Fund managers</del> 5. <u>Portfolio managers</u> (including those holding <i>client money</i> /assets and not holding <i>client money</i> /assets)	...	...
<del>6. Operators, trustees and depositaries of collective investment schemes and operators of personal pensions schemes or stakeholder pension schemes</del> 6. <u>Managers and depositaries of investment funds, and operators of collective investment schemes or pension schemes</u>	...	...

...

...

...

**6 Financial Services Compensation Scheme Funding**

...

**6 Annex 3AR Financial Services Compensation Scheme – classes**This table belongs to *FEES 6.4.7AR* and *FEES 6.5.6AR*

...

	<b>Investment</b>
<b>Class D1</b>	<b>Investment provision</b>
Firms with <i>permission</i> for:	Any of the following:
	<i>managing investments</i> ;
	<i>managing an AIF</i> ;
	<i>managing a UCITS</i> ;
	<i>acting as trustee or depositary of an AIF</i> ;

	<i>acting as trustee or depositary of a UCITS;</i>
...	...

...

## Annex G

### Amendments to the General Prudential sourcebook (GENPRU)

In this Annex, unless otherwise indicated, underlining indicates new text and striking through indicates deleted text.

#### 1.2 Adequacy of financial resources

...

- 1.2.11 G The adequacy of a *firm's* financial resources needs to be assessed in relation to all the activities of the *firm* and the risks to which they give rise and so this section applies to a *firm* in relation to the whole of its business. In the case of a *UCITS investment firm* collective portfolio management investment firm this means that this section ~~is not limited to designated investment business excluding scheme management activity~~. It also applies to ~~scheme management activity and to activities that are not designated investment business~~ its activities in relation to the management of AIFs and/or UCITS.

...

#### 2.1 Calculation of capital resources requirement

...

- 2.1.8 G ...
- (3) In the case of a *UCITS investment firm* collective portfolio management investment firm this section implements article 9 of AIFMD and (in part) Article 7 of the UCITS Directive.

...

Calculation of the variable capital requirement for a BIPRU firm

- 2.1.45 R Table: Calculation of the variable capital requirement for a BIPRU firm  
This table belongs to *GENPRU 2.1.40R*

<i>Firm category</i>	Capital requirement	
...	...	
<i>BIPRU limited licence firm (including UCITS investment firm collective portfolio)</i>	the higher of (1) and (2):	
	(1)	the sum of:
	(a)	the <i>credit risk capital requirement</i> ; and

<i>management investment firm</i> )	(b)	the <i>market risk capital requirement</i> ; and
	(2)	the <i>fixed overheads requirement</i> .

Adjustment of the variable capital requirement calculation for ~~UCITS investment firm~~ collective portfolio management investment firms

- 2.1.46 R When a *UCITS investment firm collective portfolio management investment firm* calculates the *credit risk capital requirement* and the *market risk capital requirement* for the purpose of calculating the variable capital requirement under *GENPRU 2.1.40R* it must do so only in respect of *designated investment business*. For this purpose *scheme management activity managing an AIF or managing a UCITS* is excluded from *designated investment business*.

...

Table: Base capital resources requirement for a BIPRU firm

- 2.1.48 R This table belongs to *GENPRU 2.1.47R*

<i>Firm category</i>	<i>Amount: Currency equivalent of</i>
...	...
<i>UCITS investment firm Collective portfolio management investment firm</i>	€125,000 plus, if the <i>funds under management</i> exceed €250,000,000, 0.02% of the excess, subject to a maximum of €10,000,000.

...

Requirements for collective portfolio management investment firms

- 2.1.63 R A collective portfolio management investment firm must maintain capital resources which equal or exceed the higher of (1) and (2).
- (1) (a) The higher of:
- (i) the funds under management requirement (in line with *GENPRU 2.1.66R*); and
- (ii) the fixed overheads requirement (in line with *GENPRU 2.1.53R*); plus
- (b) whichever is applicable of:
- (i) the professional negligence capital requirement (in line with *GENPRU 2.1.67G(1)(a)*); or
- (ii) the PII capital requirement (in line with *GENPRU*

2.1.67G(1)(b).

(2) The amount specified in the table in GENPRU 2.1.45R.

[**Note:** article 9(5) and 9(7) of *AIFMD* and article 7(1)(a)(iii) of the *UCITS Directive*]

2.1.64 R A collective portfolio management investment firm must hold liquid assets (in line with GENPRU 2.1.73R) which equal or exceed:

(1) the higher of:

(a) the funds under management requirement (in line with GENPRU 2.1.66R) less the base capital resources requirement in GENPRU 2.1.48R; and

(b) the fixed overheads requirement (in line with GENPRU 2.1.53R); plus

(2) whichever is applicable of:

(a) the professional negligence capital requirement (in line with GENPRU 2.1.67G(1)(a)); or

(b) the PII capital requirement (in line with GENPRU 2.1.67G(1)(b)).

2.1.65 G (1) The professional negligence capital requirement applies for a collective portfolio investment management firm which, in line with GENPRU 2.1.67G(1)(a), decides to cover professional liability risks by way of own funds.

(2) The PII capital requirement applies for a collective portfolio management investment firm which, in line with GENPRU 2.1.67G(1)(b), decides to cover professional liability risks by way of professional indemnity insurance.

2.1.66 R The funds under management requirement is (subject to a maximum of €10,000,000) the sum of:

(1) the base capital resources requirement; plus

(2) 0.02% of the amount by which the funds under management exceed €250,000,000.

[**Note:** article 9(3) of *AIFMD* and article 7(1)(a)(i) of the *UCITS Directive*]

2.1.67 G A firm should:

(1) cover the professional liability risks in article 12 of the *AIFMD level 2 regulation* (professional liability risks) (as replicated in *GENPRU 2.1.68EU*) by either:

- (a) maintaining an amount of own funds in accordance with article 14 of the AIFMD level 2 regulation (additional own funds) (as replicated in GENPRU 2.1.70EU) (the professional negligence capital requirement); or
- (b) holding professional indemnity insurance and maintaining an amount of own funds to meet the PII capital requirement in accordance with article 15 of the AIFMD level 2 regulation (professional indemnity insurance) (as replicated in GENPRU 2.1.71EU) and GENPRU 2.1.72R; and
- (2) comply with the qualitative requirements addressing professional liability risks in article 13 of the AIFMD level 2 regulation (qualitative requirements addressing professional liability) (as replicated in GENPRU 2.1.69EU).

2.1.68

EU

<u>Professional liability risks</u>	
<u>1.</u>	<u>The professional liability risks to be covered pursuant to Article 9(7) of Directive 2011/61/EU shall be risks of loss or damage caused by a relevant person through the negligent performance of activities for which the AIFM has legal responsibility.</u>
<u>2.</u>	<u>Professional liability risks as defined in paragraph 1 shall include, without being limited to, risks of:</u>
(a)	<u>loss of documents evidencing title of assets of the AIF;</u>
(b)	<u>misrepresentations or misleading statements made to the AIF or its investors;</u>
(c)	<u>acts, errors or omissions resulting in a breach of:</u>
(i)	<u>legal and regulatory obligations;</u>
(ii)	<u>duty of skill and care towards the AIF and its investors;</u>
(iii)	<u>fiduciary duties;</u>
(iv)	<u>obligations of confidentiality;</u>
(v)	<u>AIF rules or instruments of incorporation;</u>
(vi)	<u>terms of appointment of the AIFM by the AIF;</u>
(d)	<u>failure to establish, implement and maintain appropriate procedures to prevent dishonest, fraudulent or malicious acts;</u>
(e)	<u>improperly carried out valuation of assets or calculation of unit/share prices;</u>

	(f)	<u>losses arising from business disruption, system failures, failure of transaction processing or process management.</u>
3.		<u>Professional liability risks shall be covered at all times either through appropriate additional own funds determined in accordance with Article 14 or through appropriate coverage of professional indemnity insurance determined in accordance with Article 15.</u>
<b>[Note: article 12 of the AIFMD level 2 regulation]</b>		

## 2.1.69 EU

<u>Qualitative requirements addressing professional liability risks</u>		
1.		<u>An AIFM shall implement effective internal operational risk management policies and procedures in order to identify, measure, manage and monitor appropriately operational risks including professional liability risks to which the AIFM is or could be reasonably exposed. The operational risk management activities shall be performed independently as part of the risk management policy.</u>
2.		<u>An AIFM shall set up a historical loss database, in which any operational failures, loss and damage experience shall be recorded. This database shall record, without being limited to, any professional liability risks as referred to in Article 12(2) that have materialised.</u>
3.		<u>Within the risk management framework the AIFM shall make use of its internal historical loss data and where appropriate of external data, scenario analysis and factors reflecting the business environment and internal control systems.</u>
4.		<u>Operational risk exposures and loss experience shall be monitored on an ongoing basis and shall be subject to regular internal reporting.</u>
5.		<u>An AIFM's operational risk management policies and procedures shall be well documented. An AIFM shall have arrangements in place for ensuring compliance with its operational risk management policies and effective measures for the treatment of non-compliance with these policies. An AIFM shall have procedures in place for taking appropriate corrective action.</u>
6.		<u>The operational risk management policies and procedures and measurement systems shall be subject to regular review, at least on an annual basis.</u>
7.		<u>An AIFM shall maintain financial resources adequate to its assessed risk profile.</u>
<b>[Note: article 13 of the AIFMD level 2 regulation]</b>		

## 2.1.70 EU

<u>Additional own funds</u>	
<u>1.</u>	<u>This Article shall apply to AIFMs that choose to cover professional liability risks through additional own funds.</u>
<u>2.</u>	<p><u>The AIFM shall provide additional own funds for covering liability risks arising from professional negligence at least equal to 0,01 % of the value of the portfolios of AIFs managed.</u></p> <p><u>The value of the portfolios of AIFs managed shall be the sum of the absolute value of all assets of all AIFs managed by the AIFM, including assets acquired through use of leverage, whereby derivative instruments shall be valued at their market value.</u></p>
<u>3.</u>	<p><u>The additional own funds requirement referred to in paragraph 2 shall be recalculated at the end of each financial year and the amount of additional own funds shall be adjusted accordingly.</u></p> <p><u>The AIFM shall establish, implement and apply procedures to monitor on an ongoing basis the value of the portfolios of AIFs managed, calculated in accordance with the second subparagraph of paragraph 2. Where, before the annual recalculation referred to in the first subparagraph, the value of the portfolios of AIFs managed increases significantly, the AIFM shall without undue delay recalculate the additional own funds requirement and shall adjust the additional own funds accordingly.</u></p>
<u>4.</u>	<u>The competent authority of the home Member State of the AIFM may authorise the AIFM to provide additional own funds lower than the amount referred to in paragraph 2 only if it is satisfied — on the basis of the historical loss data of the AIFM as recorded over an observation period of at least three years prior to the assessment — that the AIFM provides sufficient additional own funds to appropriately cover professional liability risks. The authorised lower amount of additional own funds shall be not less than 0,008 % of the value of the portfolios of AIFs managed by the AIFM.</u>
<u>5.</u>	<u>The competent authority of the home Member State of the AIFM may request the AIFM to provide additional own funds higher than the amount referred to in paragraph 2 if it is not satisfied that the AIFM has sufficient additional own funds to appropriately cover professional liability risks. The competent authority shall give reasons why it considers that the AIFM's additional own funds are insufficient.</u>
<b>[Note: article 14 of the <i>AIFMD level 2 regulation</i>]</b>	

2.1.71

EU

<u>Professional indemnity insurance</u>	
<u>1.</u>	<u>This Article shall apply to AIFMs that choose to cover professional liability risks through professional indemnity insurance.</u>
<u>2.</u>	<u>The AIFM shall take out and maintain at all times professional indemnity insurance that:</u>
<u>(a)</u>	<u>shall have an initial term of no less than one year;</u>
<u>(b)</u>	<u>shall have a notice period for cancellation of at least 90 days;</u>
<u>(c)</u>	<u>shall cover professional liability risks as defined in Article 12(1) and (2);</u>
<u>(d)</u>	<u>is taken out from an EU or non-EU undertaking authorised to provide professional indemnity insurance, in accordance with Union law or national law;</u>
<u>(e)</u>	<u>is provided by a third party entity.</u>
	<u>Any agreed defined excess shall be fully covered by own funds which are in addition to the own funds to be provided in accordance with Article 9(1) and (3) of Directive 2011/61/EU.</u>
<u>3.</u>	<u>The coverage of the insurance for an individual claim shall be equal to at least 0,7 % of the value of the portfolios of AIFs managed by the AIFM calculated as set out in the second subparagraph of Article 14(2).</u>
<u>4.</u>	<u>The coverage of the insurance for claims in aggregate per year shall be equal to at least 0,9 % of the value of the portfolios of AIFs managed by the AIFM calculated as set out in the second subparagraph of Article 14(2).</u>
<u>5.</u>	<u>The AIFM shall review the professional indemnity insurance policy and its compliance with the requirements laid down in this Article at least once a year and in the event of any change which affects the policy's compliance with the requirements in this Article.</u>
<b>[Note: article 15 of the <i>AIFMD level 2 regulation</i>]</b>	

2.1.72

R

If a *firm* satisfies the requirement referred to in *GENPRU 2.1.67G* with professional indemnity insurance, it must, in addition to maintaining an amount of *own funds* to cover any defined excess, hold adequate *own funds* to cover any exclusions in the insurance policy that would otherwise result in the *firm* having insufficient resources to cover liabilities arising. A *firm* may satisfy its requirements for professional indemnity insurance with a policy that also provides cover to one or more entities other than the *firm*, provided the policy satisfies the conditions of the *AIFMD level 2*

---

regulation, exclusive of the cover provided to other firms by the policy.

- 2.1.73 R In *GENPRU* 2.1.64R, liquid assets are assets which:
- (1) are readily convertible to cash within one month; and
  - (2) have not been invested in speculative positions.
- 2.1.74 G Examples of liquid assets that are acceptable for the purposes of *GENPRU* 2.1.73R include cash, *readily realisable investments* that are not held for short-term resale, and debtors.

[**Note:** article 9(8) of *AIFMD*]

Please insert the following text after TP 15, all of the text is new and is not underlined.

**TP 16 AIFMD**

Application

- 16.1 R *GENPRU* TP 16 applies to a *collective portfolio management investment firm*.

Duration of transitional

- 16.2 R *GENPRU* TP 16.4 applies from 22 July 2013 until 21 July 2014.
- 16.3 R *GENPRU* TP 16.5 applies from 22 July 2013.

Transitional provision

- 16.4 R (1) Where a *firm* meets the conditions in (2), the changes effected by Annex G of the Alternative Investment Fund Managers Directive Instrument 2013 do not apply and, therefore, the provisions in *GENPRU* amended by that Annex will continue to apply as they were in force as at 21 July 2013.
- (2) The conditions referred to in (1) are:
- (a) the *firm* falls within regulation 72(1) of the *AIFMD UK regulation*; and
  - (b) the *firm* does not have a *Part 4A permission to manage an AIF*.
- 16.5 R Where a *firm* falls within regulation 74(1) or 75(1) of the *AIFMD UK regulation* it need not include *AIFs* managed by it that fall within those regulations in the calculation of its *funds under management requirement*, *professional negligence capital requirement* or *PII excess capital requirement*.

## Annex H

## Amendments to the Prudential sourcebook for Banks, Building Societies and Investment Firms (BIPRU)

In this Annex, underlining indicates new text and strike through indicates deleted text, unless otherwise stated.

### 1.1 Application

...

- 1.1.3 G In the main *BIPRU* only applies to a ~~*UCITS investment firm*~~ *collective portfolio management investment firm* in respect of *designated investment business* (excluding ~~*scheme management activity managing an AIF and managing a UCITS*~~). However *BIPRU* 2.2 (Internal capital adequacy standards), *BIPRU* 2.3 (Interest rate risk in the non-trading book), *BIPRU* 8 (Group risk - consolidation) and *BIPRU* 11 (Disclosure) apply to the whole of its business.

...

- 1.1.8 R A *firm* falling within *BIPRU* 1.1.6R(3) to *BIPRU* 1.1.6R(5) is a *BIPRU investment firm*. A *BIPRU investment firm* includes a ~~*UCITS investment firm*~~ *collective portfolio management investment firm* that is not excluded under *BIPRU* 1.1.7R.

...

Alternative classification of BIPRU investment firms

- 1.1.18 R *BIPRU investment firm* are divided into the following classes for the purposes of the calculation of the *base capital resources requirement* and for the purpose of any other provision of the *Handbook* that applies this classification:

- (1) a ~~*UCITS investment firm*~~ *collective portfolio management investment firm*;

...

Types of investment firm: BIPRU 125K firm

- 1.1.19 R A *BIPRU 125K firm* means a *BIPRU investment firm* that satisfies the following conditions:

...

- (4) it is not a ~~*UCITS investment firm*~~ *collective portfolio management investment firm*; and;

...

Types of investment firm: BIPRU 50K firm

- 1.1.20 R A *BIPRU 50K firm* means a *BIPRU investment firm* that satisfies the following conditions:

...

- (3) it is not a *UCITS investment firm* *collective portfolio management investment firm*; and

...

Types of investment firm: 730K firm

- 1.1.21 R A *BIPRU investment firm* that is not a *UCITS investment firm* *collective portfolio management investment firm*, a *BIPRU 50K firm* or a *BIPRU 125K firm* is a *BIPRU 730K firm*. A *BIPRU investment firm* that operates a *multilateral trading facility* is a *BIPRU 730k firm*.

...

## 8.5 Basis of consolidation

...

Basis of inclusion of ~~*UCITS investment firms*~~ *collective portfolio management investment firms* in consolidation

- 8.5.7 R *GENPRU 2.1.46R* (Adjustment of the variable capital requirement calculation for ~~*UCITS investment firms*~~ *collective portfolio management investment firms*) does not apply for the purpose of this chapter.
- 8.5.8 G In general a *UCITS investment firm* *collective portfolio management investment firm* only calculates its capital and concentration risk requirements in relation to its *designated investment business* and does not calculate them with respect to ~~*scheme management activity*~~ *managing an AIF or managing a UCITS*. The effect of *BIPRU 8.5.7R* is that this does not apply on a consolidated basis. For the purpose of this chapter the calculations are carried out with respect to the whole of the activities of a *UCITS investment firm* *collective portfolio management investment firm*.

...

Please insert the following text after TP 34, all of the text is new and is not underlined.

**TP 35 AIFMD**

## Application

35.1 R *BIPRU* TP 35 applies to a *collective portfolio management investment firm*.

## Duration of transitional

35.2 R *BIPRU* TP 35 applies from 22 July 2013 until 21 July 2014

## Transitional provision

35.3 R (1) Where a *firm* meets the conditions in (2), the changes effected by Annex H of the Alternative Investment Fund Managers Directive Instrument 2013 do not apply and, therefore, the provisions in *BIPRU* amended by that Annex will continue to apply as they were in force as at 21 July 2013.

(2) The conditions referred to in (1) are:

- (a) the *firm* falls within regulation 72(1) of the *AIFMD UK regulation*; and
- (b) the *firm* does not have a *Part 4A permission to manage an AIF*.

## Annex I

### Amendments to the Prudential sourcebook for UCITS firms (UPRU)

In this Annex new text is underlined and struck through text is deleted unless otherwise indicated.

#### Part I: Comes into force on 22 July 2013

##### 1.1 Introduction

Application

1.1.1 R ~~This~~ Subject to 1.1.4R, this sourcebook and any provisions of the Interim Prudential sourcebook for investment businesses incorporated into this sourcebook by reference, apply to every *UCITS firm*.

...

1.1.4 R This sourcebook does not apply to a *UCITS firm* to which *IPRU(INV) 11 (Collective Portfolio Management Firms)* applies.

1.1.5 G *IPRU(INV) TP 5* allows a *UCITS firm* that is *authorised* as such on or before 21 July 2013 to continue to comply, if it so wishes, with *UPRU* rather than *IPRU (INV) 11* until 21 July 2014 or the date it becomes a *UK AIFM* (if earlier).

1.1.6 G This sourcebook will be deleted in its entirety on 22 July 2014 and, from this date, a *UCITS firm* must comply with *IPRU(INV) 11*.

#### Part II: Comes into force on 22 July 2014

This sourcebook is deleted in its entirety.

**Annex J**  
**Amendments to the Interim Prudential sourcebook for Investment Business**  
**(IPRU(INV))**

In this Annex, underlining indicates new text and strike through indicates deleted text, unless otherwise stated.

**Contents**

Chapter

...

10 [deleted]

11 Collective Portfolio Management Firms

...

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Transitional provisions

(1)	(2)	(3)	(4)	(5)	(6)
	Material to which the transitional provision applies		Transitional provision	Transitional provision: dates in force	Handbook provision: coming into force
...					
<u>5</u>	<u>IPRU(INV) 11</u>	<u>R</u>	<u>A UCITS firm authorised on or before 21 July 2013 need not comply with IPRU(INV) 11 until 22 July 2014 or the date it becomes a UK AIFM (if earlier), provided it continues to comply instead with UPRU.</u>	<u>22 July 2013 to 21 July 2014</u>	<u>22 July 2013</u>
<u>6</u>	<u>The changes to IPRU(INV) in Annex J of the Alternative Investment Fund Managers Directive Instrument</u>	<u>R</u>	<u>(1) Where a firm meets the conditions in (2) the changes effected by the Annex listed in column (2) do not apply and the provisions in IPRU(INV) amended by that Annex will continue to apply as they were in force as at 21 July 2013.</u> <u>(2) The conditions are: (a) the</u>	<u>From 22 July 2013 until 21 July 2014</u>	<u>22 July 2013</u>

	<u>2013</u>		<u>firm falls within regulation 72(1) of the AIFMD UK regulation; and (b) the firm does not have a Part 4A permission to manage an AIF.</u>		
<u>7</u>	<u>IPRU(INV) 11</u>	<u>R</u>	<u>Where a firm falls within regulation 74(1) or 75(1) of the AIFMD UK regulation it need not include AIFs managed by it that fall within those regulations in the calculation of its funds under management requirement, professional negligence capital requirement or PII excess capital requirement.</u>	<u>From 22 July 2013</u>	<u>22 July 2013</u>

## Chapter 1: Application and General Provisions

...

1.2.1 R The *Glossary* applies to the transitional provisions, this chapter (*IPRU(INV) 1*), *IPRU(INV) 2*, *IPRU(INV) 4*, *IPRU(INV) 6*, *IPRU(INV) 11* and *IPRU(INV) 13*.

1.2.2 R (1) *IPRU(INV)* applies to:

...

- (i) a credit union which is a CFT provider; ~~and~~
- (j) an exempt CAD firm; and
- (k) a collective portfolio management firm.

...

1.2.3 G For the avoidance of doubt, *IPRU(INV)* does not apply to any of the following:

...

- (g) a UCITS qualifier; ~~or~~
- (h) ~~a UCITS management company.~~

...

1.2.5 R Table

This table belongs to IPRU(INV) 1.2.4R

...

<i>Service company</i>	Chapters 1 and 6
<u><i>Collective portfolio management firm</i></u>	<u>Chapters 1 and 11</u>
<i>Personal investment firm</i>	Chapters 1 and 13

...

...

## Chapter 2: Authorised professional firms

...

2.1.2 R ...

(2) The type of *authorised professional firm* to which (1) applies is one:

...

~~(d) which acts as the trustee or operator of a regulated collective investment scheme;~~

(da) which acts as a small authorised UK AIFM or a residual CIS operator;

(db) which acts as a depositary;

...

...

2.1.4 R This table belongs to IPRU(INV) 2.1.1R

TYPE OF BUSINESS ACTIVITY	CHAPTER OF SOURCEBOOK
...	...
<del>(iv) acting as the ACD or depositary of an ICVC; or [deleted]</del>	
<u>(iva) acting as trustee or depositary of a UCITS; or</u>	
<u>(ivb) managing an AIF; or</u>	

<u>(ivc) acting as trustee or depositary of an AIF; or</u>	
<u>(v) establishing, operating or winding-up other collective investment schemes acting as a residual CIS operator; or</u>	
...	

...

- 2.1.7      G      The activities that a full-scope UK AIFM and a UCITS management company are allowed to perform are restricted by article 6 of AIFMD and article 6 of the UCITS Directive to the management of AIFs and/or UCITS and the additional investment activities permitted by article 6(4) of AIFMD and article 6(3) of the UCITS Directive (as applicable). As such, an authorised professional firm cannot be a collective portfolio management firm or a collective portfolio management investment firm.

...

## APPENDIX 1 – GLOSSARY OF TERMS FOR IPRU(INV) 3

...

*investment business* means any of the following regulated activities specified in Part II of the Regulated Activities Order and which is carried on by way of business:

...

- (i) ~~establishing, operating or winding up a collective investment scheme (article 51(1)(a)); [deleted]~~
- (ia) managing a UCITS (article 51ZA);
- (ib) acting as trustee or depositary of a UCITS (article 51ZB);
- (ic) managing an AIF (article 51ZC);
- (id) acting as trustee or depositary of an AIF (article 51ZD);
- (ie) acting as a residual CIS operator (article 51ZE);
- (j) ~~acting as a trustee of an authorised unit trust scheme (article 51(1)(b)) or acting as the depositary of an authorised contractual scheme (article 51(1)(bb)); [deleted]~~
- (k) ~~acting as the depositary or sole director of an open-ended~~

~~investment company (article 51(1)(e)); [deleted]~~

...

...

*scheme management activity*

~~means the management by an operator of a collective investment scheme of the property held for or within a collective investment scheme of which it is the operator and includes the management of the property of an open-ended investment company by the company itself as its operator but excludes the management of an open-ended investment company by another person as its operator (and excludes in all cases activities relating to transactions in units, shares or interests in the collective investment scheme); [deleted]~~

...

## 5 Chapter 5: Financial Resources

...

### *Exceptions from the liquid capital requirement*

5.2.3(2) R ...

- (i) is an *exempt CAD firm* which is also ~~an operator of a collective investment scheme~~ a residual CIS operator or a small authorised UK AIFM and that *scheme or AIF* only invests in *venture capital investments for non-retail clients*; or
- (ii) ...
- (c) the *firm* is a *trustee* of an *authorised unit trust scheme* whose *permitted business* consists only of *trustee activities* and does not include any other activity constituting *specified trustee business* or the *firm* is a *depository* of an *ICVC* or *ACS* or a *depository* appointed in line with FUND 3.11.12R (Eligible depositories for UK AIFs) or a *UK depository* of a non-EEA AIF whose *permitted business* consists only of *depository activities*.
- (d) the *firm's permitted business* limits it to acting as ~~the operator of a collective investment scheme~~ a residual CIS operator or a small authorised UK AIFM ~~whose where the main purpose of the collective investment scheme or AIF (as applicable) is to invest in permitted immovables whether in the UK or abroad.~~

### *Own funds requirement*

- 5.2.3(3) R The *own funds requirement* for a *firm* subject to rule 5.2.3(2) is the higher  
 (a) of:
- (i) £4,000,000 for a firm which is a trustee of an authorised unit trust scheme or a depositary of an ICVC or ACS;
  - (ia) €125,000 for *firm* which is a *depositary* appointed in line with *FUND 3.11.12R* (Eligible depositaries for UK AIFs) or a *UK depositary of a non-EEA AIF*; and
  - (ii) £5,000 for any other *firm*.

...

Table 5.2.3(5)(b) POSITION RISK REQUIREMENT

...

F ~~Determination of disallowed value of *units*~~

~~The disallowed value of units held in a *UCITS management company's* box is the difference between:~~

- ~~(a) the amount at which stocks of units in the box are valued in the balance sheet; and~~
- ~~(b) the adjusted value of the units, being the value of the units calculated at cancellation prices less the value calculated at cancellation prices of the units multiplied by the following percentages based on the types of *investments* in the individual *UCITS schemes*:~~

~~Quoted, fixed or floating rate interest bearing securities: 3%~~

~~Equities:~~

<del>— USA, Japan, Canada —</del>	<del>5%</del>
<del>— Europe —</del>	<del>6%</del>
<del>— Far East and other —</del>	<del>10%</del>

~~Note~~

~~This can be illustrated as follows: 100 units, comprising Far East equities, with unit cancellation price of 100 pence.~~

	<del>£</del>	<del>£</del>
<del>Balance sheet value</del>	<del>104</del>	
<del>Value of cancellation price</del>	<del>100</del>	
<del>Less £100 x 10%</del>	<del>10</del>	<del>90</del>

Disallowed 14

Note

The percentages in the requirement column are applied to the market value (unless otherwise stated) of gross positions i.e. both longs and shorts in each category; netting and offsetting are prohibited. The long or short position in a particular instrument is the net of any long or short positions held in that same instrument. ~~[deleted]~~

...

Table 5.2.3(5)(e) OTHER ASSETS REQUIREMENT

...

PART II

RISK FACTORS

Assets and Off-Balance Sheet Items	Risk Factor
Assets	
Cash at bank and in hand and equivalent items	NIL
Assets secured by acceptable collateral including deposits and certificates of deposit with lending institutions	<u>NIL</u>

...

...

Appendix 1 (Interpretation)

Glossary of Terms for Chapter 5 (Former IMRO Firms)

...

- funds under management*
- (1) ~~collective investment schemes other than OEICs managed by the firm including schemes where it has delegated the management function but excluding schemes that it is managing as delegate; and [deleted]~~
  - (2) ~~OEICs for which the firm is the designated management company. [deleted]~~

...

- specified trustee business*
1. means any investment business carried on in the UK by a trustee firm, but excluding each of the following activities:

...

- (d) **Establishing, operating or winding up a *collective investment scheme including or acting as trustee of an authorised unit trust scheme*** but only to the extent that such activities do not otherwise constitute *specified trustee business*.

...

...

Please insert the following chapter after IPRU(INV) 10, the text is all new and is not underlined.

## 11 Chapter 11: Collective Portfolio Management Firms

### 11.1 Introduction

#### Application

- 11.1.1 R This chapter applies to a *collective portfolio management firm*.
- 11.1.2 G A *collective portfolio management firm* that manages an *AIF* is an *internally managed AIF* or an *external AIFM*. This affects the *firm's base capital resources requirement* (see IPRU(INV) 11.3.1R). An *internally managed AIF* is not permitted to engage in activities other than the management of that *AIF*, whereas an *external AIFM* may manage *AIFs* and/or *UCITS*, provided it has *permission* to do so. A *firm* that is an *external AIFM* and/or a *UCITS management company* may undertake any of the additional investment activities permitted by article 6(4) of *AIFMD* or article 6(3) of the *UCITS Directive* (as applicable), provided it has *permission* to do so, but if so it is subject to *GENPRU* and *BIPRU* rather than *IPRU(INV)* and is classified as a *collective portfolio management investment firm*, as opposed to a *collective portfolio management firm*.

#### Relevant accounting principles

- 11.1.3 R (1) Except where a *rule* makes a different provision, terms in this chapter must have the meaning given to them in the Companies Act 2006 or the *firm's* accounting framework (usually *UK* generally accepted accounting principles or *IFRS*) where defined in that Act or framework.
- (2) Accounting policies must be the same as those adopted in the *firm's annual report and accounts* and must be consistently applied.

#### Purpose

- 11.1.4 G (1) This chapter amplifies *threshold condition 2D* (Appropriate resources) by providing that a *firm* must meet, on a continuing basis, a minimum capital resources requirement. This chapter also amplifies *Principles 3 and 4* which require a *firm* to take reasonable care to organise and control its affairs responsibly and effectively with adequate risk management systems, and to maintain adequate financial resources by setting out a capital resources requirement for a *firm* according to the *regulated activity* or activities it carries on.
- (2) This chapter also implements relevant requirements of *AIFMD* and the *UCITS Directive*, which includes imposing capital and professional indemnity insurance requirements on an *AIFM* and a *UCITS management company*.

## 11.2 Main requirements

### Collective portfolio management firm

- 11.2.1 R A *collective portfolio management firm* must:
- (1) when it first becomes a *collective portfolio management firm*, hold *initial capital* of not less than the applicable *base capital resources requirement* (in line with *IPRU(INV)* 11.3.1R);
- (2) at all times, maintain *own funds* which equal or exceed:
- (a) the higher of:
- (i) the *funds under management requirement* (in line with *IPRU(INV)* 11.3.2R); and
- (ii) the *fixed overheads requirement* (in line with *IPRU(INV)* 11.3.3R); plus
- (b) whichever is applicable of:
- (i) the *professional negligence capital requirement* (in line with *IPRU(INV)* 11.3.11G(1)(a)); or
- (ii) the *PII capital requirement* (in line with *IPRU(INV)* 11.3.11G(1)(b)); and
- (3) at all times, hold liquid assets (in line with *IPRU(INV)* 11.3.17R) which equal or exceed:
- (a) the higher of:
- (i) the *funds under management requirement* (in line with *IPRU(INV)* 11.3.2R) less the *base capital resources requirement* (in line with *IPRU(INV)* 11.3.1R); and
- (ii) the *fixed overheads requirement* (in line with

*IPRU(INV)* 11.3.3R); plus

- (b) whichever is applicable of:
- (i) the *professional negligence capital requirement* (in line with *IPRU(INV)* 11.3.11G(1)(a)); or
  - (ii) the *PII capital requirement* (in line with *IPRU(INV)* 11.3.11G(1)(b)).

[**Note:** article 9(5) and 9(7) of *AIFMD* and article 7(1)(a)(iii) of the *UCITS Directive*]

Professional negligence

- 11.2.2 G (1) The *professional negligence capital requirement* applies to a *firm* that manages an *AIF* (ie, an *external AIFM* or an *internally managed AIF*) and which, in line with *IPRU(INV)* 11.3.11G(1)(a), covers professional liability risks by way of *own funds*.
- (2) The *PII capital requirement* applies to a *firm* that manages an *AIF* and which, in line with *IPRU(INV)* 11.3.11G(1)(b), decides to cover professional liability risks by professional indemnity insurance.

### 11.3 Detail of main requirements

Base capital resources requirement

- 11.3.1 R The *base capital resources requirement* for a *collective portfolio management firm* is:
- (1) €125,000 for a *firm* that is a *UCITS firm* or an *external AIFM*; and
  - (2) €300,000 for an *internally managed AIF*.

[**Note:** article 9(1), (2) and (10) of *AIFMD* and article 7(1)(a) of the *UCITS Directive*]

Funds under management requirement

- 11.3.2 R The *funds under management requirement* is (subject to a maximum of €10,000,000) the sum of:
- (1) the *base capital resources requirement*; plus
  - (2) 0.02% of the amount by which the *funds under management* exceed €250,000,000,

[**Note:** article 9(3) of *AIFMD* and article 7(1)(a)(i) of the *UCITS Directive*]

Fixed overheads requirement

11.3.3 R The *fixed overheads requirement* is one quarter (13/52) of the *firm's* relevant fixed expenditure calculated in line with *IPRU(INV)* 11.3.4R.

[**Note:** article 9(5) of *AIFMD* and article 7(1)(a)(iii) of the *UCITS Directive*]

11.3.4 R In *IPRU(INV)* 11.3.3R, and subject to *IPRU(INV)* 11.3.6R to *IPRU(INV)* 11.3.9R, a *firm's* relevant fixed expenditure is the amount described as total expenditure in its final income statement (FSA030) for the previous financial year, less the following items (if they are included within such expenditure):

- (1) staff bonuses, except to the extent that they are guaranteed;
- (2) *employees'* and *directors'* shares in profits, except to the extent that they are guaranteed;
- (3) other appropriations of profits;
- (4) shared *commission* and fees payable which are directly related to *commission* and fees receivable which are included within total revenue;
- (5) interest charges in respect of borrowings made to finance the acquisition of the *firm's readily realisable investments*;
- (6) interest paid to *customers* on *client money*;
- (7) interest paid to *counterparties*;
- (8) fees, brokerage and other charges paid to *clearing houses*, exchanges and *intermediate brokers* for the purposes of *executing*, registering or clearing transactions;
- (9) foreign exchange losses; and
- (10) other variable expenditure.

11.3.5 G The income statement (FSA030) should be completed on a cumulative basis, so that the final income statement in a *firm's* financial year (ie the period that ends on the *firm's accounting reference date*) relates to the entire year.

11.3.6 R The relevant fixed expenditure of a *firm* is:

- (1) where its final income statement (FSA030) for the previous financial year does not relate to a twelve-month period, an amount calculated in accordance with *IPRU(INV)* 11.3.4R, pro-rated so as to produce an equivalent twelve-month amount; or
- (2) where it has not completed twelve months' trading, an amount based on forecast expenditure included in the budget for the first twelve months' trading, as submitted with its application for *authorisation*.

- 11.3.7 R A *firm* must adjust its relevant fixed expenditure calculation so far as necessary to the extent that since the submission of its final income statement (FSA030) for the previous financial year or since the budget was prepared (if *IPRU(INV)* 11.3.6R(2) applies):
- (1) its level of fixed expenditure changes materially; or
  - (2) the *regulated activities* comprised within its *permission* change.
- 11.3.8 G In *IPRU(INV)* 11.3.4R to *IPRU(INV)* 11.3.7R, fixed expenditure is expenditure which is inelastic relative to fluctuations in a *firm's* levels of business. Fixed expenditure is likely to include most salaries and staff costs, office rent, payment for the rent or lease of office equipment, and insurance *premiums*. It may be viewed as the amount of funds which a *firm* would require to enable it to cease business in an orderly manner, should the need arise. This is not an exhaustive list of such expenditure and a *firm* will itself need to identify which costs amount to fixed expenditure.
- 11.3.9 R If a *firm* has a material proportion of its expenditure incurred on its behalf by another *person* and such expenditure is not fully recharged by that *person*, then the *firm* must adjust its relevant fixed expenditure calculation by adding back in the whole of the difference between the amount of the expenditure and the amount recharged.
- 11.3.10 G Under *IPRU(INV)* 11.3.9R, the *FCA* would consider 10% of a *firm's* expenditure incurred on its behalf by other *persons* as material.

#### Professional negligence

- 11.3.11 G A *firm* that manages an *AIF* should:
- (1) cover the professional liability risks set out in article 12 of the *AIFMD level 2 regulation* (professional liability risks) (as replicated in *IPRU(INV)* 11.3.12EU) by either:
    - (a) maintaining an amount of *own funds* in line with article 14 of the *AIFMD level 2 regulation* (additional own funds) (as replicated in *IPRU(INV)* 11.3.14EU) (the *professional negligence capital requirement*); or
    - (b) holding professional indemnity insurance and maintaining an amount of *own funds* to meet the *PII capital requirement* under article 15 of the *AIFMD level 2 regulation* (professional indemnity insurance) (as replicated in *IPRU(INV)* 11.3.15EU) and *IPRU(INV)* 11.3.16R; and
  - (2) comply with the qualitative requirements addressing professional liability risks in article 13 of the *AIFMD level 2 regulation* (qualitative requirements addressing professional liability risks) (as replicated in *IPRU(INV)* 11.3.13EU).

## 11.3.12 EU

Professional liability risks	
1.	The professional liability risks to be covered pursuant to Article 9(7) of Directive 2011/61/EU shall be risks of loss or damage caused by a relevant person through the negligent performance of activities for which the AIFM has legal responsibility.
2.	Professional liability risks as defined in paragraph 1 shall include, without being limited to, risks of:
	(a) loss of documents evidencing title of assets of the AIF;
	(b) misrepresentations or misleading statements made to the AIF or its investors;
	(c) acts, errors or omissions resulting in a breach of:
	(i) legal and regulatory obligations;
	(ii) duty of skill and care towards the AIF and its investors;
	(iii) fiduciary duties;
	(iv) obligations of confidentiality;
	(v) AIF rules or instruments of incorporation;
	(vi) terms of appointment of the AIFM by the AIF;
	(d) failure to establish, implement and maintain appropriate procedures to prevent dishonest, fraudulent or malicious acts;
	(e) improperly carried out valuation of assets or calculation of unit/share prices;
	(f) losses arising from business disruption, system failures, failure of transaction processing or process management.
3.	Professional liability risks shall be covered at all times either through appropriate additional own funds determined in accordance with Article 14 or through appropriate coverage of professional indemnity insurance determined in accordance with Article 15.
[Note: article 12 of the <i>AIFMD level 2 regulation</i> ]	

## 11.3.13 EU

Qualitative requirements addressing professional liability risks	
1.	An AIFM shall implement effective internal operational risk

	management policies and procedures in order to identify, measure, manage and monitor appropriately operational risks including professional liability risks to which the AIFM is or could be reasonably exposed. The operational risk management activities shall be performed independently as part of the risk management policy.
2.	An AIFM shall set up a historical loss database, in which any operational failures, loss and damage experience shall be recorded. This database shall record, without being limited to, any professional liability risks as referred to in Article 12(2) that have materialised.
3.	Within the risk management framework the AIFM shall make use of its internal historical loss data and where appropriate of external data, scenario analysis and factors reflecting the business environment and internal control systems.
4.	Operational risk exposures and loss experience shall be monitored on an ongoing basis and shall be subject to regular internal reporting.
5.	An AIFM's operational risk management policies and procedures shall be well documented. An AIFM shall have arrangements in place for ensuring compliance with its operational risk management policies and effective measures for the treatment of non-compliance with these policies. An AIFM shall have procedures in place for taking appropriate corrective action.
6.	The operational risk management policies and procedures and measurement systems shall be subject to regular review, at least on an annual basis.
7.	An AIFM shall maintain financial resources adequate to its assessed risk profile.
[Note: article 13 of the <i>AIFMD level 2 regulation</i> ]	

## 11.3.14 EU

Additional own funds	
1.	This Article shall apply to AIFMs that choose to cover professional liability risks through additional own funds.
2.	The AIFM shall provide additional own funds for covering liability risks arising from professional negligence at least equal to 0,01 % of the value of the portfolios of AIFs managed.  The value of the portfolios of AIFs managed shall be the sum of the absolute value of all assets of all AIFs managed by the AIFM, including assets acquired through use of leverage, whereby derivative instruments shall be valued at their market value.

3.	<p>The additional own funds requirement referred to in paragraph 2 shall be recalculated at the end of each financial year and the amount of additional own funds shall be adjusted accordingly.</p> <p>The AIFM shall establish, implement and apply procedures to monitor on an ongoing basis the value of the portfolios of AIFs managed, calculated in accordance with the second subparagraph of paragraph 2. Where, before the annual recalculation referred to in the first subparagraph, the value of the portfolios of AIFs managed increases significantly, the AIFM shall without undue delay recalculate the additional own funds requirement and shall adjust the additional own funds accordingly.</p>
4.	<p>The competent authority of the home Member State of the AIFM may authorise the AIFM to provide additional own funds lower than the amount referred to in paragraph 2 only if it is satisfied — on the basis of the historical loss data of the AIFM as recorded over an observation period of at least three years prior to the assessment — that the AIFM provides sufficient additional own funds to appropriately cover professional liability risks. The authorised lower amount of additional own funds shall be not less than 0,008 % of the value of the portfolios of AIFs managed by the AIFM.</p>
5.	<p>The competent authority of the home Member State of the AIFM may request the AIFM to provide additional own funds higher than the amount referred to in paragraph 2 if it is not satisfied that the AIFM has sufficient additional own funds to appropriately cover professional liability risks. The competent authority shall give reasons why it considers that the AIFM's additional own funds are insufficient.</p>
<p>[<b>Note:</b> article 14 of the <i>AIFMD level 2 regulation</i>]</p>	

## 11.3.15 EU

Professional indemnity insurance	
1.	This Article shall apply to AIFMs that choose to cover professional liability risks through professional indemnity insurance.
2.	The AIFM shall take out and maintain at all times professional indemnity insurance that:
(a)	shall have an initial term of no less than one year;
(b)	shall have a notice period for cancellation of at least 90 days;
(c)	shall cover professional liability risks as defined in Article 12(1) and (2);
(d)	is taken out from an EU or non-EU undertaking authorised to

		provide professional indemnity insurance, in accordance with Union law or national law;
	(e)	is provided by a third party entity.
		Any agreed defined excess shall be fully covered by own funds which are in addition to the own funds to be provided in accordance with Article 9(1) and (3) of Directive 2011/61/EU.
3.		The coverage of the insurance for an individual claim shall be equal to at least 0,7 % of the value of the portfolios of AIFs managed by the AIFM calculated as set out in the second subparagraph of Article 14(2).
4.		The coverage of the insurance for claims in aggregate per year shall be equal to at least 0,9 % of the value of the portfolios of AIFs managed by the AIFM calculated as set out in the second subparagraph of Article 14(2).
5.		The AIFM shall review the professional indemnity insurance policy and its compliance with the requirements laid down in this Article at least once a year and in the event of any change which affects the policy's compliance with the requirements in this Article.
[Note: article 15 of the <i>AIFMD level 2 regulation</i> ]		

- 11.3.16 R If a *firm* satisfies the requirement referred to in *IPRU(INV)* 11.3.11G with professional indemnity insurance it must, in addition to maintaining an amount of *own funds* to cover any defined excess, hold adequate *own funds* to cover any exclusions in the insurance policy that would otherwise result in the *firm* having insufficient resources to cover liabilities arising. A *firm* may satisfy its requirements for professional indemnity insurance with a policy that also provides cover to one or more entities other than the *firm*, provided that the policy satisfies the conditions of the *AIFMD level 2 regulation*, exclusive of the cover provided to other entities.

#### Liquid assets

- 11.3.17 R For the purposes of this chapter, liquid assets are assets which:
- (1) are readily convertible to cash within one month; and
  - (2) have not been invested in speculative positions.
- 11.3.18 G Examples of liquid assets that are acceptable under *IPRU(INV)* 11.3.17R include cash, *readily realisable investments* that are not held for short-term resale, and debtors.

[Note: article 9(8) of *AIFMD*]

## 11.4 Method of calculating initial capital and own funds

<b>TABLE 11.4</b>			
<b>PART I</b>			
A firm must calculate its <i>initial capital</i> and <i>own funds</i> as shown below, subject to the detailed requirements set out in Part II.			
Paragraph		Category	Part II
<b>TIER 1</b>			
(1)	Paid-up share capital (excluding preference shares)	<b>A</b>	2
(2)	Share premium account		
(3)	Audited reserves and interim profits		3 and 4
(4)	Non-cumulative preference shares		
(5)	<i>Eligible LLP members' capital</i>		5
<b>Initial capital = A</b>			
<b>TIER 1</b>			
(6)	Investments in own shares	<b>B</b>	
(7)	Intangible assets		6
(8)	Material current year losses		7
(9)	<i>Excess LLP members' drawings</i>		
(10)	Material holdings in credit and financial institutions		8
<b>Tier 1 capital = (A-B) =</b>		<b>C</b>	
<b>TIER 2</b>			
<b>TIER 2</b>			1(b)
(11)	Revaluation reserves	<b>D</b>	
(12)	Fixed-term cumulative preference share capital		1(a)
(13)	Long-term <i>qualifying subordinated loans</i>		1(a); 9

	(14)	Other cumulative preference share capital and debt capital		
	(15)	Qualifying arrangements		10
<b>OWN FUNDS = (C+D) =</b>			<b>E</b>	
<b>PART II DETAILED REQUIREMENTS</b>				
<b>1</b>	<b>Ratios</b>			
	(a)	The total of fixed-term cumulative preference share capital (item 12) and long-term <i>qualifying subordinated loans</i> (item 13) that may be included in Tier 2 capital (D) is limited to 50 per cent of Tier 1 capital (C); and		
	(b)	Tier 2 capital (D) must not exceed 100 per cent of Tier 1 capital (C).		
<b>2</b>	<b>Non corporate entities</b>			
	(a)	In the case of partnerships, the following terms should be substituted, as appropriate, for items 1 to 4 in <i>initial capital</i> :		
		(i)	partners' capital accounts (excluding loan capital);	
		(ii)	partners' current accounts (excluding unaudited profits and loan capital); and	
		(iii)	proprietor's account (or other term used to signify the sole trader's capital but excluding unaudited profits).	
	(b)	Loans other than <i>qualifying subordinated loans</i> shown within partners' or proprietors' accounts must be classified as Tier 2 capital under item 14.		
	(c)	For the calculation of <i>initial capital</i> and <i>own funds</i> , partners' current accounts figures are subject to the following adjustments for of a <i>defined benefit occupational pension scheme</i> :		
		(i)	a <i>firm</i> must derecognise any <i>defined benefit</i> asset: and	
		(ii)	a <i>firm</i> may substitute for <i>defined benefit liability</i> the <i>firm's deficit reduction amount</i> . The election must be applied consistently in any one financial year.	

<b>Note</b>	
A <i>firm</i> should keep a record of and be ready to explain to its supervisory contacts in the <i>FCA</i> the reasons for any difference between the <i>deficit reduction amount</i> and any commitment the <i>firm</i> has made in a public document to provide funding for a <i>defined benefit occupational pension scheme</i> .	
<b>3</b>	<b>Audited Reserves (Item 3)</b>
For the calculation of <i>initial capital</i> and <i>own funds</i> , the following adjustments apply to the audited reserves figure:	
	(a) a <i>firm</i> must deduct any unrealised gains or, where applicable, add back in any unrealised losses on cash flow hedges of <i>financial instruments</i> measured at cost or amortised cost:
	(b) for a <i>defined benefit occupational pension scheme</i> , a <i>firm</i> must derecognise any <i>defined benefit asset</i> ; and
	(c) a <i>firm</i> may substitute for a <i>defined benefit liability</i> the <i>firm's deficit reduction amount</i> . The election must be applied consistently in respect of any one financial year.
<b>Note</b>	
A <i>firm</i> should keep a record of, and be ready to explain to its supervisory contacts in the <i>FCA</i> , the reasons for any difference between the <i>deficit reduction amount</i> and any commitment the <i>firm</i> has made in a public document to provide funding for a <i>defined benefit occupational pension scheme</i> .	
	(d) a <i>firm</i> must not include any unrealised gains from investment property.
<b>Note</b>	
Unrealised gains from investment property should be reported as part of revaluation reserves.	
	(e) where applicable, a <i>firm</i> must deduct any asset in respect of deferred acquisition costs and add back in any liability in respect of deferred income (but excluding from the deduction or addition any asset or liability which will give rise to future cash flows), together with any associated deferred tax.
<b>Note</b>	

<p>If the <i>firm</i> uses the exemption in Part 16 of the Companies Act 2006 (section 477 (Small companies: Conditions for exemption from audit)) relating to the audit of accounts then it will not be able to include its reserves under this Item (3), unless it appoints an auditor.</p>	
<p><b>4 Interim profits (Item 3)</b></p>	
<p>Non-<i>trading book</i> interim profits may only be included in Tier 1 of the calculation if they have been independently verified by the <i>firm's</i> auditor.</p>	
<p>For this purpose, the auditor should normally undertake at least the following:</p>	
	<p>(a) satisfy himself that the figures forming the basis of the interim profits have been properly extracted from the underlying accounting records;</p>
	<p>(b) review the accounting policies used in calculating the interim profits so as to obtain comfort that they are consistent with those normally adopted by the <i>firm</i> in drawing up its annual financial statements;</p>
	<p>(c) perform analytical review procedures on the results to date, including comparisons of actual performance to date with budget and with the results of prior periods;</p>
	<p>(d) discuss with management the overall performance and financial position of the <i>firm</i>;</p>
	<p>(e) obtain adequate comfort that the implications of current and prospective litigation, all known claims and commitments, changes in business activities and provisions for bad and doubtful debts have been properly taken into account in arriving at the interim profits; and</p>
	<p>(f) follow up problem areas of which the auditor is already aware in the course of auditing the <i>firm's</i> financial statements.</p>
<p>A <i>firm</i> wishing to include interim profits in Tier 1 capital must obtain a verification report signed by its auditor which states whether the interim results are fairly stated.</p>	
<p>Profits on the sale of capital items or arising from other activities which are not directly related to the <i>designated investment business</i> of the <i>firm</i> may also be included within the calculation of <i>own funds</i> if they can be separately verified by the <i>firm's</i> auditor. Such profits can form part of the <i>firm's</i> Tier 1 capital as audited profits.</p>	

<b>Note</b>	
If the <i>firm</i> uses the exemption in Part 16 of the Companies Act 2006 (section 477 (Small companies: Conditions for exemption from audit)) for the audit of accounts then it will not be able to include its interim profits under Item (3), unless it appoints an auditor.	
<b>5</b>	<b>Eligible LLP members' capital (Item 5)</b>
Members' capital of a <i>limited liability partnership</i> may only be included in <i>initial capital</i> (see item 5) if the conditions in <i>IPRU(INV)</i> Annex A 2.2R (Specific conditions for eligibility) and <i>IPRU(INV)</i> Annex A 2.3R (General conditions for eligibility) are satisfied.	
<b>6</b>	<b>Intangible assets (Item 7)</b>
Intangible assets comprise:	
	(a) formation expenses to the extent that these are treated as an asset in the <i>firm's</i> accounts;
	(b) goodwill, to the extent that it is treated as an asset in the <i>firm's</i> accounts; and
	(c) other assets treated as intangibles in the <i>firm's</i> accounts.
<b>7</b>	<b>Material current year losses (Item 8)</b>
Losses in current year operating figures must be deducted when calculating Tier 1 capital if such losses are material. For this purpose, profits and losses must be calculated quarterly, as appropriate. If this calculation reveals a net loss it shall only be deemed to be material for the purposes of this Table if it exceeds 10 per cent of the <i>firm's</i> Tier 1 capital.	
<b>8</b>	<b>Material holdings in credit and financial institutions (Item 10)</b>
Material holdings comprise:	
	(a) where the <i>firm</i> holds more than 10 per cent of the equity share capital of a <i>credit institution</i> or <i>financial institution</i> , the value of that holding and the amount of any subordinated loans to that institution and the value of holdings in <i>qualifying capital</i>

		<i>items</i> or <i>qualifying capital instruments</i> issued by that institution;
	(b)	for holdings other than those mentioned in (a) above, the value of holdings of equity share capital in, and the amount of subordinated loans made to, such institutions and the value of holdings in <i>qualifying capital items</i> or <i>qualifying capital instruments</i> issued by such institutions to the extent that the total of such holdings and subordinated loans exceeds 10 per cent of the <i>firm's own funds</i> calculated before the deduction of item 10.
<b>9</b>	<b>Long term <i>qualifying subordinated loans</i> (Item 13)</b>	
Loans having the characteristics prescribed by <i>IPRU(INV)</i> 11.5.1R may be included in item 13, subject to the limits in paragraph (1).		
<b>10</b>	<b>Qualifying arrangements (Item 15)</b>	
A <i>firm</i> may only include an arrangement in item 15 if it is a <i>qualifying capital instrument</i> or a <i>qualifying capital item</i> .		

## 11.5 Qualifying subordinated loans

Characteristics of long-term qualifying subordinated loans

- 11.5.1 R A long-term *qualifying subordinated loan* (item (13) of Table 11.4) must have the following characteristics:
- (1) the loan is repayable only on maturity or on the expiration of a period of notice under (3) below, or on the winding up of the *firm*;
  - (2) in the event of the winding up of the *firm*, the loan ranks after the claims of all other creditors and is not to be repaid until all other debts outstanding at the time have been settled;
  - (3) either:
    - (a) the minimum original maturity of the loan is five years; or
    - (b) the loan does not have a minimum or fixed maturity but requires five years notice of repayment; and
  - (4) the loan is fully paid-up.

[**Note:** article 4(1)(ad) of *AIFMD*, article 2(1)(l) of the *UCITS Directive* and article 64(3) of the *Banking Consolidation Directive*]

Amount allowable in the calculation of own funds

- 11.5.2 R *A firm* may only take into account the paid-up amount of a long term *qualifying subordinated loan* in the calculation of its *own funds*. This amount must be amortised on a straight-line basis over the five years prior to the date of repayment.

[**Note:** article 4(1)(ad) of *AIFMD*, article 2(1)(l) of the *UCITS Directive* and article 64(3)(c) of the *Banking Consolidation Directive*]

Form of qualifying subordinated loan agreement

- 11.5.3 R *A qualifying subordinated loan* must be in the form prescribed for Chapter 5 of *IPRU(INV)* by Annex D to *IPRU(INV)* with the following changes:
- (1) the reference to “Chapter 5” in Recital B on page 2 deleted and replaced with “Chapter 11”; and
  - (2) the references to “rule 5.2.1(1) of Chapter 5” in clause 3(b) (Interest) deleted and replaced with “rule 11.2.1 (collective portfolio management firm) of Chapter 11”.

Requirements on a firm in relation to qualifying subordinated loans

- 11.5.4 R *A firm* including a *qualifying subordinated loan* in its calculation of *own funds* must not:
- (1) secure all or any part of the loan; or
  - (2) redeem, purchase or otherwise acquire any of the liabilities of the borrower in respect of the loan; or
  - (3) amend or concur in amending the terms of the loan agreement; or
  - (4) repay all or any part of the loan otherwise than in line with the terms of the loan agreement; or
  - (5) take or omit to take any action which may terminate, impair or adversely affect the subordination of the loan or any part thereof.

Amend the following provisions.

## Chapter 14: Consolidated Supervision for Investment Businesses

...

14.1.4 R A *firm* need not meet the requirements in rules 14.3.1 and 14.3.2 if:

...

- (2) no *firm* in the group *deals in investments* as *principal*, except where it is ~~an operator of a collective investment scheme~~ dealing solely as a result of its activity of operating a *collective investment scheme*, or where the *firm's* positions fulfil the *CAD article 3 exempting criteria*;

...

## Annex A: LIMITED LIABILITY PARTNERSHIPS: ELIGIBLE MEMBERS' CAPITAL

1 Introduction

Application

1.1 R This annex applies to any *firm*:

- (1) that is a *limited liability partnership*; and
- (2) that is a kind of *firm* to whom the provisions of this sourcebook apply, ~~or which is a UCITS firm~~.

...

1.5 G The following *rules* allow inclusion of members' capital within a *firm's* capital if it meets the conditions in this annex:

Chapter	IPRU(INV) rule	How <i>eligible LLP members'</i> capital should be treated for the purposes of the <i>IPRU(INV)</i> rule
...		
10	Table 10-61(1)A Table 10-61(1)B Table 10-62(2)A Table 10-62(2)B Table 10-62(2)C	Eligible LLP members' capital may be counted as initial capital within the relevant table.
<u>11</u>	<u>Table 11.4</u>	<u>Eligible LLP members' capital may be counted as Item (5) in Table 11.4.</u>
...		

## Annex K

## Amendments to the Conduct of Business sourcebook (COBS)

In this Annex underlining indicates new text and striking through indicates deleted text.

## 1 Annex 1 Application (see COBS 1.1.2R)

## Part 1: What?

Modifications to the general application rule according to activities

...		
<u>7</u>		<u>Modified meaning of regulated activities for UK AIFMs and UK UCITS management companies</u>
<u>7.1</u>	<u>R</u>	<u>In determining whether a provision in COBS applies to a UK AIFM or a UK UCITS management company, an activity carried on by the firm which would be a regulated activity but for article 72AA (Managers of UCITS and AIFs) of the Regulated Activities Order, must be treated as a regulated activity carried on by the firm.</u>

...

## Part 3: Guidance

...		
<u>10.</u>		<u>AIFMD: effect on territorial scope</u>
<u>10.1</u>	<u>G</u>	<u>PERG 16 contains general guidance on the businesses to which AIFMD applies. FUND 1 contains guidance on the types of AIFM.</u>
<u>10.2</u>	<u>G</u>	<u>The only rule in this sourcebook which implements AIFMD is COBS 2.1.4R, which applies to:</u>
		<u>(1) a full-scope UK AIFM operating from an establishment in the UK or a branch in another EEA State; and</u>
		<u>(2) an incoming EEA AIFM branch.</u>
<u>10.3</u>	<u>G</u>	<u>The other rules in COBS which apply to a full-scope UK AIFM or incoming EEA AIFM (including an AIFM qualifier) fall outside the scope of AIFMD and are, therefore, not affected by its territorial scope.</u>

...

## 2.1 Acting honestly, fairly and professionally

...

### AIFMs

2.1.4 R A full-scope UK AIFM and an incoming EEA AIFM branch must, for all AIFs it manages:

- (1) act honestly, fairly and with due skill care and diligence in conducting their activities;
- (2) act in the best interests of the AIF it manages or the investors of the AIF it manages and the integrity of the market;
- (3) treat all investors fairly; and
- (4) not allow any investor in an AIF to obtain preferential treatment, unless such preferential treatment is disclosed in the relevant AIF's instrument constituting the fund.

[**Note:** article 12(1)(a), (b) and (f) and article 12(1) last paragraph of *AIFMD*]

### Subordinate measures for alternative investment fund managers

2.1.5 G Articles 16 to 29 of the AIFMD level 2 regulation provide detailed rules supplementing the relevant provisions of Article 12(1) of AIFMD.

...

## 3.2 Clients

...

Who is the client?

3.2.3 R ...

- (4) In relation to business that is neither *MiFID* or equivalent third country business, if a firm provides services to a *collective investment scheme fund* that does not have separate legal personality, that *collective investment scheme fund* will be the firm's client.

...

## 4.12 Unregulated collective investment schemes

4.12.1 R ...

(4)

Promotion to:	Promotion of an unregulated collective investment scheme which is:
...	
<p>Category 3 person</p> <p>A <i>person</i> who is eligible to participate in a scheme constituted under:</p> <p>(1) the Church Funds Investment measure 1958;</p> <p>(2) section 96 of the Charities Act 2011; <del>or</del></p> <p>(3) section 25 of the Charities Act (Northern Ireland) 1964; <del>or</del></p> <p>(4) section 100 of the Charities Act 2011.</p>	Any such <i>collective investment scheme</i>
...	

...

## 18.5 ~~Operators of collective investment schemes~~ Residual CIS operators, UCITS management companies and AIFMs

Application

18.5.1 R ~~This~~ Subject to *COBS 18.5.1AR*, this section applies to a *firm* which is ~~an operator of a collective investment scheme;~~

(1) a UCITS management company;

(2) a full-scope UK AIFM;

(3) a small authorised UK AIFM;

(4) a residual CIS operator; or

(5) an incoming EEA AIFM branch.

18.5.1 R *COBS 18.5.3R(2)* and *COBS 18.5.5R* to *COBS 18.5.18E* do not apply to a  
A *small authorised UK AIFM* of an *unauthorised AIF* which is not a *collective investment scheme*.

Application or modification of general COBS rules ~~for operators~~

18.5.2 R ~~An operator~~ A firm when it is carrying on *scheme management activity* or, for an AIFM, AIFM investment management functions;

- (1) must comply with the *COBS rules* specified in the table, as modified by this section; and
- (2) need not comply with any other *rule* in *COBS*.

18.5.2- G A For activities carried on by firms which are not scheme management activities or, for an AIFM, AIFM investment management functions, the COBS rules apply under the general application rule, as modified in COBS 1 Annex 1.

Table: Application of conduct of business rules

**Application of conduct of business rules**

Chapter, section or rule	Description	Modifications
1	Application	
2.1.1	Acting honestly, fairly and professionally	
2.3	Inducements	
2.4	Agent as client and reliance on others	
4.2.1– 4.2.3	Fair, clear and not misleading communications	
5.1	Distance communications	
5.2	E-Commerce	
6.1G.2	Re-registration requests: firms acting as registrars	
11.2	Best execution	In the case of an <i>unregulated collective investment scheme</i> , <i>COBS 18.5.4R (Modification of best execution)</i> applies instead of <i>COBS 11.2</i> in the circumstances set out in <i>COBS 18.5.4R</i> .
11.3	Client order handling	
11.5	Record keeping: client	

	orders and decisions to deal	
11.6	Use of dealing commission	
11.8	Recording telephone conversations and electronic communications	
18.5	Operators of collective investment schemes	

This table belongs to COBS 18.5.2R

<u>Chapter section rule</u>	<u>Full-scope UK AIFM</u>	<u>Small authorised UK AIFM and a residual CIS operator</u>	<u>Incoming EEA AIFM branch</u>	<u>UCITS management company</u>
<u>1</u>	<u>Applies</u>	<u>Applies</u>	<u>Applies</u>	<u>Applies</u>
<u>2.1.1</u>	<u>Does not apply</u>	<u>Applies</u>	<u>Does not apply</u>	<u>Applies</u>
<u>2.1.4</u>	<u>Applies</u>	<u>Does not apply</u>	<u>Applies</u>	<u>Does not apply</u>
<u>2.3</u>	<u>Does not apply</u>	<u>Applies</u>	<u>Does not apply</u>	<u>Applies</u>
<u>2.4</u>	<u>Does not apply</u>	<u>Applies</u>	<u>Does not apply</u>	<u>Applies</u>
<u>4.2.1 – 4.2.3</u>	<u>Applies</u>	<u>Applies</u>	<u>Applies</u>	<u>Applies</u>
<u>5.2</u>	<u>Applies</u>	<u>Applies</u>	<u>Applies</u>	<u>Applies</u>
<u>6.1G.2</u>	<u>Applies</u>	<u>Applies</u>	<u>Applies</u>	<u>Applies</u>
<u>11.2</u>	<u>Applies as modified by COBS 18.5.4AR</u>	<u>Applies to a small authorised UK AIFM of an authorised AIF. Applies (as modified by COBS 18.5.4R) to a small authorised UK AIFM of an unauthorised AIF or residual CIS operator</u>	<u>Applies as modified by COBS 18.5.4AR</u>	<u>Applies</u>
<u>11.3</u>	<u>Does not apply</u>	<u>Applies</u>	<u>Does not apply</u>	<u>Applies</u>
<u>11.5</u>	<u>Does not apply</u>	<u>Applies as rules</u>	<u>Does not apply</u>	<u>Does not apply</u>

<u>11.6</u>	<u>Applies</u>	<u>Applies</u>	<u>Applies</u>	<u>Applies</u>
<u>11.8</u>	<u>Applies</u>	<u>Applies</u>	<u>Applies</u>	<u>Applies</u>
<u>16.3</u>	<u>Does not apply</u>	<u>Applies to a <i>small authorised UK AIFM</i> of an <i>unauthorised AIF</i> which is not a <i>collective investment scheme</i>, as modified by <i>COBS 18.5.4BR</i>. <u>Otherwise does not apply.</u></u>	<u>Does not apply</u>	<u>Does not apply</u>
<u>18.5</u>	<u>Applies</u>	<u>Applies</u>	<u>Applies</u>	<u>Applies</u>

...

## General modifications

- 18.5.3 R ~~The~~ Where COBS rules specified in the table in COBS 18.5.2R apply to an operator when it is carrying on scheme management activity with the following modifications a firm carrying on scheme management activities or, for an AIFM, AIFM investment management functions, the following modifications apply:
- (1) subject to (2), references to *customer* or *client* are to be construed as references to any *scheme fund* in respect of which the ~~operator~~ firm is acting or intends to act, and with or for the benefit of which the relevant activity is to be carried on;
  - (2) in the case of an ~~unregulated collective investment scheme~~ a small authorised UK AIFM of an unauthorised AIF or a residual CIS operator, when an ~~operator~~ firm is required by the rules in COBS to provide information to, or obtain consent from, a *customer* or *client*, the ~~operator~~ firm must ensure that the information is provided to, or consent obtained from, ~~a participant an investor~~ or a potential participant investor in the scheme fund as the case may be;
  - (3) references to the service of *portfolio management* in COBS 11.2 (Best execution), ~~and~~ 11.3 (Client order handling) and 11.5 (Record keeping: client orders and transactions) are to be read as references to the management by an ~~operator~~ firm of *financial instruments* held for or within the *scheme fund* ~~of which it is the operator~~; and
  - (4) references to investment firm in COBS 11.5 are to be read as references to small authorised UK AIFM or residual CIS operator.

## Modification of best execution operators of unregulated collective investment schemes

- 18.5.4 R The best execution provisions applying to an ~~operator of a collective investment scheme~~ a small authorised UK AIFM of an unauthorised AIF or

*a residual CIS operator* do not apply in relation to ~~an unregulated collective investment scheme~~ a fund whose ~~scheme~~ fund documents include a statement that best execution does not apply in relation to the *scheme fund* and in which:

- (1) no ~~participant~~ investor is a retail client; or
- (2) no current ~~participant~~ investor in the *scheme fund* was a retail client ~~on joining the scheme~~ when it invested in the *fund* as a ~~participant~~.

18.5.4A R Only the following provisions in COBS 11.2 apply to a full-scope UK AIFM:

- (1) COBS 11.2.5G;
- (2) COBS 11.2.17G;
- (3) COBS 11.2.23AR, but references to management company should be read as references to an AIFM and references to unitholders are to be read as references to investors. This obligation only applies for the execution policy required under article 27(3) of the AIFMD level 2 regulation (Execution of decisions to deal on behalf of the managed AIF) ;
- (4) COBS 11.2.24R;
- (5) COBS 11.2.25R(1) and COBS 11.2.26R, but only where an AIF itself has a governing body which can provide prior consent; and
- (6) COBS 11.2.27R, but only regarding the obligation on an AIFM to notify the AIF of any material changes to their order execution arrangements or execution policy.

#### Modification of periodic reporting requirements

18.5.4B R A small authorised UK AIFM of an unauthorised AIF which is not a collective investment scheme must comply with COBS 16.3 (Periodic reporting) with references to managing investments to be construed as providing AIFM investment management functions.

#### Scheme documents for an unregulated collective investment scheme unauthorised fund

18.5.5 R An operator of an unregulated collective investment scheme A small authorised UK AIFM of an unauthorised AIF or a residual CIS operator must not accept a retail client as a participant an investor in the scheme fund unless it has taken reasonable steps to offer and, if requested, provide to the potential participant investor, scheme fund documents which adequately describe how the operation of the scheme fund is governed.

#### Distance marketing

18.5.5A G Firms should also be aware that if they are carrying on distance marketing

activity from an establishment in the UK, with or for a consumer in the UK or another EEA State, COBS 5.1 applies specific requirements for that activity.

#### Format and content of ~~scheme~~ fund documents

- 18.5.6 G ~~An operator's scheme~~ The fund documents required under COBS 18.5.5R may consist of any number of *documents* provided that it is clear that collectively they constitute the ~~scheme fund~~ documents and provided the use of several *documents* in no way diminishes the significance of any of the statements which are required to be given to the potential ~~participant~~ investor.
- 18.5.7 G The ~~scheme fund~~ documents of an ~~unregulated collective investment scheme unauthorised fund~~ managed by a ~~small authorised UK AIFM or a residual CIS operator~~ (if ~~they~~ those fund documents exist) should make it clear that if a ~~participant~~ an investor is reclassified as a *retail client*, this reclassification will not affect certain ~~scheme management activities~~ activities of the ~~firm operator of the scheme~~. In particular, despite such a reclassification, the ~~operator firm~~ will not be required to comply with the best execution provisions ~~applying to an operator of a collective investment scheme~~. It should be noted that there is no requirement that ~~scheme fund~~ documents must be produced for ~~by an unregulated collective investment scheme a small authorised UK AIFM of an unauthorised fund or a residual CIS operator~~.
- 18.5.8 R Where the ~~scheme fund~~ is an ~~unregulated collective investment scheme unauthorised fund~~ managed by a ~~small authorised UK AIFM or a residual CIS operator~~ and no current ~~participant~~ investor in the ~~scheme fund~~ was a *retail client* ~~on joining the scheme as a participant~~ when it invested in the ~~fund~~, the ~~scheme fund~~ documents must include a statement that:
- (1) explains that if a ~~participant~~ an investor is reclassified as a *retail client* subsequent to ~~joining the scheme as a participant~~ investing in the fund, then the ~~operator firm~~ may continue to treat all ~~participants~~ investors in the ~~scheme fund~~ as though they were not *retail clients*;
  - (2) explains that if a ~~participant~~ an investor is reclassified as a *retail client* subsequent to ~~joining the scheme as a participant~~ investing in the fund, then the modification of best execution (see ~~COBS 18.5.5R~~ 18.5.4R) will continue to apply to that ~~scheme fund~~; and
  - (3) explains that, in the event of such a reclassification, the ~~operator firm~~ will not be required to provide best execution in relation to the ~~scheme fund~~.
- 18.5.9 G ~~The operator~~ A small authorised UK AIFM of an unauthorised AIF or a residual CIS operator will still have to comply with other *COBS* provisions as a result of the reclassification of a ~~participant~~ an investor as a *retail client*. For example, the *firm* must provide *periodic statements* to ~~participants~~

investors who are *retail clients* in an *unregulated collective investment scheme unauthorised fund* (see the rule on periodic statements for an *unregulated collective investment scheme unauthorised fund (COBS 18.5.11R)*)).

#### Adequate information

- 18.5.10 E (1) In order to provide adequate information to describe how the operation of the *scheme fund* is governed, ~~an operator of an unregulated collective investment scheme~~ a *small authorised UK AIFM of an unauthorised AIF or a residual CIS operator* should include in the *scheme fund* documents a provision about each of the items of relevant information set out in the following table (Content of *scheme fund* documents).

...

Table: Content of *scheme fund* documents

#### Content of *scheme fund* documents

The <i>scheme fund</i> documents should include provision about:	
...	
(2)	Services the nature of the services that the <i>operator firm</i> will provide in relation to the <i>scheme</i> ;
(3)	Payments for services details of any payment for services payable by the <i>scheme fund</i> or from the property of the <i>scheme fund</i> or <i>participants investors</i> in the <i>scheme fund</i> to the <i>operator firm</i> , including where appropriate:
...	
(d)	whether or not any other payment is receivable by the <i>operator firm</i> (or to its knowledge by any of its <i>associates</i> ) in connection with any transactions effected by the <i>operator firm</i> with or for the <i>scheme fund</i> , in addition to or in lieu of any fees;
(4)	Commencement when and how the <i>operator firm</i> is appointed;
(5)	Accounting the arrangements for accounting to the <i>scheme fund</i> or <i>participants investors</i> in the <i>scheme fund</i> for any transaction effected;
(6)	Termination method

	how the appointment of the <i>operator firm</i> may be terminated;
(7)	Complaints procedure how to complain to the <i>operator firm</i> and a statement that the <i>participants investors</i> in the <i>scheme fund</i> may subsequently complain direct to the <i>Financial Ombudsman Service</i> ;
(8)	Compensation whether or not compensation may be available from the <i>compensation scheme</i> should the <i>operator firm</i> be unable to meet its liabilities, and information about any other applicable compensation scheme; and, for each applicable <i>compensation</i> scheme, the extent and level of cover and how further information can be obtained;
(9)	Investment objectives the investment objectives for the portfolio of the <i>scheme fund</i> ;
(10)	Restrictions
	(a) any restrictions on:
	(i) the types of <i>investments</i> or property which may be included in the portfolio of the <i>scheme fund</i> ;
	(ii) the markets on which <i>investments</i> or property may be acquired for the portfolio of the <i>scheme fund</i> ;
	(iii) the amount or value of any one <i>investment</i> or asset, or on the proportion of the portfolio of the <i>scheme fund</i> which any one <i>investment</i> or asset or any particular kind of <i>investment</i> or asset may constitute; or
	...
(11)	Holding <i>scheme fund</i> assets
	(a) if it is the case, that the <i>operator firm</i> will:
	(i) hold <i>money</i> on behalf of the <i>scheme fund</i> or be the <i>custodian</i> of <i>investments</i> or other property of the <i>scheme fund</i> ; or
	(ii) arrange for some other <i>person</i> to act in either capacity and, if so, whether that <i>person</i> is an associate of the <i>operator firm</i> identifying that <i>person</i> and describing the nature of any association; and
	(b) in either case:
	...

		(ii)	the arrangements for recording and separately identifying registrable <i>investments</i> of the <i>scheme fund</i> and, where the registered holder is the <i>operator's firm's</i> own nominee, that the <i>operator firm</i> will be responsible for the acts and omissions of that <i>person</i> ;
		(iii)	the extent to which the <i>operator firm</i> accepts liability for any loss of the <i>investment</i> of the <i>scheme fund</i> ;
		(iv)	the extent to which the <i>operator firm</i> or any other <i>person</i> mentioned in (11)(a)(ii), may hold a lien or security interest over <i>investments</i> of the <i>scheme fund</i> ;
		(v)	where <i>investments</i> of the <i>scheme fund</i> will be registered collectively in the same name, a statement that the entitlements of the <i>scheme fund</i> may not be identifiable by separate certificates or other physical documents of title, and that, should the <i>operator firm</i> default, any shortfall in <i>investments</i> of the <i>scheme fund</i> registered in that name may be shared proportionately among all <i>schemes funds</i> and any other <i>customers</i> of the <i>operator firm</i> whose <i>investments</i> are so registered;
		(vi)	whether or not <i>investments</i> or other property of the <i>scheme fund</i> can be lent to, or deposited by way of collateral with, a third party and whether or not <i>money</i> can be borrowed on behalf of the <i>scheme fund</i> against the security of those <i>investments</i> or property and, if so, the terms upon which they may be lent or deposited;
		(vii)	the arrangements for accounting to the <i>scheme fund</i> for <i>investments</i> of the <i>scheme fund</i> , for income received (including any interest on <i>money</i> and any income earned by lending <i>investments</i> or other property) of the <i>scheme fund</i> , and for rights conferred in respect of <i>investments</i> or other property of the <i>scheme fund</i> ;
		(viii)	the arrangements for determining the exercise of any voting rights conferred by <i>investments</i> of the <i>scheme fund</i> ; and
		(ix)	where <i>investments</i> of the <i>scheme fund</i> may be held by an eligible <i>custodian</i> outside the <i>United Kingdom</i> , a general statement that different settlement, legal and regulatory requirements, and different practices relating to the segregation of those <i>investments</i> , may apply;
(12)	Clients' money outside the United Kingdom if it is the case, that the <i>operator firm</i> may hold the <i>money</i> of the		

	<i>scheme fund</i> in a client bank account outside the United Kingdom;
(13)	Exchange rates if a liability of the <i>scheme fund</i> in one currency is to be matched by an asset in a different currency, or if the services to be provided to the <i>operator firm</i> for the <i>scheme fund</i> may relate to an <i>investment</i> denominated in a currency other than the currency in which the <i>investments</i> of the <i>scheme fund</i> are valued, a warning that a movement of exchange rates may have a separate effect, unfavourable or favourable, on the gain or loss otherwise made on the <i>investments</i> of the <i>scheme fund</i> ;
(14)	Stabilised investments if it is the case, that the <i>operator firm</i> is to have the right under the <i>scheme fund documents</i> to effect transactions in <i>investments</i> the prices of which may be the subject of stabilisation;
(15)	Conflict of interest and material interest if it is the case, that the <i>operator firm</i> is to have the right under the agreement or <i>instrument constituting the scheme instrument constituting the fund</i> to effect transactions on behalf of the <i>scheme fund</i> in which the <i>operator firm</i> has directly or indirectly a material interest (except for an interest arising solely from the <del>participation</del> <i>investment</i> of the <i>operator firm</i> as agent for the <i>scheme fund</i> ), or a relationship of any description with another party which may involve a conflict with the <i>operator's firm</i> duty to the <i>scheme fund</i> , together with a disclosure of the nature of the interest or relationship;
(16)	Use of dealing commission if the <i>operator firm</i> receives goods or services in addition to the <i>execution</i> of its <i>customer orders</i> in accordance with the section on the use of dealing commission, the prior disclosure required by the <i>rule</i> on prior disclosure (see COBS 11.6.2R);
(17)	Acting as principal if it is the case, that the <i>operator firm</i> may act as <i>principal</i> in a transaction with the <i>scheme fund</i> ;
(18)	Stock lending if it is the case, that the <i>operator firm</i> may undertake <i>stock lending activity</i> with or for the <i>scheme fund</i> specifying the type of assets of the <i>scheme fund</i> to be lent, the type and value of <i>relevant collateral</i> from the borrower and the method and amount of payment due to the <i>scheme fund</i> in respect of the lending;
(19)	Transactions involving contingent liability investments
(a)	if it is the case, that the agreement or <i>instrument constituting the scheme instrument constituting the fund</i> allows the

		<i>operator firm</i> to effect transactions involving <i>contingent liability investments</i> for the account of the portfolio of the <i>scheme fund</i> ;
	...	
	(c)	if applicable, that the <i>operator firm</i> has the authority to effect transactions involving <i>contingent liability investments</i> otherwise than under the rules of a <i>recognised investment exchange</i> or <i>designated investment exchange</i> and in a contract traded thereon;
	...	
(21)	Valuation	the bases on which assets comprised in the portfolio of the <i>scheme fund</i> are to be valued;
(22)	Borrowings	if it is the case, that the <i>operator firm</i> may supplement the funds in the portfolio of the <i>scheme fund</i> and, if it may do so:
	(a)	the circumstances in which the <i>operator firm</i> may do so;
	(b)	whether there are any limits on the extent to which the <i>operator firm</i> may do so and, if so, what those limits are; and
	...	
(23)	Underwriting commitments	if it is the case, that the <i>operator firm</i> may for the account of the portfolio of the <i>scheme fund</i> underwrite or sub-underwrite any issue or offer for sale of <i>securities</i> , and:
	...	
(24)	Investments in other <del>collective investment schemes</del> <i>funds</i>	whether or not the portfolio may <del>contain units in a collective investment scheme</del> invest in <i>funds</i> either <del>operated</del> <i>managed</i> or advised by the <i>operator firm</i> or by an <i>associate</i> of the <i>operator firm</i> or in a <del>collective investment scheme</del> <i>fund</i> which is not a <i>regulated collective investment scheme</i> ;
(25)	Investments in securities underwritten by the <i>operator firm</i>	whether or not the portfolio may contain <i>securities</i> of which any issue or offer for sale was underwritten, managed or arranged by the <i>operator firm</i> or by an <i>associate</i> of the <i>operator firm</i> during the preceding 12 months.

Application of COBS 18.5.10E to a full-scope UK AIFM

18.5.10 R A full-scope UK AIFM which markets an unauthorised AIF to a retail client  
A must, in addition to providing the information in FUND 3.2, take reasonable  
steps to offer and, if requested, provide to that potential investor information  
about the following items in the COBS 18.5.10E table (content of fund  
documents):

- (1) (1) (Regulator);
- (2) (4) (Commencement);
- (3) (5) (Accounting);
- (4) (6) (Termination method);
- (5) (7) (Complaints procedure);
- (6) (8) (Compensation);
- (7) (13) (Exchange rates);
- (8) (14) (Stabilised investments);
- (9) (16) (Use of dealing commission);
- (10) (17) (Acting as principal);
- (11) (23) (Underwriting commitments);
- (12) (24) (Investments in other funds); and
- (13) (25) (Investments in securities underwritten by the firm).

Periodic statements for an ~~unregulated collective investments scheme~~ unauthorised  
fund

18.5.11 R ~~An operator of an unregulated collective investment scheme~~ A small  
authorised UK AIFM of an unauthorised AIF or a residual CIS operator  
 must, subject to the exceptions from the requirement to provide a *periodic*  
*statement*, provide to ~~participants~~ investors in the *scheme fund*, promptly  
 and at suitable intervals, a statement in a *durable medium* which contains  
 adequate information on the value and composition of the portfolio of the  
*scheme fund* at the beginning and end of the period of the statement.

Promptness, suitable intervals and adequate information

18.5.12 E (1) ~~An operator~~ A small authorised UK AIFM of an unauthorised AIF  
or a residual CIS operator should act in accordance with the  
 provisions in the right hand column of the periodic statements table  
 (see COBS 18.5.15E) to fulfil the requirement to prepare and issue  
*periodic statements* indicated in the left hand column against these  
 provisions.

- (2) Compliance with (1) may be relied on as tending to establish compliance with the requirement to prepare and issue ~~periodic statements~~ periodic statements.
- (3) Contravention of (1) may be relied on as tending to establish contravention of the requirement to prepare and issue ~~periodic statements~~ periodic statements.

Exceptions from the requirement to provide a periodic statement

- 18.5.13 R (1) ~~An operator of an unregulated collective investment scheme~~ A small authorised UK AIFM of an unauthorised AIF or a residual CIS operator need not provide a *periodic statement*:
- (a) (i) to ~~a participant~~ an investor in the ~~scheme fund~~ who is a *retail client* ordinarily resident outside the *United Kingdom*; or
  - (ii) to ~~a participant~~ an investor in the ~~scheme fund~~ who is a *professional client*; if the ~~participant~~ investor has so requested or the ~~operator~~ firm has taken reasonable steps to establish that the ~~participant~~ investor does not wish to receive it; or
- ...
- (2) For a *firm* acting as an *outgoing ECA provider*, the exemption for *retail client* ~~participants~~ investors ordinarily resident outside the *United Kingdom* applies only to ~~a participant~~ an investor in the ~~scheme fund~~ who is a *retail client* ordinarily resident outside the *EEA*.

Record keeping requirements

- 18.5.14 R ~~An operator of an unregulated collective investment scheme~~ A small authorised UK AIFM of an unauthorised AIF or a residual CIS operator must make a copy of any *periodic statement* it has provided in accordance with the requirement to prepare and issue *periodic statements* to ~~participants~~ investors in the ~~scheme fund~~. The record must be retained for a minimum period of three years.

- 18.5.15 E Table: Periodic statements  
This table belongs to COBS 18.5.12E.

Periodic statements			
Suitable intervals	(1)	A <i>periodic statement</i> should be provided at least:	
		...	

		(b)	once in any other period, not exceeding 12 months, which has been mutually agreed between the <i>operator firm</i> and the <i>participant investor</i> in the <i>scheme fund</i> .	
Adequate information	(2)	(a)	A <i>periodic statement</i> should contain:	
			(i)	...
			(B)	where the portfolio of the <i>scheme fund</i> includes uncovered open positions in <i>contingent liability investments</i> , the additional information in the table listing the contents of a <i>periodic statement</i> (see <i>COBS 18.5.15E 18.5.18E</i> ) in respect of contingent liability investments; or
			(ii)	such information as a <i>participant an investor</i> who is a <i>retail client</i> ordinarily resident outside the <i>United Kingdom</i> , or a <i>professional client</i> , has on his own initiative agreed with the <i>operator firm</i> as adequate.
...				

...

18.5.17 E Table: General contents of a periodic statement  
This table belongs to *COBS 18.5.15E*.

General contents of periodic statements			
1	Contents and value		
	(a)	As at the beginning of the account period, the total value of the portfolio of the <i>scheme fund</i> , being either:	
		...	
		(ii)	in the case of the first <i>periodic statement</i> , the value of the assets comprised in the portfolio on the date on which the <i>operator firm</i> assumed responsibility for the management of the portfolio.
	(b)	As at the end of the account period:	

	(i)	the number, description and value of each <i>investment</i> held on behalf of the <i>scheme fund</i> ;
	(ii)	the amount of cash held on behalf of the <i>scheme fund</i> ; and
	(iii)	the total value of the portfolio of the <i>scheme fund</i> .
2	<p>Basis of valuation</p> <p>A statement of the basis on which the value of each <i>investment</i> has been calculated and, if applicable, a statement that the basis for valuing a particular <i>investment</i> has changed since the previous <i>periodic statement</i>. Where any <i>investments</i> are shown in a currency other than the usual one used for valuation of the portfolio of the <i>scheme fund</i>, the relevant currency exchange rates must be shown.</p>	
3	<p>Details of any assets loaned or charged</p>	
	(a)	A summary of those <i>investments</i> (if any) which were, at the closing date, loaned to any third party and those <i>investments</i> (if any) that were at that date charged to secure borrowings made on behalf of the portfolio of the <i>scheme fund</i> ; and
	...	
4	<p>Transactions and changes in composition</p> <p>Except in the case of a portfolio which aims to track the performance of an external index:</p>	
	(a)	a statement that summarises the transactions entered into for the portfolio of the <i>scheme fund</i> during the period; and
	(b)	the aggregate of <i>money</i> and a summary of all investments transferred into and out of the portfolio of the <i>scheme fund</i> during the period; and
	(c)	the aggregate of any interest payments, dividends and other benefits received by the <i>operator firm</i> for the portfolio of the <i>scheme fund</i> during that period.
5	<p>Charges and remuneration</p> <p>If not previously advised in writing, a statement for the account period:</p>	
	(a)	of the aggregate charges of the <i>operator firm</i> and its <i>associates</i> ; and
	(b)	of any <i>remuneration</i> received by the <i>operator firm</i> or its <i>associates</i> or both from a third party in respect of the transactions entered into, or any other services provided, for the portfolio of the <i>scheme fund</i> .

6	<p>Movement in value of portfolio</p> <p>A statement of the difference between the value of the portfolio at the closing date and its value at the starting date of the account period, having regard at least, during the account period, to the following:</p>
(a)	the aggregate of assets received from <del>participants</del> <u>investors</u> of the <i>scheme fund</i> and added to the portfolio of the <i>scheme fund</i> ;
(b)	the aggregate of the value of assets transferred, or of amounts paid, to the <i>scheme fund</i> ;
(c)	the aggregate income received on behalf of the <i>scheme fund</i> in respect of the portfolio; and
(d)	the aggregate of realised and unrealised profits or gains and losses attributable to the assets comprised in the portfolio of the <i>scheme fund</i> .
<p>Notes:</p> <p>For the purposes of Item 1, where the <i>scheme fund</i> is a <i>property enterprise trust</i>, it will be sufficient for the <i>periodic statement</i> to disclose the number of properties held in successive valuation bands where this is appropriate to the size and composition of the <i>scheme fund</i>, rather than the value of each asset in the portfolio. The valuation bands of over £10m, £5-£10m, £2.5-£5m, £1-£2.5m and under £1m would be appropriate, unless <del>an operator</del> <u>a firm</u> could show that different bands were justifiable in the circumstances. The statement to be provided under Item 6 is not intended to be an indicator of the performance of the portfolio of the <i>scheme fund</i>. <del>An operator</del> <u>A firm</u> may wish to distinguish capital and income, and thereby provide more information than referred to in this table. If the statement includes some measure of performance, the basis of measurement should be stated.</p>	

- 18.5.18 E Table: Contents of a periodic statement in respect of contingent liability investments  
This table belongs to COBS 18.5.15E.

Contents of a periodic statement in respect of contingent liability investments	
(1)	<p>Changes in value</p> <p>The aggregate of <i>money</i> transferred into and out of the portfolio of the <i>scheme fund</i> during the account period.</p>
(2)	<p>Open positions</p> <p>In relation to each open position in the portfolio of the <i>scheme fund</i> at the end of the account period, the unrealised profit or loss to the portfolio of the <i>scheme fund</i> (before deducting or adding any <i>commission</i> which would be payable on closing out).</p>

(3)		<p>Closed positions</p> <p>In relation to each transaction effected during the account period to close out a position of the <i>scheme fund</i>, the resulting profit or loss to the portfolio of the <i>scheme fund</i> after deducting or adding any <i>commission</i>.</p> <p>(Instead of the specific detail required by Items 2 or 3, the statement may show the net profit or loss in respect of the overall position of the <i>scheme fund</i> in each contract)</p>
(4)		<p>Aggregate of contents</p> <p>The aggregate of each of the following in, or relating to, the portfolio of the <i>scheme fund</i> at the close of business on the valuation date:</p>
	...	
	(d)	<p><i>commissions</i> attributable to transactions during the period or a statement that this information has been separately disclosed in writing on earlier statements or confirmations to the <i>participant investor</i>.</p>
(5)		<p>Option account valuations</p> <p>In respect of each open <i>option</i> comprising the portfolio of the <i>scheme fund</i> on the valuation date:</p>
	...	
		<p><i>Options</i> account valuations may show an average trade price and market price in respect of an <i>option</i> series where a number of contracts within the same series have been purchased on behalf of the <i>scheme fund</i>.</p>

...

**18.10 UCITS qualifiers, AIFM qualifiers and service companies**

...

18.10.2 R COBS 4 and COBS 12.4 apply to an AIFM qualifier.

...

**TP 1 Transitional Provisions relating to Client Categorisation**

(1)	(2)	(3)	(4)	(5)	(6)
-----	-----	-----	-----	-----	-----

	Material to which the transitional provision applies		Transitional provision	Transitional provision: date in force	Handbook provisions : coming into force
...					
<u>2.23</u>	<u>The changes to COBS set out in Annex K of the Alternative Investment Fund Managers Directive Instrument 2013</u>	<u>R</u>	<p><u>(1) Where a <i>firm</i> meets the conditions in (2), the changes effected by the Annex listed in column (2) do not apply and, therefore, the provisions in COBS amended by that Annex will continue to apply as they were in force as at 21 July 2013.</u></p> <p><u>(2) the conditions are:</u>  <u>(a) the <i>firm</i> falls within regulation 73(1) of the AIFMD UK regulation; and</u>  <u>(b) the <i>firm</i> does not have a Part 4A permission to manage an AIF.</u></p>	<u>From 22 July 2013 until 21 July 2014</u>	<u>22 July 2013</u>

## Annex L

## Amendments to the Client Assets sourcebook (CASS)

In this Annex, underlining indicates new text and striking through indicates deleted text.

**Part I: Comes into force on 22 July 2013**

**1 Application and general provisions**

...

**1.4 Application: particular activities**

...

Depositories

...

1.4.6A G Firms acting as trustee or depositary of an AIF are reminded of the obligations in FUND 3.11 (Depositaries) and Chapter IV (Depositary) of the AIFMD level 2 regulation which apply in addition to those in CASS.

1.4.7 R ~~The remainder of~~ Subject to CASS 1.4.6R, CASS applies to a *depositary*, when acting as such, with the following general modifications: '*client*' means '*trustee*', '*trust*', '*AIF*', '*AIFM acting on behalf of the AIF*', or '*collective investment scheme*', as appropriate.

(1) ~~except in the mandate rules,~~ '*client*' means '*trustee*', '*trust*' or '*collective investment scheme*' as appropriate; and

(2) ~~in the mandate rules,~~ '*client*' means '*trustee*', '*collective investment scheme*' or '*collective investment scheme instrument*' as appropriate.

...

**6 Custody rules**

**6.1 Application**

6.1.1 R This chapter (the *custody rules*) applies to a *firm*:

...

(1A) when it holds *financial instruments* belonging to a *client* in the course

of its *MiFID business*; ~~and/or~~

(1B) when it is *safeguarding and administering investments*, in the course of business that is not *MiFID business*;

(1C) when it is acting as trustee or depositary of an AIF; and/or

(1D) when it is acting as trustee or depositary of a UCITS.

...

6.1.1B R *Firms* to which the *custody rules* apply by virtue of CASS 6.1.1R (1B), (1C) or (1D) must also apply the *custody rules* to those *custody assets* which are not *safe custody investments* in a manner appropriate to the nature and value of those *custody assets*.

...

Managers of AIFs and UCITS

6.1.16 G The custody rules do not apply to a firm that is managing an AIF or managing a UCITS in relation to activities which are carried on by that firm in connection with, or for the purposes of, managing the AIF or UCITS.  
BA

...

Trustees and depositaries (except depositaries of AIFs)

...

6.1.16F R When a *trustee firm* or *depositary* acts as a *custodian* for a trust or *collective investment scheme*, (except for a firm acting as trustee or depositary of an AIF), and:

...

...

Depositaries of AIFs

6.1.16I R (1) Subject to (2), when a firm is acting as trustee or depositary of an AIF the firm need comply only with the custody rules in the table below:  
A

<u>Reference</u>	<u>Rule</u>
<u>CASS 6.1.1R, CASS 6.1.9G, CASS 6.1.9AG and CASS 6.1.16IBG</u>	<u>Application</u>
<u>CASS 6.1.22G to CASS 6.1.24G</u>	<u>General purpose</u>
<u>CASS 6.2.3R and CASS 6.2.4R to CASS 6.2.6G</u>	<u>Registration and recording</u>

<u>CASS 6.2.7R</u>	<u>Holding</u>
<u>CASS 6.3.1R(1A) and CASS 6.3.1R(4)</u>	<u>Arranging registration</u>
<u>CASS 6.5.1R, CASS 6.5.2AR, CASS 6.5.3R, CASS 6.5.13R(1A) and CASS 6.5.14G</u>	<u>Records, accounts and reconciliations</u>

- (2) When a firm is acting as trustee or depositary of an AIF that is an authorised AIF the firm must, in addition to the custody rules in (1), also comply with the custody rules in the table below:

<u>Reference</u>	<u>Rule</u>
<u>CASS 6.1.1B R</u>	<u>Application</u>
<u>CASS 6.5.4G(1A) to CASS 6.5.4G(4), CASS 6.5.5R, CASS 6.5.7AG, CASS 7.5.8AG, CASS 6.5.9G and CASS 6.5.15G</u>	<u>Records, accounts and reconciliations</u>

6.1.16I G Firms acting as trustee or depositary of an AIF are reminded of the  
B obligations in FUND 3.11 (Depositaries) and Chapter IV (Depositary) of the  
AIFMD level 2 regulation which apply in addition to those in CASS 6.

6.1.16I G A firm (Firm A) to which another firm acting as trustee or depositary of an  
C AIF (Firm B) has delegated safekeeping functions in line with FUND  
3.11.25R (Delegation: safekeeping) will not itself be acting as trustee or  
depositary of an AIF for that AIF. CASS 6.1.16IAR will not apply to Firm A  
in respect of that AIF. However, Firm A may be safeguarding and  
administering investments in respect of that AIF.

...

## **6.5 Records, accounts and reconciliations**

...

6.5.4 G ...

- (1A) For a firm acting as trustee or depositary of an AIF that is an  
authorised AIF, carrying out internal reconciliations of the safe  
custody assets held for each client with the safe custody assets held by  
the firm and third parties is an important step in the discharge of the  
firm's obligations under article 89(1)(b) (Safekeeping duties with  
regard to assets held in custody) of the AIFMD level 2 regulation and,  
where relevant, SYSC 4.1.1R (General requirements) and SYSC 6.1.1R  
(Compliance).

...

...

6.5.7A    **G**    If a firm acting as trustee or depositary of an AIF that is an authorised AIF deposits safe custody assets belonging to a client with a third party, under article 89(1)(c) (Safekeeping duties with regard to assets held in custody) of the AIFMD level 2 regulation, the firm should seek to ensure that the third party will deliver to the firm a statement as at a date or dates specified by the firm which details the description and amounts of all the safe custody assets credited to the account, and that this statement is delivered in adequate time to allow the firm to carry out the periodic reconciliations required under article 89(1)(c) (Safekeeping duties with regard to assets held in custody) of the AIFMD level 2 regulation.

...

6.5.8A    **G**    A firm acting as trustee or depositary of an AIF that is an authorised AIF should perform the reconciliation under article 89(1)(c) (Safekeeping duties with regard to assets held in custody) of the AIFMD level 2 regulation:

- (1) as regularly as is necessary; and
- (2) as soon as reasonably practicable after the date to which the reconciliation relates;

to ensure the accuracy of its internal accounts and records against those of third parties by whom safe custody assets are held.

...

6.5.13    **R**    A firm must inform the FCA in writing without delay:

...

- (1A) if it is a firm acting as trustee or depositary of an AIF and has not complied with, or is materially unable to comply with, the requirements in CASS 6.5.1R and/or articles 89(1)(b) or 89(1)(c) (Safekeeping duties with regard to assets held in custody) of the AIFMD level 2 regulation; or

...

Audit of compliance with the ~~MFID~~ MiFID custody rules

...

## **8 Mandates**

## 8.1 Application

...

8.1.2A R The *mandate rules* do not apply to a *firm*:

...

- (2) in relation to *safe custody assets* that the *firm* is holding, or in respect of which the *firm* is carrying on *safeguarding and administration of assets (without arranging), acting as trustee or depositary of an AIF or acting as trustee or depositary of a UCITS* in accordance with CASS 6; or

...

...

## 8.2 Definition of mandate

8.2.1 R A *mandate* is any means that give a *firm* the ability to control a *client's* assets or liabilities, which meet the conditions in (1) to (5):

...

- (4) they put the *firm* in a position where it is able to give any or all of the types of instructions described in (a) to (d):

...

- (c) instructions to another *person* in relation to an asset of the *client*, where that other *person* is responsible to the *client* for holding that asset (including where that other person is *safeguarding and administering investments, acting as trustee or depositary of an AIF or acting as trustee or depositary of a UCITS*);

...

...

## 9 Prime brokerage

...

### 9.2 Prime broker's daily report to clients

...

9.2.2 G Where a *firm* has entered into an agreement with a *client* under article 91

(Reporting obligations for prime brokers) of the AIFMD level 2 regulation, and to the extent that the firm makes available to the client the same statements as specified by that article that it is required to provide to the relevant depositary, the FCA will treat the obligations under CASS 9.2.1R as satisfied by the firm.

### 9.3 Prime brokerage agreement disclosure annex

...

#### 9.3.2 G ...

- (2) A Subject to paragraph (3), a prime brokerage firm should not enter into "right to use arrangements" for a *client's safe custody assets* unless:

...

are each satisfied that the *firm* has adequate systems and controls to discharge its obligations under *Principle 10* which include (where applicable):

...

- (3) Paragraph (2) does not apply where the prime brokerage firm is also acting as trustee or depositary of an AIF which is an unauthorised AIF and exercises a right of reuse for a safe custody asset of that unauthorised AIF under FUND 3.11.24R (Reuse of assets).

## 10 CASS resolution pack

### 10.1 Application, purpose and general provisions

Application

- 10.1.1 R (1) Subject to (2) this chapter applies to a *firm* when it:

- (a) holds *financial instruments*, ~~or~~ *is safeguarding and administering investments*, is acting as trustee or depositary of an AIF or is acting as trustee or depositary of a UCITS, in accordance with *CASS 6*; and/or

...

...

## Sch 2 Notification requirements

Sch  
2.1G

Handbook reference	Matter to be notified	Contents of notification	Trigger event	Time allowed
...				
<u>CASS 6.5.13R(1A)</u>	<u>Non-compliance or material inability to comply with the requirements in CASS 6.5.1 R (Records and accounts) and/or articles 89(1)(b) or 89(1)(c) (Safekeeping duties with regard to assets held in custody) of the AIFMD level 2 regulation</u>	<u>The fact that the <i>firm</i> has not complied or is materially unable to comply with the requirements and the reasons for that</u>	<u>Non-compliance or material inability to comply with the requirement</u>	<u>Without delay</u>
...				

**Part II: Comes into force on 22 July 2014****6 Custody rules****6.1 Application**

...

~~Operators of regulated collective investment schemes~~

- 6.1.16B R ~~The *custody rules* do not apply to a *firm* when it acts as the *operator* of a *regulated collective investment scheme*, in relation to activities carried on for the purpose of, or in connection with, the operation of the *scheme*. [deleted]~~

**Annex M**

**Amendments to the Supervision manual (SUP)**

In this Annex, underlining indicates new text and striking through indicates deleted text except where indicated otherwise.

**Part I: Comes into force on 22 July 2013**

**3 Auditors**

...

**3.10 Duties of auditors: notification and report on client assets**

...

**3.10.5 R Client assets report**

...	
(3)	in the case of an <i>investment management firm, personal investment firm, a UCITS firm, securities and futures firm, <u>firm acting as trustee or depositary of an AIF, firm acting as trustee or depositary of a UCITS</u> or BIPRU investment firm</i> , when a <i>subsidiary</i> of the <i>firm</i> is during the period a <i>nominee company</i> in whose name <i>custody assets</i> of the <i>firm</i> are registered during the period, that <i>nominee company</i> has maintained throughout the period systems for the custody, identification and control of <i>custody assets</i> which:
...	

...

**3 Annex Auditor's client assets report**

**1R**

...

Instructions for Part 1:

...

\*\* In accordance with SUP 3.10.5R(3), the opinion relating to the nominee company is only required to be included in the case of a nominee company in whose name custody assets are registered where that company is a subsidiary of an investment management firm, personal investment firm, a UCITS firm, securities and futures firm, firm acting as a depositary of an AIF or a UCITS or

BIRPU investment firm.

...

## 10A FCA Approved Persons

### 10A.1 Application

...

Internally managed corporate AIFs

10A.1.24 G In accordance with section 59(7C) of the Act this chapter does not apply to an internally managed corporate AIF.

### 10A.6 FCA governing functions

...

What the FCA governing functions include

10A.6.3 R Each of the *FCA governing functions* includes:

- (1) (where apportioned under SYSC 2.1.1R or SYSC 4.3.1R and SYSC 4.4.3R (or, for a *full-scope UK AIFM* apportioned under article 60(1) of the *AIFMD level 2 regulation*))

...

...

### 10A.7 FCA required functions

...

Compliance oversight function (CF10)

10A.7.8 R The *compliance oversight function* is the function of acting in the capacity of:

- (1) a *director* or *senior manager* who is allocated the function set out in SYSC 3.2.8R or SYSC 6.1.4R(2); or
- (2) for a *full-scope UK AIFM*, a person allocated the function in article 61(3)(b) of the *AIFMD level 2 regulation*.

...

## 10A.8 Systems and controls functions

...

### Full-scope UK AIFM

- 10A.8.5 G For a full-scope UK AIFM, the requirement to have an employee responsible for reporting to the governing body of the firm or the audit committee for matters in SYSC 10A.8.1R(2) and (3) is derived from the AIFMD level 2 regulation, which imposes obligations on such firms to have a permanent risk management function and, where appropriate and proportionate for their business, an internal audit function.

...

## 13 Exercise of passport rights by UK firms

...

### 13.2 Introduction

...

- 13.2.5 G A UK firm that is an AIFM will only be entitled to carry on an activity under AIFMD under a passport in another EEA State if it is a full-scope UK AIFM.

### 13.3 Establishing a branch in another EEA State

...

The conditions for establishing a branch

- 13.3.2 G A UK firm other than a UK pure reinsurer cannot establish a branch in another EEA State for the first time under an EEA right unless the relevant conditions in paragraphs paragraph 19(2), (4) and (5) of Part III of Schedule 3 to the Act are satisfied. It is an offence for a UK firm which is not an authorised person to contravene this prohibition (paragraph 21 of Part III of Schedule 3 to the Act). These conditions are that:

...

- (2A) If the *UK firm's EEA right* relates to providing *collective portfolio management services* under the UCITS Directive, the *FCA* has provided to the *Host State regulator*:

...

- (3) ...

- (b) in any other case (except for a firm passporting under AIFMD):

...

...

- 13.3.4-A G If a UK firm is passporting under AIFMD, it may establish a branch in another EEA State as soon as the conditions in SUP 13.3.2G(1) and (2) are met.

Issue of a consent notice to the Host State regulator

- 13.3.5 G ...

- (1B) Where the UK firm's EEA right derives from AIFMD, the FCA will give the Host State regulator a consent notice within two months of having received the notice of intention and immediately inform the UK firm pursuant to SUP 13.3.6G if the FCA is satisfied that the firm complies, and continues to comply with:

- (a) the provisions implementing the AIFMD; and

- (b) any directly applicable EU regulation made under that directive.

...

- 13.3.6 G ...

- (4) Where a consent notice is given under the AIFMD it must include confirmation that the UK firm has been authorised by the FCA

under AIFMD.

13.3.7 G ...

- (2) If the *appropriate UK regulator* decides to refuse to give a *consent notice*, then paragraph 19(12) of Part III of Schedule 3 to the *Act* requires the *appropriate UK regulator* to give the *UK firm* a *decision notice* within three *months* of the date on which it received the *UK firm's notice of intention* (two *months* in the case of a *UK firm* which is a *UCITS management company* or an *AIFM*). The *UK firm* may refer the matter to the *Tribunal*.

...

#### 13.4 Providing cross-border services into another EEA State

...

13.4.2 G A *UK firm*, other than a *UK pure reinsurer* or an *AIFM* exercising an *EEA right to market an AIF* under *AIFMD*, cannot start providing *cross-border services* into another *EEA State* under an *EEA right* unless it satisfies the conditions in paragraphs 20(1) of Part III of Schedule 3 to the *Act* and, if it derives its *EEA right* from the *Insurance Directives*, *AIFMD*, *MiFID* or the *UCITS Directive*, paragraph 20(4B) of Part III of Schedule 3 to the *Act*. It is an offence for a *UK firm* which is not an *authorised person* to breach this prohibition (paragraph 21 of Part III of Schedule 3 to the *Act*). The conditions are that:

...

- (3) if the *UK firm* is passporting under the *Insurance Mediation Directive* and the *EEA State* in which the *UK firm* is seeking to provide services has notified the European Commission of its wish to be informed of the intention of *persons* to provide *cross border services* in its territory in accordance with article 6(2) of that directive, one *month* has elapsed beginning with the date on which the *UK firm* received written notice from the *appropriate UK regulator* as described in SUP 13.4.5G (paragraph 20 (3B)(c) of Schedule 3 to the ~~*Act*~~ *Act*, or
- (4) if the *UK firm* is passporting under *AIFMD*, the *firm* has received written notice from the *FCA* as described in SUP 13.4.4-AG(1)(c).

...

...

13.4.2F     G     A UK firm that is an AIFM may exercise an EEA right to market a UK AIF or EEA AIF managed by it under AIFMD when the following conditions are satisfied:

- (1)     the UK firm has given the FCA a notice of intention to market the AIF under SUP 13.5.2R; and
- (2)     the FCA has sent a copy of the notice of intention to the Host State regulator where the AIF will be marketed and has given the UK firm written notice that it has done so.

...

Issuing a consent notice or notifying the Host State regulator

...

13.4.4-A     G     (1)     If the UK firm's EEA right derives from AIFMD (other than the EEA right to market an AIF (referred to in (3)) and the condition in (2) is met, paragraph 20(3D) of Part III of Schedule 3 to the Act requires the FCA to:

- (a)     send a copy of the notice of intention to the Host State regulator within one month of receipt;
- (b)     include confirmation that the UK firm has been authorised by the FCA under AIFMD; and
- (c)     immediately inform the UK firm that the notice of intention and confirmation have been sent to the Host State regulator;
- (2)     The condition referred to in (1) is that the FCA is satisfied that the firm complies and will continue to comply with:
  - (a)     the provisions implementing AIFMD, and
  - (b)     any directly applicable EU regulation made under AIFMD.

- (3) If the UK firm's EEA right derives from AIFMD and relates to the EEA right to market an AIF and both the conditions in (4) are met, paragraph 20C of Part III of Schedule 3 to the Act requires the FCA to:
- (a) send a copy of the notice of intention to the Host State regulator within 20 working days of receipt;
  - (b) include confirmation that the UK firm has been authorised by the FCA to manage AIFs with a particular investment strategy; and
  - (c) where the notice of intention relates to an EEA AIF, inform the competent authority of the EEA AIF that the UK firm may start marketing the AIF in the EEA States covered by the notice of intention.
- (4) The conditions referred to in (3) are that:
- (a) the FCA is satisfied that the UK firm complies, and will continue to comply with, AIFMD and any directly applicable EU regulation made under AIFMD; and
  - (b) where the AIF is a feeder AIF, its master AIF is a UK AIF or EEA AIF that is managed by a full-scope UK AIFM or a full-scope EEA AIFM.
- (5) If the FCA refuses to send a copy of the notice of intention to the Host State regulator it must notify the AIFM in writing and include the reasons for such refusal. In such case, the AIFM may refer the matter to the Tribunal.

- 13.4.5 G When the appropriate UK regulator sends a copy of a notice of intention or if it gives a consent notice to the Host State regulator, it must inform the UK firm in writing that it has done so (paragraphs 20(3B)(b), (3D)(a)(iii) and (4) and 20C(9) of Schedule 3 to the Act).

...

## 13.5 Notices of intention

...

Specified contents: notice of intention to provide cross-border services

- 13.5.2 R A UK firm wishing to provide *cross-border services* into a particular *EEA State* for the first time under an *EEA right* other than under the *auction regulation* must submit a notice in the form set out in:

...

(5) SUP 13 Annex 8AR, if the UK firm is providing cross-border services under AIFMD to manage an AIF in another EEA State.

(6) SUP 13 Annex 8BR, if the UK firm is providing cross-border services under AIFMD to market an AIF in another EEA State.

...

## 13.6 Changes to branches

...

Firms passporting under AIFMD

- 13.6.9C G (1) If a UK firm has exercised an EEA right under AIFMD and established a branch in another EEA State, the UK firm must not make a material change in the requisite details of the branch or the identity of the AIFs it manages in the EEA State in which it has established a branch (see SUP 13 Annex 1), unless:
- (a) it has complied with regulation 17A(4) for a planned change; or
- (b) it has complied with regulation 17A(5) for a unplanned change.
- (2) The requirements in regulation 17A(4) for a planned change are that:
- (a) the UK firm has given notice to the FCA stating the details of the proposed change; and
- (b) either the FCA:
- (i) has consented to the change; or

(ii) has not objected to the change in the period of one month beginning on the day on which the UK firm gave notice.

(3) The requirements in regulation 17A(5) for an unplanned change are that:

(a) the UK firm has given notice to the FCA immediately after an unplanned change has occurred; and

(b) the FCA has consented to the change.

Changes arising from circumstances beyond the control of a UK firm

13.6.10 G ...

(3) ~~Neither this~~ This guidance ~~nor that set out at SUP 13.6.4G or 13.6.5G~~ is not applicable to MiFID investment firms or AIFMs.

The process

13.6.11 G When the *appropriate UK regulator* receives a notice from a *UK firm* other than a *MiFID investment firm* (see SUP 13.6.5G(1) and SUP 13.6.7G(1)), ~~or a pure reinsurer~~ (see SUP 13.6.9BR) or an AIFM (see SUP 13.6.9CG) it is required by regulations 11(4) and 13(4) to either refuse, or consent to the change within a period of one *month* from the day on which it received the notice.

...

The process: AIFMs

13.6.18 G (1) When the FCA receives a notice from an AIFM (see SUP 13.6.9CG) for a planned change and such change means the AIFM no longer complies with AIFMD, the FCA must inform the AIFM without undue delay that:

(a) the FCA objects to the change, including reasons for its decision; and

(b) the AIFM must not implement the change.

In these circumstances the AIFM may refer the matter to the Tribunal.

- (2) If a planned change is implemented or an unplanned change takes place and results in the AIFM no longer complying with an implementing provision of AIFMD, the FCA must:
- (a) take steps to ensure that the AIFM complies with that provision or ceases to exercise the EEA right; and
  - (b) give notice to the AIFM with reasons for taking such steps.

In these circumstances, the AIFM may refer the matter to the Tribunal.

- (3) If a planned change is implemented or an unplanned change takes place and results in no change to the AIFM's compliance with an implementing provision, the FCA must:
- (a) give a notice to the Host State regulator informing it of the change; and
  - (b) inform the firm that it has given the notice, stating the date on which it did so.

## 13.7 Changes to cross-border services

- 13.7.1 G Where a UK firm is exercising an EEA right under the UCITS Directive, MiFID or the Insurance Directives or AIFMD and is providing cross-border services into another EEA State, any changes to the details of the services are governed by the EEA Passport Rights Regulations...

...

### Firms passporting under AIFMD

- 13.7.13B G If a UK firm has exercised an EEA right under AIFMD to provide cross-border services to manage an AIF, regulation 17A(2) states that the UK firm must not make a material change to:

- (1) the programme of operations, or the *EEA* activities, to be carried out in exercise of that right; or
- (2) the *EEA States* in which it manages *AIFs*; or
- (3) the identity of the *AIFs* it manages in those *EEA States*;

unless the *UK firm* complies with the relevant requirements in regulation 17A(4) for a planned change or regulation 17A(5) for an unplanned change (see *SUP* 13.6.9CG(2) and(3)).

13.7.14 G If a *UK firm* has exercised an *EEA right* deriving from *AIFMD* to provide *cross-border services to market* an *AIF*, regulation 17A(3) states that it must not make a material change to any of the following:

- (1) the programme of operations identifying the *AIF* the *AIFM* intends to *market* and information on where the *AIF* is established;
- (2) the *AIF* rules or instruments of incorporation;
- (3) the *depository* of the *AIF*;
- (4) the description of, or information on, the *AIF* available to investors;
- (5) if the *AIF* is a feeder *AIF*, the jurisdiction where the *master AIF* is established;
- (6) any additional information referred to in *FUND* 3.2.2R (Prior disclosure of information to investors), for each *AIF* the *AIFM* intends to *market*;
- (7) the *EEA States* in which the *AIFM* intends to *market* the *units* or *shares* of the *AIF* to an investor that is a *professional client*; and
- (8) information about arrangements made for the *marketing* of the *AIF* and, where relevant, arrangements to prevent the *AIF* from being *marketed* to an investor that is a *retail client*, including where the *AIFM* relies on the activities of independent entities to provide investment services for the *AIF*;

unless the *UK firm* complies with regulation 17A(4) for a planned change or regulation 17A(5) for an unplanned change (see *SUP* 13.6.9CG(2) and

(3).

### **13.8 Changes of details: provision of notices to the appropriate UK regulator**

- 13.8.1 R (1) Where a *firm* is required to submit a notice of a change to a *branch* referred to in *SUP* 13.6.5G(1), *SUP* 13.6.5BG(1), *SUP* 13.6.7G(1), *SUP* 13.6.8G , *SUP* 13.6.9BR ~~and~~ *SUP* 13.6.10G(1); and *SUP* 13.6.9CG or a notice of a change to *cross-border services* referred to in *SUP* 13.7.3G(1) , *SUP* 13.7.3AG(1), *SUP* 13.7.5G(1), ~~and~~ *SUP* 13.7.6G , *SUP* 13.7.13G and *SUP* 13.7.14G it must complete and submit that notice in accordance with the procedures set out in *SUP* 13.5 for notifying the establishing of a *branch* or the provision of *cross-border services*.

...

### **13 Annex 1R Passporting: Notification of intention to establish a branch in another EEA state**



BANK OF ENGLAND  
PRUDENTIAL REGULATION  
AUTHORITY



*Notification of intention to establish a branch in another EEA state (excluding the Payment Services Directive and Electronic Money Directive)*

FIRM NAME:

FRN:

...

**Filling in the Form**

1. If you are using your computer to complete the form, use the TAB key to move from question to question and press SHIFT TAB to move back to the previous question. Once completed, print the relevant sections and sign the declaration in section ~~10~~ 11.
2. If you are filling in the form by hand, use black ink, write clearly and, once you have completed the relevant sections, sign the declaration in section ~~10~~ 11.
3. All firms should answer sections 1, 2, and ~~10~~ 11. Sections 3-~~9~~10 refer to specific directives and only relevant sections should be completed. However, please answer all questions in the sections relevant to you.
4. If there is not enough space on the form, you may need to use separate sheets of paper. Clearly mark each separate sheet of paper with the relevant question number.

...

**10.1 You must select those activities that you wish to carry out under AIFMD as listed in article 6(2) and 6(4) of AIFMD.**

<u>Management of AIFs</u>	<input type="checkbox"/>
<u>Management of portfolios of investments, including those owned by pension funds and institutions for occupational retirement provision in accordance with Article 19(1) of Directive 2003/41/EC, in accordance with mandates given by investors on a discretionary, client-by-client basis.</u>	<input type="checkbox"/>
<u>Investment advice</u>	<input type="checkbox"/>
<u>Safekeeping and administration in relation to <i>units</i> of collective investment undertakings.</u>	<input type="checkbox"/>
<u>Reception and transmission of orders in relation to <i>financial instruments</i>.</u>	<input type="checkbox"/>

**10.2 Please give details of the firm’s programme of operations.**

**Note to Question 10.2**

Provide a programme of operations stating in particular the services which the AIFM intends to perform and the organisational structure of the branch.

Please also identify the AIFs that the AIFM intends to manage and the domiciles of these AIFs.

For a suggested template firms may adhere to the template provided in section 3.3 when preparing a programme of operations.

# 11 Declaration

...

\*

*I enclose the following sections (**mark the appropriate section**)*

Section 1 – Contact Details (mandatory)	<input type="checkbox"/>
...	
<u>Section 10 – Alternative Investment Fund Managers Directive</u>	<input type="checkbox"/>
<u>Section <del>10</del>11 – Declaration (mandatory)</u>	<input type="checkbox"/>

---

\* These questions should only be completed if the form is being submitted in one of the ways set out in SUP 15.7 other than online submission. It should not be completed if the submission of this form is online

After SUP 13 Annex 7 insert the following annex. The text is new and is not underlined.

**13 Annex   Passporting: AIFMD  
8R**

This annex consists of one or more forms. Forms can be completed online now by visiting [*FCA web address to follow*]

The forms are also to be found through the following address:

*Passporting: AIFMD - cross border services (management) - SUP 13 Annex 8AR*

*Passporting: AIFMD - cross border services (marketing) - SUP 13 Annex 8BR*



## ***Notification of intention to provide cross-border services in another EEA state with respect to managing an AIF***

**FIRM NAME:**

**FRN:**

### **Purpose of this form**

You should complete this form if you are a *UK firm* that wishes to exercise a passport right to provide *cross border services* in another *EEA State* under the Alternative Investment Fund Managers Directive ("AIFMD") to manage an *EEA AIF*.

You may also use this form if you are a *UK firm* that wishes to notify us (the *FCA*) of changes to the details of that *cross border services*.

### **Important information you should read before completing this form**

A *UK firm* can only use this form if it is entitled to provide *cross border services* into another *EEA State* subject to the conditions of AIFMD (see Schedule 3 to the Financial Services and Markets Act 2000 (FSMA)). By completing this form, you are confirming this is the case. *UK firms* should consult the legislation or take legal advice both in the *United Kingdom* and in the relevant *EEA State(s)* if they are in any doubt.

We give guidance on this in Chapter 13 of the Supervision manual (*SUP*). In particular, a *UK firm* that wants to exercise an *EEA right* must have the specific activity included in its Scope of Permission and must be a *full scope UK AIFM*.

### **Filling in the Form**

- 5.** If you are using your computer to complete the form, use the TAB key to move from question to question and press SHIFT TAB to move back to the previous question. Once completed, print the relevant sections and sign the declaration in section 4.
- 6.** If you are filling in the form by hand, use black ink, write clearly and, once you have completed the relevant sections, sign the declaration in section 4.
- 7.** All firms should answer sections 1, 2, 3 and 4.
- 8.** If there is not enough space on the form, you may need to use separate sheets of paper. Clearly mark each separate sheet of paper with the relevant question number.

---

#### ***Applications should be sent to:***

AIFMD Team  
Financial Conduct Authority  
25 The North Colonnade  
Canary Wharf  
London  
E14 5HS

**Telephone:** +44 (0)20 7066 7188

**Website:** [www.fca.org.uk](http://www.fca.org.uk)

**E-mail:** [passport.notifications@fca.org.uk](mailto:passport.notifications@fca.org.uk)

# 1 Contact details

## 1.1 Details of the person we will contact about this application.

Firm reference number <sup>†</sup>	
Title <sup>†</sup>	
Contact name <sup>†</sup>	
Address Line 1 <sup>†</sup>	
Address Line 2 <sup>†</sup>	
Postcode <sup>†</sup>	
Country <sup>†</sup>	
Telephone number <sup>†</sup>	
Fax number <sup>†</sup>	
Email address <sup>†</sup>	

---

<sup>†</sup> These questions should be completed whether submission of this form is online or in one of the other ways set out in SUP 15.7

## 2 Details of the services to be provided

2.1 Please indicate the *EEA State(s)* in which services are to be provided.

**Note to Question 2.1**

*UK firms* have the right to provide *cross border services* to Gibraltar. References in this form to an *EEA State* include references to Gibraltar (see the Financial Services and Markets Act (Gibraltar) Order 2001).

States required	
Austria	<input type="checkbox"/>
Belgium	<input type="checkbox"/>
Bulgaria	<input type="checkbox"/>
Croatia	<input type="checkbox"/>
Cyprus	<input type="checkbox"/>
Czech Republic	<input type="checkbox"/>
Denmark	<input type="checkbox"/>
Estonia	<input type="checkbox"/>
Finland	<input type="checkbox"/>
France	<input type="checkbox"/>
Germany	<input type="checkbox"/>
Gibraltar	<input type="checkbox"/>
Greece	<input type="checkbox"/>
Hungary	<input type="checkbox"/>
Iceland	<input type="checkbox"/>
Ireland	<input type="checkbox"/>
Italy	<input type="checkbox"/>
Latvia	<input type="checkbox"/>
Liechtenstein	<input type="checkbox"/>
Lithuania	<input type="checkbox"/>
Luxembourg	<input type="checkbox"/>
Malta	<input type="checkbox"/>
Netherlands	<input type="checkbox"/>
Norway	<input type="checkbox"/>
Poland	<input type="checkbox"/>
Portugal	<input type="checkbox"/>
Romania	<input type="checkbox"/>
Slovak Republic	<input type="checkbox"/>
Slovenia	<input type="checkbox"/>
Spain	<input type="checkbox"/>
Sweden	<input type="checkbox"/>
All States	<input type="checkbox"/>

2.2 If the *firm* intends to provide services into more than one *EEA State*, will these services vary for each State?

Yes ▶  (If yes please provide a separate application form for each state)  
 No ▶

2.3 Tell us the proposed date for the business to start.

Date	dd/mm/yy
------	----------

### 3

## Alternative Investment Fund Managers Directive ('AIFMD')

### 3.1 You must select those activities that you wish to carry out under AIFMD as listed in article 6(2) and 6(4) of AIFMD.

Management of <i>AIFs</i>	<input type="checkbox"/>
Management of portfolios of investments, including those owned by pension funds and institutions for occupational retirement provision in accordance with Article 19(1) of Directive 2003/41/EC, in accordance with mandates given by investors on a discretionary, client-by-client basis.	<input type="checkbox"/>
Investment advice	<input type="checkbox"/>
Safekeeping and administration in relation to <i>units</i> of collective investment undertakings.	<input type="checkbox"/>
Reception and transmission of orders in relation to <i>financial instruments</i> .	<input type="checkbox"/>

### 3.2 Please give details of the *firm's* programme of operations.

#### **Note to Question 3.2**

Provide a programme of operations stating in particular the services which the *AIFM* intends to perform.

Please also identify the *AIFs* that the *AIFM* intends to manage and the domiciles of these *AIFs*.

<div style="background-color: #cccccc; width: 50px; height: 15px; margin-bottom: 10px;"></div>
--

## 4 Declaration

### **Note to Declaration**

If you are submitting this notification electronically you do not need to provide a signature here. However, you still need to have the authority to make this notification on behalf of the *firm*.

It is a criminal offence to knowingly or recklessly give us information that is false or misleading. If necessary, please take appropriate professional advice before supplying information to us.

There will be a delay in processing the application if any information is inaccurate or incomplete. And failure to notify us immediately of any significant change to the information provided may result in a serious delay in the application process.

- **I understand it is a criminal offence knowingly or recklessly to give the FCA information that is false or misleading in a material particular.**
- **I confirm that the information in this form is accurate and complete to the best of my knowledge and belief.**
- **I confirm that I am authorised to sign on behalf of the *firm*.**

Name <sup>†</sup>	<input type="text"/>
-------------------	----------------------

Position <sup>†</sup>	<input type="text"/>
-----------------------	----------------------

Signature*	<input type="text"/>
------------	----------------------

Date <sup>†</sup>	<input type="text" value="dd/mm/yy"/>
-------------------	---------------------------------------

*I enclose the following sections (mark the appropriate section) \**

Section 1 – Contact Details (mandatory)	<input type="checkbox"/>
Section 2 – Details of the services to be provided (mandatory)	<input type="checkbox"/>
Section 3 – Alternative Investment Fund Managers Directive	<input type="checkbox"/>
Section 4 – Declaration (mandatory)	<input type="checkbox"/>

<sup>†</sup> These questions should be completed whether submission of this form is online or in one of the other ways set out in SUP 15.7

\* These questions should only be completed if the form is being submitted in one of the ways set out in SUP 15.7 other than online submission. It should not be completed if the submission of this form is online



## ***Notification of intention to provide cross-border services in another EEA state with respect to marketing an AIF***

**AIFM name:**

**FRN:**

**AIF name:**

### **Purpose of this form**

You should complete this form if you are a *UK firm* that wishes to exercise a passport right to provide the *cross border services* in another *EEA State* under the Alternative Investment Fund Managers Directive (“*AIFMD*”) to market a *UK AIF* or *EEA AIF* (that is not a *feeder AIF*, the *master AIF* of which is managed by a *non-EEA AIFM* or is a *non-EEA AIF*) to *professional clients*.

You may also use this form if you are a *UK firm* that wishes to notify us (the *FCA*) of changes to the details of that *cross border service*.

### **Important information you should read before completing this form**

A *UK firm* can only use this form if it is entitled to provide *cross border services* into another *EEA State* subject to the conditions of *AIFMD* (see Schedule 3 to the Financial Services and Markets Act 2000 (FSMA)). By completing this form, you are confirming this is the case. *UK firms* should consult the legislation or take legal advice both in the *United Kingdom* and in the relevant *EEA State(s)* if they are in any doubt.

We give guidance on this in Chapter 13 of the Supervision manual (*SUP*). In particular, a *UK firm* that wants to exercise an *EEA right* must have the specific activity included in its Scope of Permission and must be a *full scope UK AIFM*.

### **Filling in the Form**

- 9.** If you are using your computer to complete the form, use the TAB key to move from question to question and press SHIFT TAB to move back to the previous question. Once completed, print the relevant sections and sign the declaration in section 4.
- 10.** If you are filling in the form by hand, use black ink, write clearly and, once you have completed the relevant sections, sign the declaration in section 4.
- 11.** All firms should answer sections 1, 2, 3 and 4.
- 12.** If there is not enough space on the form, you may need to use separate sheets of paper. Clearly mark each separate sheet of paper with the relevant question number.

#### ***Applications should be sent to:***

*AIFMD Team  
Financial Conduct Authority  
25 The North Colonnade  
Canary Wharf  
London  
E14 5HS*

*An electronic copy must be submitted by email to [AIFMDAuthorisations@fca.org.uk](mailto:AIFMDAuthorisations@fca.org.uk)*

**Website:** [www.fca.org.uk](http://www.fca.org.uk)

# 1 Contact details

## 1.2 Details of the person we will contact about this application.

Contact name	
Telephone number	
Fax number	
Email address	

## 2 Details of the services to be provided

### 2.1 Please indicate the *EEA State(s)* into which services are to be provided.

#### **Note to Question 2.1**

UK firms have the right to provide cross border services to Gibraltar. References in this form to an EEA State include references to Gibraltar (see the Financial Services and Markets Act (Gibraltar) Order 2001).

States required	
Austria	<input type="checkbox"/>
Belgium	<input type="checkbox"/>
Bulgaria	<input type="checkbox"/>
Croatia	<input type="checkbox"/>
Cyprus	<input type="checkbox"/>
Czech Republic	<input type="checkbox"/>
Denmark	<input type="checkbox"/>
Estonia	<input type="checkbox"/>
Finland	<input type="checkbox"/>
France	<input type="checkbox"/>
Germany	<input type="checkbox"/>
Gibraltar	<input type="checkbox"/>
Greece	<input type="checkbox"/>
Hungary	<input type="checkbox"/>
Iceland	<input type="checkbox"/>
Ireland	<input type="checkbox"/>
Italy	<input type="checkbox"/>
Latvia	<input type="checkbox"/>
Liechtenstein	<input type="checkbox"/>
Lithuania	<input type="checkbox"/>
Luxembourg	<input type="checkbox"/>
Malta	<input type="checkbox"/>
Netherlands	<input type="checkbox"/>
Norway	<input type="checkbox"/>
Poland	<input type="checkbox"/>
Portugal	<input type="checkbox"/>
Romania	<input type="checkbox"/>
Slovak Republic	<input type="checkbox"/>
Slovenia	<input type="checkbox"/>
Spain	<input type="checkbox"/>
Sweden	<input type="checkbox"/>
All States	<input type="checkbox"/>

### 2.2 Please tell us the proposed start date for the *marketing*.

Date	dd/mm/yy
------	----------

## 3 Alternative investment fund managers

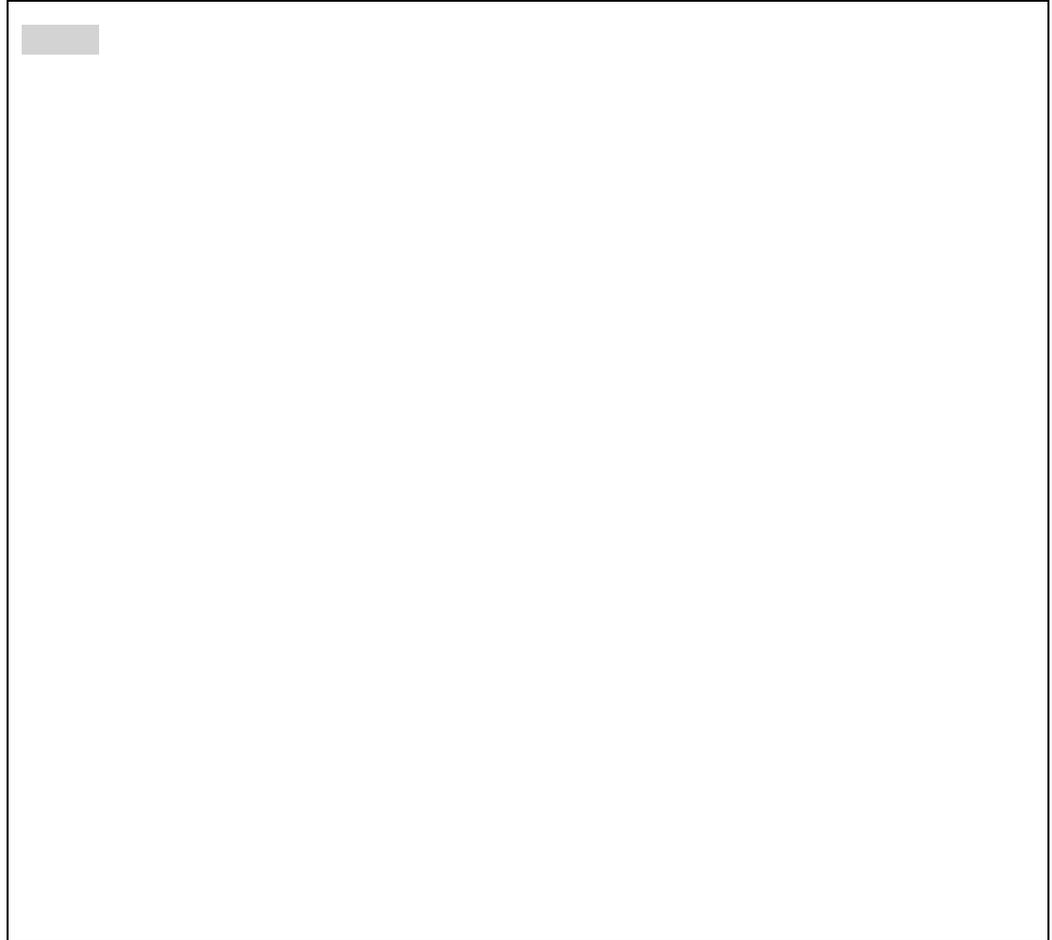
Please provide the following documentation and information

### 3.1 Details of the *firm's* programme of operations

**Note to  
Question 3.1**

Provide a programme of operations stating in particular the services which the *AIFM* intends to perform.

Please also identify the *AIF* that the *AIFM* intends to *market* by providing the legal name and national identification code of the *AIF*.



**3.2 The EEA state in which the AIF is established.**

[Redacted]

**3.3 A copy of the *instrument constituting the fund*  Attached**

**3.4 The identity of the *depository* of the AIF.**

[Redacted]

**3.5 A description of, or any information on, the AIF available to investors.**

[Redacted]

**3.6 If the AIF is a *feeder AIF*, the jurisdiction in which the *master AIF* is established.<sup>1</sup>**

[Redacted]

**3.7 Any additional information referred to in *FUND 3.2.2R* (Prior disclosure of information to investors), for the AIF the AIFM intends to market.**

[Redacted]

---

<sup>1</sup> Where the AIF is a *feeder AIF* the right to *market* the AIF using the *marketing* passport is subject to the condition that the *master AIF* is an EEA AIF that is managed by a *full scope UK AIFM* or *full scope EEA AIFM*.

**3.8 Information about arrangements made for the *marketing* of the *AIF*.**



A large rectangular box with a black border, intended for text. A small grey rectangular redaction mark is located in the top-left corner.

**3.9 Where relevant, arrangements established to prevent the *AIF* from being marketed to an investor that is a *retail client*, including in the case where the *AIFM* relies on the activities of independent entities to provide investment services in respect of the *AIF*.**



A large rectangular box with a black border, intended for text. A small grey rectangular redaction mark is located in the top-left corner.

## 4 Declaration

### **Note to Declaration**

If you are submitting this notification electronically you do not need to provide a signature here. However, you still need to have the authority to make this notification on behalf of the *firm*.

It is a criminal offence to knowingly or recklessly give us information that is false or misleading. If necessary, please seek appropriate professional advice before supplying information to us.

There will be a delay in processing the application if any information is inaccurate or incomplete. And failure to notify us immediately of any significant change to the information provided may result in a serious delay in the application process.

- **I understand it is a criminal offence knowingly or recklessly to give the FCA information that is false or misleading in a material particular.**
- **I confirm that the information in this form is accurate and complete to the best of my knowledge and belief.**
- **I confirm that I am authorised to sign on behalf of the *firm*.**

Name	
------	--

Position	
----------	--

Signature	
-----------	--

Date	dd/mm/yy
------	----------

*I enclose the following sections (mark the appropriate section)*

Section 1 - Contact details	<input type="checkbox"/>
Section 2 - Details of the services to be provided	<input type="checkbox"/>
Section 3 - Alternative investment fund managers	<input type="checkbox"/>
Section 4 - Declaration	<input type="checkbox"/>

Amend the following provisions.

**13A Qualifying for authorisation under the Act**

**13A.1 Application**

...

13A.1.3 G (1) Under the *Gibraltar Order* made under section 409 of the *Act*, a Gibraltar firm is treated as an *EEA firm* under Schedule 3 to the *Act* if it is:

...

(d) authorised in Gibraltar under the *MiFID*;

(e) authorised in Gibraltar under the *UCITS Directive*.

...

...

**13A.4 EEA firms establishing a branch in the United Kingdom**

...

The notification procedure

13A.4.4 G ...

(2) Although the *appropriate UK regulator* is not required to notify the *applicable provisions* to an *EEA firm* passporting under the *Insurance Mediation Directive*, ~~or *MiFID* or *AIFMD*~~, these provisions are set out in *SUP 13A Annex 1G* (Application of the Handbook to Incoming EEA Firms).

...

**13A.5 EEA firms providing cross-border services into the United Kingdom**

...

The notification procedure

13A.5.4 G ...

- (2) Although the *appropriate UK regulator* is not required to notify the *applicable provisions* to an *EEA Firm* passporting under the *Insurance Mediation Directive*, ~~or MiFID~~ or *AIFMD* these provisions are set out in SUP 13A Annex 1G (Application of the Handbook to Incoming EEA Firms).

...

**13A**      **Application of the Handbook to Incoming EEA firms**  
**Annex**  
**1G**

...		
<b>(1) Module of Handbook</b>	<b>(2) Potential application to an incoming EEA firm with respect to activities carried on from an establishment of the firm (or its appointed representative) in the United Kingdom</b>	<b>(3) Potential application to an incoming EEA firm with respect to activities carried on other than from an establishment of the firm (or its appointed representative) in the United Kingdom</b>
...		
SYSC	<p>...</p> <p>The <i>common platform requirements</i> in SYSC 4 - 10 apply as set out in Part 2 of SYSC 1 Annex 1 (Application of the common platform requirement).</p> <p><u>SYSC 1 Annex 1 row 2.6F provides that the <i>common platform requirements</i> do not apply to an <i>incoming EEA AIFM branch</i>, except the <i>AIFMD host state requirements</i> and certain requirements regarding <i>financial crime</i>.</u></p> <p>...</p> <p>SYSC 19A <del>and 19B does</del> <u>do</u> not apply.</p>	...
...		

<p><i>DISP</i></p>	<p><u>Applies Generally applies (DISP 1.1.1G) and applies but in a limited way in relation to MiFID business.</u></p> <p><u>For an incoming EEA AIFM branch DISP applies (subject to some limitations, see DISP 1.1.3R), except for an incoming EEA AIFM branch of a closed-ended corporate AIF when DISP does not apply.</u></p>	<p><del>Does Generally does not apply (DISP 1.1.1G).</del></p> <p><u>However, for an incoming EEA firm which is a UCITS management company managing a UCITS scheme or an AIFM managing an authorised AIF, DISP applies (subject to some limitations, see DISP 1.1.3R).</u></p>
<p><i>COMP</i></p>	<p>Applies, except in relation to the passported activities of an <i>MIFID investment firm</i>, a <i>BCD credit institution</i> (other than an electronic money institution within the meaning of article 1(3)(a) of the <i>E-Money Directive</i> that has the right to benefit from the mutual recognition arrangements under the <i>Banking Consolidation Directive</i>), an <i>IMD insurance intermediary</i>, <del>or a UCITS management company acting in that capacity other than in relation to a UCITS scheme</del> <u>carrying on non-core services under article 6.3 of the UCITS Directive and an incoming AIFM branch carrying on either AIFM management functions for an unauthorised AIF or non-core services under article 6.4 of AIFMD (see the definition of “participant firm”)</u>. However, <del>a MiFID investment firm, BCD credit institution, an IMD insurance intermediary or a UCITS management company (when carrying on permitted MiFID business)</del> <u>a firm specified above may be able to apply for top-up cover in relation to its passported activities (see COMP 14 (Participation by EEA firms)).</u></p>	<p>Does not apply in relation to the passported activities of an <i>MiFID investment firm</i>, <del>or a BCD credit institution, an IMD insurance intermediary, or a UCITS management company acting in that capacity other than in relation to a UCITS scheme (see the definition of “participation firm”)</del> <u>carrying on non-core services under article 6.3 of the UCITS Directive or an incoming EEA AIFM carrying on AIFM management functions for an unauthorised AIF or providing non-core services under article 6.4.</u> Otherwise, <i>COMP</i> may apply, but the coverage of the <i>compensation scheme</i> is limited for non-UK activities (see <i>COMP</i> 5).</p>
<p><i>COLL</i></p>	<p><u>A. The following provisions of ...</u></p> <p>...</p> <p><u>B. Subject to FUND 1.1.2R, COLL applies to an incoming EEA AIFM as relevant.</u></p>	<p><u>For an EEA UCITS management company providing collective portfolio management services for a UCITS scheme, As as column (2) A.(d), (e), (f) and (g) and the other parts of COLL specify.</u></p> <p><u>For an incoming EEA AIFM, as column (2) B.</u></p>
<p><i>FUND</i></p>	<p><u>FUND 3.8 (Prime brokerage firms) applies to an incoming EEA AIFM</u></p>	<p><u>Does not apply, except FUND 10 (Operating on a cross border</u></p>

	<u>branch.</u> <u>FUND 10 (Operating on a cross-border basis), provides guidance for an incoming EEA AIFM branch.</u>	<u>basis) which provides guidance for an EEA AIFM managing an AIF on a services basis or marketing an AIF using the marketing passport under AIFMD.</u>
...		

**13A**  
**Annex**  
**2G**

**Matters reserved to a Home State regulator**

...	
Requirements in the interest of the general good	
2.	...
(1)	the <i>Single Market Directives</i> expressly reserve responsibility for the prudential supervision of a <i>MiFID investment firm</i> , <i>BCD credit institution</i> , <i>UCITS management company</i> , <i>AIFM</i> or <i>passporting insurance undertaking</i> to the <i>Firm's Home State regulator</i> . The <i>Insurance Mediation Directive</i> reaches the same position without expressly referring to the concept of prudential supervision. Accordingly, the <i>FCA</i> , as <i>Host State regulator</i> , is entitled to regulate only the conduct of the firm's business within the <i>United Kingdom</i> ;
(2)	there is no explicit "general good" provision in <i>MiFID</i> or <i>AIFMD</i> . Rather, <i>MiFID</i> states exactly what the <i>Host State regulator</i> regulates (see paragraphs 8–10) the responsibilities for a <i>Host State regulator</i> under <i>MiFID</i> are contained in paragraphs 8 to 10 and under <i>AIFMD</i> are contained in paragraphs 11G to 11J;
...	
Requirements under <i>AIFMD</i>	
<u>11G</u>	<u>Article 33(5) of AIFMD prohibits Host States from imposing additional requirements on an AIFM to matters covered by AIFMD if the firm is managing an AIF on a cross-border basis by establishing a branch or providing cross-border services to manage an AIF in that EEA State, except as expressly permitted (see 11H below).</u>
<u>11H</u>	<u>Under article 45(2) (Responsibility of competent authorities in Member States) of AIFMD the supervision of an AIFM's compliance with articles 12 (General principles) and 14 (Conflicts of interest) are the responsibility of the Host State of the AIFM where the AIFM manages and/or markets an AIF through a branch in that EEA State.</u>

11I	<p><u>As a result, an <i>incoming EEA AIFM branch</i> is required to comply with the <i>AIFMD Host State requirements</i> (as set out below):</u></p> <p>(a) <u><i>FUND 3.8</i>;</u></p> <p>(b) <u><i>SYSC 4.1.2CR</i>;</u></p> <p>(c) <u><i>SYSC 10.1.22R to SYSC 10.1.26R</i>; and</u></p> <p>(d) <u><i>COBS 2.1.4R</i>.</u></p>
11J	<p><u>Under article 32(5) of <i>AIFMD</i>, arrangements in point (h) of Annex IV of <i>AIFMD</i> for the <i>marketing</i> of <i>AIFs</i> is subject to the laws and supervision of the <i>Host State</i> of the <i>AIFM</i>.</u></p>
11K	<p><u>A <i>full-scope EEA AIFM</i> that is <i>marketing</i> an <i>AIF</i> in the <i>UK</i> using the <i>marketing</i> passport should have regard to the <i>financial promotions</i> regime, as explained in <i>PERG 8.37.5G(2)</i> (<i>Communications with investors in relation to draft documentation</i>).</u></p>
...	

## 14 Incoming EEA firms changing details, and cancelling qualification for authorisation

...

### 14.2 Changes to branch details

...

#### Firms passporting under AIFMD

14.2.15 G Where an *EEA AIFM* has established a *branch* in the *UK*, it must not make a material change to:

- (1) the requisite details of the *branch*; or
- (2) the identity of the *AIFs* that the *EEA AIFM* intends to manage;

unless it has complied with the relevant requirement in regulation 7A(3).

14.2.16 G The relevant requirement in regulation 7A(3) is that the *Home State regulator* has informed the *FCA* that it has approved the proposed change.

## 14.3 Changes to cross-border services

14.3.1 Where an *incoming EEA firm* passporting under the *MiFID*, *UCITS Directive* or *Insurance Directives* or *AIFMD* is exercising an *EEA right* and is providing *cross-border services* into the *United Kingdom*, the *EEA Passport Rights Regulations* govern any changes to the details of those services. Where an *incoming EEA firm* has complied with the ~~relevant requirements in the EEA Passport Rights Regulations~~, then the *firm's permission given* under Schedule 3 to the *Act* is to be treated as varied accordingly.

...

### Firms passporting under AIFMD

14.3.8 G Where an *EEA AIFM* is providing *cross-border services* to manage an *AIF* in the *UK*, it must not make a material change to:

(1) the particulars of the programme of operations to be carried out in the *UK*, including the description of the particular *EEA* activities; or

(2) the identity of the *AIFs* that the *EEA AIFM* intends to manage;

unless it has complied with the relevant requirement in regulation 7A(3).

14.3.9 G Where an *EEA AIFM* is providing *cross-border services* to market an *AIF* in the *UK*, it must not make a material change to:

(1) the documents and information referred to in Annex IV to *AIFMD*; or

(2) the statement that the *EEA AIFM* is authorised to manage *AIFs* with a particular management strategy;

unless it has complied with the relevant requirement in regulation 7A(3).

14.3.10 G The relevant requirement in regulation 7A(3) is that the *Home State regulator* has informed the *FCA* that it has approved the proposed change.

## 15 Notifications to the FCA or PRA

...

### 15.3 General notification requirements

...

Breaches of rules and other requirements in or under the Act

- 15.3.11 R (1) *A firm must notify the appropriate regulator of:*
- ...
- (f) *it exceeding (or becoming aware that it will exceed) the limit in BIPRU 10.5.6R; or*
- (g) *a breach of the AIFMD UK regulation; or*
- (h) *a breach of any directly applicable EU regulation made under AIFMD;*

...

#### UK AIFMs

- 15.3.26 R *A full-scope UK AIFM must notify the FCA before implementing any material changes to the conditions under which it was granted permission to manage an AIF, in particular to the information it provided in its application for that permission.*

[Note: article 10(1) of AIFMD]

- 15.3.27 G *Changes that the FCA would expect to be notified of under SUP 15.3.26R include:*

- (1) *an AIFM being appointed to manage another AIF;*
- (2) *the appointment of a different depositary for an AIF the AIFM manages; and*
- (3) *the appointment of any new senior personnel if the AIFM is not required to apply for the FCA's approval for that appointment under section 59 of the Act.*

- 15.3.28 R *Where a small authorised UK AIFM no longer meets the conditions in regulation 11 of the AIFMD UK regulation (within the meaning of Chapter 1 of the AIFMD level 2 regulation) it must:*

- (1) *immediately notify the FCA; and*
- (2) *within 30 calendar days, apply to the FCA for a variation of its permission to become a full-scope UK AIFM.*

[Note: article 3(3) second and third paragraphs of AIFMD]

...

## 16.1 Application

...

16.1.1C G The directions and guidance in SUP 16.18 apply for the following types of AIFM:

- (1) a small registered UK AIFM;
- (2) an above-threshold non-EEA AIFM marketing in the UK; and
- (3) a small non-EEA AIFM marketing in the UK.

...

16.1.3 R Application of different sections of SUP 16 (excluding SUP 16.13, SUP 16.15, SUP 16.16 and SUP 16.17)

(1) Sections(s)	(2) Categories of firm to which section applies	(3) Applicable rules and guidance
...		
SUP 16.14	A CASS large firm and a CASS medium firm	Entire section
<u>SUP 16.18</u>	<u>A full-scope UK AIFM and a small authorised UK AIFM</u>	<u>SUP 16.18.3R</u>
...		
<u>Note 3 = The application of SUP 16.18 for the types of AIFMs specified in SUP 16.1.1CG is set out in SUP 16.18.2G.</u>		

...

## 16.3 General provisions on reporting

...

Structure of the chapter

16.3.2 G This chapter has been split into the following sections, covering:

...

- (11) client money and asset return (SUP 16.14); ~~and~~

...

(14) remuneration reporting (*SUP* 16.17); and

(15) *AIFMD* reporting (*SUP* 16.18).

...

## 16.12 Integrated Regulatory Reporting

...

Reporting requirement

...

16.12.4 R Table of applicable rules containing *data items*, frequency and submission periods

	(1)	(2)	(3)	(4)
<i>RAG</i> number	<i>Regulated Activities</i>	Provisions containing:		
		applicable <i>data items</i>	reporting frequency/period	due date
...				
<i>RAG</i> 4	<ul style="list-style-type: none"> <li>• managing investments</li> <li>• establishing, operating or winding up a regulated collective investment scheme</li> <li>• <del>establishing, operating or winding up an unregulated collective investment scheme</del></li> <li>• establishing, operating or winding up a stakeholder pension scheme</li> <li>• establishing, operating or winding up a personal pension scheme</li> </ul>	<p><i>SUP</i> 16.12.14R <i>SUP</i> 16.12.15R</p>	<p><i>SUP</i> 16.12.14R <i>SUP</i> 16.12.16R</p>	<p><i>SUP</i> 16.12.14R <i>SUP</i> 16.12.17R</p>

	<ul style="list-style-type: none"> <li>• <u>managing an AIF</u></li> <li>• <u>managing a UCITS</u></li> </ul>			
...				
RAG 6	<ul style="list-style-type: none"> <li>• <del>acting as a trustee of an authorised unit trust</del></li> <li>• acting as the depositary of an authorised contractual scheme</li> <li>• safeguarding and administration of assets (without arranging)</li> <li>• arranging safeguarding and administration of assets</li> <li>• <del>acting as depositary or sole director of an OEIC</del></li> <li>• <u>acting as trustee or depositary of an AIF</u></li> <li>• <u>acting as trustee or depositary of a UCITS</u></li> </ul>	SUP 16.12.19R	SUP 16.12.20R	SUP 16.12.21R

...

### Regulated Activity Group 3

...

16.12.11 R The applicable *data items* referred to in SUP 16.12.4R are set out according to *firm* type in the table below:

Description of data item	Firms prudential category and applicable data items (note 1)							
	BIPRU firms (note 17)			Firms other than BIPRU firms				
	730 K	125K and UCITS investment firms collective portfolio management investment firms	50 K	IPRU (INV) Chapter 3	IPRU (INV) Chapter 5	IPRU (INV) Chapter 9	IPRU (INV) Chapter 13	UPRU
...								
Capital adequacy	...	...	...	...	...	...	...	...
Supplementary capital data for collective portfolio management investment firms		FIN067 (note 35)						
...								
Note 35	Only applicable to firms that are collective portfolio management investment firms.							

...

16.12.12 R The applicable reporting frequencies for data items referred to in SUP 16.12.4R are set out in the table below according to firm type. Reporting frequencies are calculated from a firm's accounting reference date, unless indicated otherwise.

Data item	BIPRU 730K firm	BIPRU 125K firm and UCITS investment firm collective portfolio management investment firm	BIPRU 50K firm	UK consolidation group or defined liquidity group	Firm other than BIPRU firms
...					

FSA058	...	...	...	...	
<u>FIN067</u>		<u>Quarterly</u>			
...					

16.12.13 R The applicable due dates for submission referred to in *SUP* 16.12.4R are set out in the table below. The due dates are the last day of the periods given in the table below following the relevant reporting frequency period set out in *SUP* 16.12.12R, unless indicated otherwise.

<i>Data item</i>	Daily	Weekly	Monthly	Quarterly	Half yearly	Annual
...						
FSA058						
<u>FIN067</u>				<u>20 business days</u>		
...						

...

Regulated Activity Group 4

...

16.12.15 R The applicable *data items* referred to in *SUP* 16.12.4R according to type of *firm* are set out in the table below:

Description of data item	<i>Firms' prudential category and applicable data items (note 1)</i>								
	<i>BIPRU firms</i>			<i>Firms other than BIPRU firms</i>					
	730 K	125K and <u>UCITS investment firms collective portfolio management investment firms</u>	50 K	<u>IPRU (INV) Chapter 3</u>	<u>IPRU (INV) Chapter 5</u>	<u>IPRU (INV) Chapter 9</u>	<u>IPRU (INV) Chapter 11</u>	<u>IPRU (INV) Chapter 13</u>	<u>UPRU</u>

<i>Annual report and accounts</i>	...	...	...	...	...	...	<u>No standard format (note 13)</u>	...	...
...									
Solvency statement (note 11)	...	...	...	...	...	...	<u>No standard format</u>		...
Balance sheet	...	...	...	...	...	...	<u>FSA029</u>	...	-...
Income statement	...	...	...	...	...	...	<u>FSA030</u>	...	-...
Capital adequacy	...	...	...	...	...	...	<u>FIN066</u>	...	-...
<u>Supplementary capital data for collective portfolio management investment firms</u>		<u>FIN067 (note 32)</u>							
...									
Volumes and types of business (note 21)	...	...	...	...	...	...	<u>FSA038</u>	...	-...
Client money and client assets	...	...	...	...	...	...	<u>FSA039</u>	...	-...

Asset managers that use hedge fund techniques (note 21)	<del>FS A0 41</del>	FSA041	<del>F S A 04 1</del>	<del>FSA 041</del>	<del>FSA04 1</del>	<del>FSA 041</del>		<del>FSA 041</del>	<del>FSA 041</del>
UCITS (note 22)	<del>FS A0 42</del>	FSA042	<del>F S A 04 2</del>	<del>FSA 042</del>	<del>FSA04 2</del>	<del>FSA 042</del>	<u>FSA 042</u>	<del>FSA 042</del>	<del>FSA 042</del>
...									
Note 21	Only applicable to <del>firms that have a managing investments permission [deleted]</del>								
Note 22	Only applicable to <i>firms</i> that have <i>permission</i> for <del>establishing, operating or winding up a regulated collective investment scheme</del> <i>managing a UCITS</i> .								
...									
Note 32	Only applicable to <i>firms</i> that are <i>collective portfolio management investment firms</i> .								

...

16.12.16 R The applicable reporting frequencies for *data items* referred to in SUP 16.12.15R are set out in the table below according to *firm* type. Reporting frequencies are calculated from a *firm's accounting reference date*, unless indicated otherwise.

<i>Data item</i>	<i>Firms' prudential category</i>				
	<i>BIPRU 730K firm</i>	<i>BIPRU 125K firm and <del>UCITS investment firm</del> <u>collective portfolio management investment firm</u></i>	<i>BIPRU 50K firm</i>	<i>UK consolidation group or defined liquidity group</i>	<i>Firm other than BIPRU firms</i>
...					
FSA041	Annually	Annually	Annually		Annually
FSA042	Quarterly	Quarterly	Quarterly		Quarterly
...					
FSA058	...	...	...	...	

<u>FIN066</u>					<u>Quarterly</u>
<u>FIN067</u>		<u>Quarterly</u>			
...					

16.12.17 R The applicable due dates for submission referred to in SUP 16.12.4R are set out in the table below. The due dates are the last day of the periods given in the table below following the relevant reporting frequency period set out in SUP 16.12.16R, unless indicated otherwise.

<i>Data item</i>	Daily	Weekly	Monthly	Quarterly	Half yearly	Annual
...						
FSA041						<i>30 business days</i>
...						
FSA058				...		
<u>FIN066</u>				<u>20 business days</u>		
<u>FIN067</u>				<u>20 business days</u>		
...						

...

#### Regulated Activity Group 7

...

16.12.22 R The applicable *data items* referred to in SUP 16.12.4R are set out according to type of *firm* in the table below:

Description of <i>Data item</i>	<i>Firms' prudential category and applicable data item (note 1)</i>					
	<i>BIPRU 730k firm</i>	<i>BIPRU 125k firm and UCITS investment firm collective portfolio</i>	<i>BIPRU 50k firm</i>	<i>Exempt CAD firms subject to IPRU(INV) Chapter 13</i>	<i>Firms (other than exempt CAD firms) subject to IPRU(INV) Chapter 13</i>	<i>Firms that are also in one or more of RAGs 1 to 6 and not subject to</i>

		<i>management investment firm</i>				<i>IPRU(INV)</i> Chapter 13
...						
Securitisation: trading book	...	...	...			
Supplementary capital data for <i>collective portfolio management investment firms</i>		FIN067 (note 28)				
...						
<u>Note 28</u>	<u>Only applicable to firms that are collective portfolio management investment firms.</u>					

...

16.12.23 R The applicable reporting frequencies for *data items* referred to in SUP 16.12.22AR are set out in the table below. Reporting frequencies are calculated from a *firm's accounting reference date*, unless indicated otherwise.

<i>Data item</i>	Frequency				
	Unconsolidated <i>BIPRU investment firm</i>	Solo consolidated <i>BIPRU investment firm</i>	<i>UK Consolidation Group or defined liquidity group</i>	Annual regulated business revenue up to and including £5 million	Annual regulated business revenue over £5 million
...					
FSA058	...	...	...		
<u>FIN067</u>	<u>Quarterly</u>				
...					

16.12.24 R The applicable due dates for submission referred to in SUP 16.12.4R are set out in the table below. The due dates are the last day of the periods given in the table below following the relevant reporting frequency period set out in

SUP 16.12.23R, unless indicated otherwise.

<i>Data item</i>	Daily	Weekly	Monthly	Quarterly	Half yearly	Annual
...						
FSA058				...		
<u>FIN067</u>	<u>20 business days</u>					
...						

...

## 16.14 Client money and asset return

...

Report

...

16.14.4 R For the purposes of the *CMAR*:

...

- (2) *safe custody assets* are those to which the *custody rules* in *CASS 6* apply but only in relation to the holding of *financial instruments* (in the course of *MiFID business*) ~~and~~ the *safeguarding and administration of assets (without arranging)* (in the course of business that is not *MiFID business*), acting as trustee or depositary of an AIF and acting as trustee or depositary of a UCITS.

After SUP 16.17 insert the following chapter. The text is new and is not underlined.

## 16.18 AIFMD reporting

Application

16.18.1 G This section applies to the following types of *AIFM* in line with SUP 16.18.2G:

- (1) a *full-scope UK AIFM*;

- (2) a *small authorised UK AIFM*;
- (3) a *small registered UK AIFM*;
- (4) an *above-threshold non-EEA AIFM marketing in the UK*; and
- (5) a *small non-EEA AIFM marketing in the UK*.

16.18.2 G

Type of AIFM	Rules	Directions	Guidance	AIFMD level 2 regulation
<i>full-scope UK AIFM</i>	<i>FUND 3.4</i> (Reporting obligation to the FCA) and <i>SUP 16.18.5R</i>			Article 110 (Reporting to competent authorities) (as replicated in <i>SUP 16.18.4EU</i> )
<i>small authorised UK AIFM</i>	<i>SUP 16.18.6R</i>			Article 110 (Reporting to competent authorities) (as replicated in <i>SUP 16.18.4EU</i> )
<i>small registered UK AIFM</i>		<i>SUP 16.18.7D</i>		Article 110 (Reporting to competent authorities) (as replicated in <i>SUP 16.18.4EU</i> )
<i>above-threshold non-EEA AIFM marketing in the UK</i>			<i>SUP 16.18.8G</i>	Article 110 (Reporting to competent authorities) (as replicated in <i>SUP 16.18.4EU</i> )
<i>small non-EEA AIFM marketing in the UK</i>		<i>SUP 16.18.9D</i>		Article 110 (Reporting to competent authorities) (as replicated in <i>SUP 16.18.4EU</i> )

Purpose

16.18.3 G This section specifies the end dates for reporting periods for *AIFMs* and the reporting period for *small AIFMs* for the types of *AIFM* to whom this section applies. Although article 110 of the *AIFMD level 2 regulations*

(Reporting to competent authorities) (as replicated in SUP 16.18.4EU) applies certain reporting requirements directly to *AIFMs*, it does not specify the end dates for reporting periods for an *AIFM* and, for *small AIFMs*, it does not specify the reporting period. Therefore, *competent authorities* are required to specify these requirements.

Article 110 of the AIFMD level 2 regulation

16.18.4	EU	Reporting to competent authorities	
	1.	In order to comply with the requirements of the second subparagraph of Article 24(1) and of point (d) of Article 3(3) of Directive 2011/61/EU, an AIFM shall provide the following information when reporting to competent authorities:	
		(a)	the main instruments in which it is trading, including a break-down of financial instruments and other assets, including the AIF's investment strategies and their geographical and sectoral investment focus;
		(b)	the markets of which it is a member or where it actively trades;
		(c)	the diversification of the AIF's portfolio, including, but not limited to, its principal exposures and most important concentrations.
		The information shall be provided as soon as possible and not later than one month after the end of the period referred to in paragraph 3. Where the AIF is a fund of funds this period may be extended by the AIFM by 15 days.	
	2.	For each of the EU AIFs they manage and for each of the AIFs they market in the Union, AIFMs shall provide to the competent authorities of their home Member State the following information in accordance with Article 24(2) of Directive 2011/61/EU:	
		(a)	the percentage of the AIF's assets which are subject to special arrangements as defined in Article 1(5) of this Regulation arising from their illiquid nature as referred to in point (a) of Article 23(4) of Directive 2011/61/EU;
		(b)	any new arrangements for managing the liquidity of the AIF;
		(c)	the risk management systems employed by the AIFM to manage the market risk, liquidity risk, counterparty risk and other risks including operational risk;
		(d)	the current risk profile of the AIF, including:
		(i)	the market risk profile of the investments of the AIF,

			including the expected return and volatility of the AIF in normal market conditions;
		(ii)	the liquidity profile of the investments of the AIF, including the liquidity profile of the AIF's assets, the profile of redemption terms and the terms of financing provided by counterparties to the AIF;
	(e)		information on the main categories of assets in which the AIF invested including the corresponding short market value and long market value, the turnover and performance during the reporting period; and
	(f)		the results of periodic stress tests, under normal and exceptional circumstances, performed in accordance with point (b) of Article 15(3) and the second subparagraph of Article 16(1) of Directive 2011/61/EU.
3.	The information referred to in paragraphs 1 and 2 shall be reported as follows:		
	(a)		on a half-yearly basis by AIFMs managing portfolios of AIFs whose assets under management calculated in accordance with Article 2 in total exceed the threshold of either EUR 100 million or EUR 500 million laid down in points (a) and (b) respectively of Article 3(2) of Directive 2011/61/EU but do not exceed EUR 1 billion, for each of the EU AIFs they manage and for each of the AIFs they market in the Union;
	(b)		on a quarterly basis by AIFMs managing portfolios of AIFs whose assets under management calculated in accordance with Article 2 in total exceed EUR 1 billion, for each of the EU AIFs they manage, and for each of the AIFs they market in the Union;
	(c)		on a quarterly basis by AIFMs which are subject to the requirements referred to in point (a) of this paragraph, for each AIF whose assets under management, including any assets acquired through use of leverage, in total exceed EUR 500 million, in respect of that AIF;
	(d)		on an annual basis by AIFMs in respect of each unleveraged AIF under their management which, in accordance with its core investment policy, invests in non-listed companies and issuers in order to acquire control.
4.	By way of derogation from paragraph 3, the competent authority of the home Member State of the AIFM may deem it appropriate and necessary for the exercise of its function to require all or part of the		

	information to be reported on a more frequent basis.
5.	AIFMs managing one or more AIFs which they have assessed to be employing leverage on a substantial basis in accordance with Article 111 of this Regulation shall provide the information required under Article 24(4) of Directive 2011/61/EU at the same time as that required under paragraph 2 of this Article.
6.	AIFMs shall provide the information specified under paragraphs 1, 2 and 5 in accordance with the pro-forma reporting template set out in the Annex IV.
7.	In accordance with point (a) of Article 42(1) of Directive 2011/61/EU, for non-EU AIFMs, any reference to the competent authorities of the home Member State shall mean the competent authority of the Member State of reference.
<b>[Note: Article 110 of the <i>AIFMD level 2 regulation</i>]</b>	

#### Reporting periods and end dates

- 16.18.5 R The reporting period of a *full-scope UK AIFM* must end on the following dates:
- (1) for *AIFMs* that are required to report annually, on 31 December each calendar year;
  - (2) for *AIFMs* that are required to report half-yearly, on 30 June and 31 December in each calendar year; and
  - (3) for *AIFMs* that are required to report quarterly, on 31 March, 30 June, 30 September and 31 December in each calendar year.
- 16.18.6 R A *small authorised UK AIFM* must report annually and its reporting period must end on 31 December in each calendar year.
- 16.18.7 D [*To follow*]
- 16.18.8 G In accordance with regulation 59(3)(a) of the *AIFMD UK regulation*, an *above-threshold non-EEA AIFM* that is *marketing* in the *UK* is required to comply with the implementing provisions of the *AIFMD UK regulation* that apply to a *full-scope UK AIFM* and relate to articles 22 to 24 *AIFMD* in so far as such provisions are relevant to the *AIFM* and the *AIF*. Therefore, such an *AIFM* should comply with the provisions in *SUP* 16.18.5R that are applicable to a *full-scope UK AIFM*.
- 16.18.9 D [*To follow*]
- 16.18.10 G All periods in this section should be calculated by reference to London time.

**SUP 16 Annex 24R Data items for SUP 16.12**

Form FSA041 is deleted.

FIN066 and FIN067 are added as follows, the text of these forms is new and is not underlined).







## SUP 16 Annex 25G Guidance notes for data items in SUP 16 Annex 24R

Guidance notes on Form FSA041 are deleted.

Guidance notes on Forms FIN066 and FIN067 are added - see following pages.

### FIN066 – Capital Adequacy (for *collective portfolio management firms*)

#### Introduction

FIN066 provides a framework for the collection of prudential information required by the *FCA* for its supervision activities. The data item is intended to reflect the underlying prudential requirements in *IPRU(INV)* 11 and allows monitoring against those requirements.

#### Defined terms

Where terms used in these notes are defined by the Companies Act 2006, as appropriate, or the provisions of the *firm's* accounting framework (usually UK GAAP or *IFRS*) they should have that meaning. The descriptions in these notes are designed to repeat, summarise or amplify the relevant statutory or other definitions and terminology without departing from their full meaning or effect.

- The data item should comply with the principles and requirements of the *firm's* accounting framework, which will generally be UK GAAP (including relevant provisions of the Companies Act 2006 as appropriate) or *IFRS*.
- The data item should be completed on an unconsolidated basis.
- The data item should be in agreement with the underlying accounting records.
- Accounting policies should be consistent with those adopted in the *firm's annual report and accounts* and consistently applied.
- Information required should be prepared in line with generally accepted accounting standards.
- The data item should not give a misleading impression of the *firm*. A data item is likely to give a misleading impression if a *firm* wrongly omits or includes a material item or presents a material item in the wrong way.

#### Currency

You should report in the currency of your annual audited accounts, ie in Sterling, Euro, US dollars, Canadian dollars, Swedish Kroner, Swiss Francs or Yen. Figures should be reported in 000s.

#### Data elements

These are referred to by row first, then by column, so data element 2B will be the element numbered 2 in column B.

Regulatory capital		
	1 to 19	The figures in this section should be consistent with those submitted in FSA029 for the same reporting period.
Regulatory capital test		

<i>Own funds test for collective portfolio management firms</i>		
Own funds	20B	The amount of <i>own funds</i> calculated in line with <i>IPRU(INV)</i> 11.4. This is the figure entered at 19B.
Funds under management requirement	21B	<p>Up to a maximum of €10,000,000, this is the <i>base capital resources requirement</i> plus 0.02% of the amount by which the <i>firm's funds under management</i> exceeds €250,000,000.</p> <p>If the data item is not submitted with figures in Euros, then the figure should be converted to the currency of the submission using the closing mid-market rate of exchange on the reporting period end date.</p> <p>The appropriate definition of <i>funds under management</i> to be used in this calculation is that set out in the <i>FCA Handbook Glossary of definitions</i>.</p>
Fixed overheads requirement	22B	<p>This is one quarter of the annualised fixed expenditure calculated in line with <i>IPRU(INV)</i> 11.3.3R.</p> <p>The amount to be entered in this element is calculated using elements 30 to 42 in the fourth quarter of the preceding financial year. Each of the four quarters in any financial year should use the figure calculated in the fourth quarter of the preceding year.</p> <p>Where there was no preceding year, the figure entered is that determined in line with <i>IPRU(INV)</i> 11.3.6R.</p>
Professional negligence capital requirement	23B	<p>The amount of additional <i>own funds</i> used to cover potential liability risks arising from professional negligence for <i>AIFM</i> activities in lieu of professional indemnity insurance, as per <i>IPRU(INV)</i> 11.3.11G(1)(a).</p> <p>When calculating this amount, <i>firms</i> should include the amount of any assets under management that are delegated to the firm by mandate, see <i>IPRU(INV)</i> 11.3.14EU. Note that this treatment is different from that prescribed for the <i>funds under management requirement</i> (see the guidance in line 21B).</p> <p>If a firm makes an entry in 23B it should not make an entry in 24B.</p>
PII capital requirement	24B	<p>The amount of any additional <i>own funds</i> required to cover any defined excess and exclusions in the insurance policy, as required by <i>IPRU(INV)</i> 11.3.11G(1)(b).</p> <p>If a firm makes an entry in 24B it should not make an entry in 23B.</p>
Total capital requirement	25B	This is the higher of 21B and 22B, plus either 23B or

		24B.
Surplus / deficit of own funds	26B	This is 20B less 25B.
<i>Liquid assets test</i>		
Liquid assets requirement	27B	For a <i>collective portfolio management firm</i> , this is the amount required by <i>IPRU(INV)</i> 11.2.1R(3).
Liquid assets held	28B	This is the amount of liquid assets held by the <i>firm</i> at the reporting date. Assets are regarded as liquid if they are readily convertible to cash within one month. This figure must not include speculative positions.
Surplus / deficit of liquid assets	29B	This is 28B less 27B.
<b>Calculation of relevant annual expenditure for forthcoming year</b>		
	30 to 42	This section of the data item must be completed when the reporting period end date is equal to the <i>firm's</i> accounting reference date, ie the fourth quarter. This does not need to be completed during the other three quarters. Where appropriate, figures entered should match those on FSA030 for the same reporting period.  When, as per <i>IPRU(INV)</i> 11.3.6R(2), the <i>firm</i> is using projected figures, these should be entered in this section.
Total expenditure (per income statement)	30B	This should be the amount entered in element 22A of FSA030 for the same reporting period. FSA030 should be completed on a cumulative basis, so the amounts entered in the fourth quarter represent the entire financial year up to the accounting reference date.
Deductions from expenditure	31A to 40A	Deductions from expenditure should be made in line with <i>IPRU(INV)</i> 11.3.4R
Relevant fixed expenditure	41B	This is 30B less the sum of 31A to 40A
Relevant annualised fixed expenditure	42B	If the figures submitted in FSA030 for the period ending on the <i>firm's</i> accounting reference date do not include twelve month's trading, then the amount calculated in 41B must be pro-rated to an equivalent annual amount. This situation may occur if the <i>firm</i> has changed its accounting reference date.  Where a <i>firm</i> has not completed a full year since the commencement of its permitted business, an amount based on forecast expenditure included in its budget for the first twelve months' trading, as submitted with its application for membership, should be entered.
<b>Professional Indemnity Insurance</b>		
Specify whether your firm holds additional own funds or PII in accordance with <i>IPRU(INV)</i> 7.3.12R	43B	The <i>firm</i> should report either "Own funds" or "PII". Where a <i>firm</i> has PII but also holds <i>own funds</i> to cover any excesses and/or exclusions on the policy, the <i>firm</i> should report "PII".

<i>PII Basic information</i>		
	44	<p><i>Firms</i> should enter details on all relevant PII policies, using a separate line for each policy.</p> <p>A <i>firm</i> may satisfy its requirements for professional indemnity insurance with a policy that also provides cover to one or more entities other than the <i>firm</i>, provided the policy satisfies the conditions of the <i>AIFMD level 2 regulation</i> in respect of the <i>firm</i>, exclusive of the cover provided to other entities by the policy. If such a policy is held, each <i>firm</i> covered by the policy should include the policy information on their return.</p>
Annualised premium	44A	This should state the premium payable (in descending order of size, where relevant), net of tax and any other add-ons. If the premium covers a period other than 12 months, it should be annualised before ranking.
Insurer (from list)	44B	Select the PII insurer from the list provided. If you have more than one policy with the same insurer, they should be combined. If the insurer is not listed, select 'Other'. If a policy is underwritten by more than one insurance undertaking or Lloyd's syndicate, you should select 'multiple'.
Start date	44C	Enter the start date of the policy.
Renewal date	44D	Enter the renewal date of the policy.
Currency of indemnity limits	44E	Using the appropriate International Organization for Standardization ISO 4217 three digit code (eg, GBP), enter the currency in which the indemnity limits in fields 44F to 44J are reported.
Limit of indemnity required: single	44F	<p>You should record the required indemnity limits on the <i>firm's</i> PII policy or policies, in relation to single claims. A <i>firm</i> should calculate this amount with reference to <i>IPRU(INV) 11.3.15EU</i> and include the amount of any assets under management that are delegated to the firm by mandate.</p> <p>Where these are denominated in a currency other than the currency of the report, the figure should be converted to the currency of the submission using the closing mid-market rate of exchange on the reporting period end date.</p>
Limit of indemnity required: aggregate	44G	<p>You should record here the required indemnity limits on the <i>firm's</i> PII policy or policies, in aggregate. A <i>firm</i> should calculate this amount with reference to <i>IPRU(INV) 11.3.15EU</i> and include the amount of any assets under management that are delegated to the firm by mandate.</p> <p>Where these are denominated in a currency other than</p>

		the currency of the report, the figure should be converted to the currency of the submission using the closing mid-market rate of exchange on the reporting period end date.
Limit of indemnity received: single	44H	<p>You should record here the indemnity limits on the <i>firm's</i> PII policy or policies, received in relation to single claims.</p> <p>Where these are denominated in a currency other than the currency of the report, the figure should be converted to the currency of the submission using the closing mid-market rate of exchange on the reporting period end date.</p>
Limit of indemnity received: aggregate	44J	<p>You should record here the indemnity limits on the <i>firm's</i> PII policy or policies, received in aggregate.</p> <p>Where these are denominated in a currency other than the currency of the report, the figure should be converted to the currency of the submission using the closing mid-market rate of exchange on the reporting period end date.</p>
<i>PII detailed information</i>		
Business line (from list)	44K	<p>For policies that cover all business lines, <i>firms</i> should select 'All' from the list provided.</p> <p>Where the policy contains different excesses for different business lines, <i>firms</i> should identify these business lines from the list (or the closest equivalent) and report the (highest) excess for that business line in data element 44L. Once these 'non-standard' excesses have been identified, the remaining business lines should be reported under 'All other'.</p>
Policy excess	44L	<p>For policies that cover all business lines with no difference in excesses, this should be the excess applicable. Otherwise, it should contain the highest excess for each business line that differs.</p> <p>In line with <i>IPRU(INV)</i> 11.3.11G(1)(b), a <i>firm</i> should include additional own funds sufficient to cover the highest excess in the amount reported in 24B.</p>
Policy exclusions	44M	<p>If there are exclusions in the <i>firm's</i> PII policy, the business type(s) to which they relate should be selected here from the list provided.</p> <p>In line with <i>IPRU(INV)</i> 11.3.11G(1)(b), a <i>firm</i> should include additional own funds sufficient to cover any liabilities arising in the amount reported in 24B.</p>

## Internal validations

Data elements are referenced by row, then column.

Validation number	Data element		
1	6B	=	$\Sigma(1B:5B)$
2	12B	=	$\Sigma(7A:11A)$
3	13B	=	$6B - 12B$
4	19B	=	$\Sigma(13B:18B)$
5	20B	=	19B
6	25B	=	(higher of 21B and 22B) + 23B + 24B
7	26B	=	$20B - 25B$
10	41B	=	$30B - \Sigma(31A:40A)$

## External validations

Validation number	Data element		
1	30B	=	FSA030.22A

## FIN067 – Capital adequacy – supplemental (for *collective portfolio management investment firms*)

### Introduction

FIN067 provides a framework for the collection of prudential information required by the *FCA* for its supervision activities. The data item is intended to reflect the underlying prudential requirements in *GENPRU* 2.1.63R to 2.1.74R and allows monitoring against those requirements.

### Defined terms

Where terms used in these notes are defined by the Companies Acts 2006, as appropriate, or the provisions of the *firm's* accounting framework (usually UK GAAP or *IFRS*) they should have that meaning. The descriptions indicated in these notes are designed simply to repeat, summarise or amplify the relevant statutory or other definitions and terminology without departing from their full meaning or effect.

- The data item should comply with the principles and requirements of the firm's accounting framework, which will generally be UK GAAP (including relevant provisions of the Companies Acts 2006 as appropriate) or *IFRS*.
- The data item should be completed on an unconsolidated basis.
- The data item should be in agreement with the underlying accounting records.
- Accounting policies should be consistent with those adopted in *annual report and accounts* and should be consistently applied.

- Information required should be prepared in line with generally accepted accounting standards.
- The data item should not give a misleading impression of the *firm*. A data item is likely to give a misleading impression if a *firm* wrongly omits or includes a material item or presents a material item in the wrong way.

### Currency

You should report in the currency of your annual audited accounts, ie in Sterling, Euro, US dollars, Canadian dollars, Swedish Kroner, Swiss Francs or Yen. Figures should be reported in 000s.

### Data Elements

These are referred to by row first, then by column, so data element 2B will be the element numbered 2 in column B.

Own funds	1A	This amount should be equal to the figure entered in element 57A of FSA003 for the same reporting period.
Funds under management requirement	2A	<p>The <i>base capital resources requirement</i> plus the amount which is 0.02% of <i>funds under management</i> that exceeds €250,000,000, up to a maximum of €10,000,000.</p> <p>If the data item is not submitted with figures in Euros, then the figure should be converted to the currency of the submission using the closing mid-market rate of exchange on the reporting period end date.</p> <p>The appropriate definition of <i>funds under management</i> to be used in this calculation is that set out in the <i>FCA Handbook Glossary of definitions</i>.</p>
Fixed overheads requirement	3A	The amount calculated in line with <i>GENPRU 2.1.53R</i> . The amount should equal element 104A on FSA003 for the same reporting period.
Professional negligence capital requirement	4A	<p>The amount of additional <i>own funds</i> used to cover potential liability risks arising from professional negligence in relation to <i>AIFM</i> activities in lieu of professional indemnity insurance, as per <i>GENPRU 2.1.67G(1)(a)</i>.</p> <p>When calculating this amount, <i>firms</i> should include the amount of any assets under management that are delegated to the firm by mandate, as set out in <i>GENPRU 2.1.70EU</i>. Note that this treatment is different from that prescribed for the <i>funds under management requirement</i> (see the guidance in line 2A)</p> <p>If a <i>firm</i> makes an entry in 4A it should not make an entry in 5A.</p>
PII capital requirement	5A	The amount of any additional <i>own funds</i> required to cover any defined excess and exclusions in the

		insurance policy, as required by <i>GENPRU</i> 2.1.67G(1)(b).  If a <i>firm</i> makes an entry in 5A it should not make an entry in 4A.
Variable capital requirement	6A	The amount calculated in line with <i>GENPRU</i> 2.1.45R. The amount should equal element 70A on FSA003 for the same reporting period.
Total requirement	7A	This is the higher of 2A and 3A plus 4A or 5A, and 6A.
Surplus / deficit of own funds	8A	This is 1A less 7A.
<b>Liquid assets test</b>		
Liquid assets requirement	9A	The amount of <i>own funds</i> required by <i>GENPRU</i> 2.1.64R.
Liquid assets held	10A	The amount of liquid assets held by the <i>firm</i> at the reporting date. Assets are regarded as liquid if they are readily convertible to cash within one month. This figure must not include speculative positions.
Surplus / deficit of liquid assets	11A	This is 10A less 9A.
<b>Professional Indemnity Insurance</b>		
Does your firm hold additional own funds or PII in accordance with <i>GENPRU</i> 2.1.67G	12A	The <i>firm</i> should report either “Own funds” or “PII”. Where a <i>firm</i> has PII but also holds <i>own funds</i> to cover any excesses and/or exclusions on the policy, the <i>firm</i> should report “PII”.
<i>PII Basic information</i>		
	13	<i>Firms</i> should enter details on all relevant PII policies, using a separate line for each policy.  A <i>firm</i> may satisfy its requirements for professional indemnity insurance with a policy that also provides cover to one or more entities other than the <i>firm</i> , provided the policy satisfies the conditions of the <i>AIFMD level 2 regulation</i> in respect of the <i>firm</i> , exclusive of the cover provided to other entities by the policy. If such a policy is held, each <i>firm</i> covered by the policy should include the policy information on their return.
Annualised premium	13A	This should state the premium payable (in descending order of size, where relevant), net of tax and any other add-ons. If the premium covers a period other than 12 months, it should be annualised before ranking.
Insurer (from list)	13B	Select the PII insurer from the list provided. If you have more than one policy with the same insurer, they should be combined. If the insurer is not listed, select ‘Other’. If a policy is underwritten by more than one insurance undertaking or Lloyd's syndicate, you should select ‘multiple’.

Start date	13C	Enter the start date of the policy.
Renewal date	13D	Enter the renewal date of the policy.
Currency of indemnity limits	13E	Using the appropriate International Organization for Standardization ISO 4217 three digit code (eg, GBP), enter the currency in which the indemnity limits, in fields 13F to 13J are reported.
Limit of indemnity required: single	13F	<p>You should record here the required indemnity limits on the <i>firm's</i> PII policy or policies for single claims. A <i>firm</i> should calculate this amount with reference to <i>GENPRU 2.1.71EU</i> and include the amount of any assets under management that are delegated to the firm by mandate.</p> <p>Where these are denominated in a currency other than the currency of the report, the figure should be converted to the currency of the submission using the closing mid-market rate of exchange on the reporting period end date.</p>
Limit of indemnity required: aggregate	13G	<p>You should record here the required indemnity limits on the <i>firm's</i> PII policy or policies, in aggregate. A <i>firm</i> should calculate this amount with reference to <i>GENPRU 2.1.71EU</i> and include the amount of any assets under management that are delegated to the firm by mandate.</p> <p>Where these are denominated in a currency other than the currency of the report, the figure should be converted to the currency of the submission using the closing mid-market rate of exchange on the reporting period end date.</p>
Limit of indemnity received: single	13H	<p>You should record here the indemnity limits on the <i>firm's</i> PII policy or policies received in relation to single claims.</p> <p>Where these are denominated in a currency other than the currency of the report, the figure should be converted to the currency of the submission using the closing mid-market rate of exchange on the reporting period end date.</p>
Limit of indemnity received: aggregate	13J	<p>You should record here the indemnity limits on the <i>firm's</i> PII policy or policies, received in aggregate.</p> <p>Where these are denominated in a currency other than the currency of the report, the figure should be converted to the currency of the submission using the closing mid-market rate of exchange on the reporting period end date.</p>
<i>PII detailed information</i>		
Business line (from list)	13K	For policies that cover all business lines, <i>firms</i> should select 'All' from the list provided. Where the

		policy contains different excess for different business lines, <i>firms</i> should identify these business lines from the list (or the closest equivalent) and report the (highest) excess for that business line in data element 13L. Once these ‘non-standard’ excesses have been identified, the remaining business lines should be reported under ‘All other’.
Policy excess	13L	For policies that cover all business lines with no difference in excesses, this should be the excess applicable. Otherwise, it should contain the highest excess for each business line that differs.  In line with <i>GENPRU 2.1.67G(1)(b)</i> , a <i>firm</i> should include additional own funds sufficient to cover the highest excess in the amount reported in 5A.
Policy exclusions	13M	If there are exclusions in the <i>firm</i> 's PII policy, the business type(s) to which they relate should be selected from the list provided.  In line with <i>GENPRU 2.1.67G(1)(b)</i> , a <i>firm</i> should include additional own funds sufficient to cover any liabilities arising in the amount reported in 5A.

**FIN067 – Capital adequacy – supplemental (for *collective portfolio management investment firms*) validations**

**Internal validations**

Data elements are referenced by row, then column.

Validation number	Data element	
1	7A	= Higher of ((Higher of 2A and 3A) + 4A + 5A) and 6A
2	8A	= 1A – 7A
3	11A	= 10A – 9A

**External validations**

Validation number	Data element	
1	1A	= FSA003.57A
2	3A	= FSA003.104A
3	6A	= FSA003.70A

...

Please insert the following text after TP 1.7. The text is new and is not underlined.

**TP 1.8 AIFMD**

(1)	(2) Material to which the transitional provision applies	(3)	(4) Transitional provision	(5) Transitional provision: date in force	(6) Handbook provisions: coming into force
1	The changes to SUP 16.12 set out in Annex M of the Alternative Investment Fund Managers Directive Instrument 2013, other than those relating to FSA041.	R	<p>(1) Where a <i>firm</i> meets the conditions in (2) the changes effected by the Annex listed in column (2) do not apply and, therefore, the provisions in SUP 16.12 amended by that Annex will continue to apply as they were in force as at 21 July 2013.</p> <p>(2) The conditions are:            (a) the <i>firm</i> falls within regulation 73(1) of the <i>AIFMD UK regulation</i>; and            (b) the <i>firm</i> does not have a <i>Part 4A permission to manage an AIF</i>.</p>	From 22 July 2013 until 21 July 2014	22 July 2013
2	The changes to SUP 16.12 set out in Annex M of the Alternative Investment Fund Managers Directive Instrument 2013, other than those relating to FSA041.	R	<p>(1) Where a <i>firm</i> meets the conditions in (2) the changes effected by the Annex listed in column (2) do not apply provided that:            (a) for a <i>firm</i> which is an existing <i>firm</i> on 21 July 2013, it continues to comply with the requirements applicable to that <i>firm</i> on 21 July 2013;            or            (b) for a <i>firm</i> that was not an existing <i>firm</i> on 21 July 2013, it complies with the requirements applicable to a <i>firm</i> that was establishing, operating or</p>	From 22 July 2013 until 30 January 2014	22 July 2013



Solvency statement	...	...	...	...	...	...	...	No standard format (note 11)
Balance sheet	...	...	...	...	...	...	...	FSA029
Income statement	...	...	...	...	...	...	...	FSA030
Capital adequacy	...	...	...	...	...	...	...	FSA036
...								
Client money and client assets	...	...	...	...	...	...	...	FSA039
CFTC	...	...	...	...	...	...	...	FSA040 (note 24)
...								

...

16.12.12 R The applicable reporting frequencies for *data items* referred to in SUP 16.12.4R are set out in the table below according to *firm* type. Reporting frequencies are calculated from a *firm's accounting reference date*, unless indicated otherwise.

<i>Data item</i>	<i>BIPRU 730K firm</i>	<i>BIPRU 125K firm and collective portfolio management investment firm</i>	<i>BIPRU 50K firm</i>	<i>UK consolidation group or defined liquidity group</i>	<i>Firm other than BIPRU firms</i>
...					
FSA036	...	...	...		Quarterly
...					

16.12.13 R The applicable due dates for submission referred to in SUP 16.12.4R are set out in the table below. The due dates are the last day of the periods given in



Volumes and types of business (note 21)	...	...	...	...	...	...	...	FSA038
Client money and client assets	...	...	...	...	...	...	...	FSA039
UCITS (note 22)	...	...	...	...	...	...	...	FSA042
...								

...

16.12.16 R The applicable reporting frequencies for *data items* referred to in SUP 16.12.15R are set out in the table below according to *firm* type. Reporting frequencies are calculated from a *firm's accounting reference date*, unless indicated otherwise.

<i>Data item</i>	<i>Firms' prudential category</i>				
	<i>BIPRU 730K firm</i>	<i>BIPRU 125K firm and collective portfolio management investment firm</i>	<i>BIPRU 50K firm</i>	<i>UK consolidation group or defined liquidity group</i>	<i>Firm other than BIPRU firms</i>
...					
FSA036					Quarterly
...					

16.12.17 R The applicable due dates for submission referred to in SUP 16.12.4R are set out in the table below. The due dates are the last day of the periods given in the table below following the relevant reporting frequency period set out in SUP 16.12.16R, unless indicated otherwise.

<i>Data item</i>	Daily	Weekly	Monthly	Quarterly	Half yearly	Annual
...						
FSA036				20 business days		
...						

...

Regulated Activity Group 6

...

16.12.19 R The applicable *data items* referred to in *SUP* 16.12.4R are set out according to type of *firm* in the table below:

Description of <i>data item</i>	<i>Firm's</i> prudential category and applicable data item (note 1)				
	<i>IPRU(INV)</i> Chapter 3	<i>IPRU(INV)</i> Chapter 5	<i>IPRU(INV)</i> Chapter 9	<i>IPRU(INV)</i> Chapter 13	<i>UPRU</i>
...					
Solvency statement (note 6)		...			No standard format
Balance sheet	...	...	...	...	FSA029
Income statement	...	...	...	...	FSA030
Capital adequacy	...	...	...	...	FSA036
...					
Client money and client assets	...	...	...	...	FSA039
...					

16.12.20 R The applicable reporting frequencies for submission of *data items* referred to in *SUP* 16.12.4R are set out in the table below. Reporting frequencies are calculated from a *firm's accounting reference date*, unless indicated otherwise.

...	
FSA036	Quarterly
...	



Client money and client assets	...	...	...	...	...	...	...	FSA039
...								

...

16.12.26 R The applicable reporting frequencies for *data items* referred to in SUP 16.12.25AR are set out according to the type of *firm* in the table below. Reporting frequencies are calculated from a *firm's accounting reference date*, unless indicated otherwise.

<i>Data item</i>	<i>BIPRU 730K firm</i>	<i>BIPRU 125K firm</i>	<i>BIPRU 50K firm</i>	<i>UK consolidation group or defined liquidity group</i>	<i>Firms other than BIPRU firms</i>
...					
FSA036					Quarterly
...					

16.12.27 R The applicable due dates for submission referred to in SUP 16.12.4R are set out in the table below. The due dates are the last day of the periods given in the table below following the relevant reporting frequency period set out in SUP 16.12.26R, unless indicated otherwise .

<i>Data item</i>	Daily	Weekly	Monthly	Quarterly	Half yearly	Annual
...						
FSA036				<del>20 business days</del>		
...						

**SUP 16 Annex 24R                      Data items for SUP 16.12**

Form FSA036 is deleted.

**SUP 16 Annex 25G                      Guidance notes for data items in SUP 16 Annex 24R**

Guidance notes on Form FSA036 are deleted

## Annex N

### Amendments to the Dispute Resolution: Complaints sourcebook (DISP)

In this Annex, underlining indicates new text and striking through indicates deleted text.

#### 1.1 Purpose and application

...

Application to firms

1.1.3 R ...

...

- (4) This chapter, except the *complaints data publication rules*, also applies to an *incoming EEA AIFM* for *complaints from eligible complainants concerning AIFM management functions carried on for an authorised AIF under the freedom to provide cross-border services*.

...

1.1.5 R This chapter does not apply to:

...

- (3) an *authorised professional firm* in respect of expressions of dissatisfaction about its *non-mainstream regulated activities*; ~~and~~
- (4) *complaints* in respect of *auction regulation bidding*;
- (5) a *full-scope UK AIFM*, *small authorised UK AIFM* or an *incoming EEA AIFM*, for *complaints concerning AIFM management functions carried on for a closed-ended corporate AIF*; and
- (6) a *depository*, for *complaints concerning activities carried on for*:
- (a) an *unauthorised AIF* which is not a *charity AIF*; or
- (b) any *closed-ended corporate AIF*.

1.1.5-A G References in *DISP 1.1.5R* to a *full-scope UK AIFM* and *small authorised UK AIFM* carrying on *AIFM management functions* for a *closed-ended corporate AIF* include firms that are *internally managed corporate AIFs*.

...

#### 1 Annex Application of DISP 1 to type of respondent / complaint

...

Type of respondent / complaint	DISP 1.2 Consumer awareness rules	DISP 1.3 Complaints handling rules	DISP 1.4 – 1.8 Complaints resolution rules etc.	DISP 1.9 Complaints record rule	DISP 1.19 Complaints reporting rules	DISP 1.10A Complaints data publication rules
...						
<u>a full-scope UK AIFM, small authorised UK AIFM or an incoming EEA AIFM, for complaints concerning AIFM management functions carried on for a closed-ended corporate AIF</u>	<u>Does not apply</u>	<u>Does not apply</u>	<u>Does not apply</u>	<u>Does not apply</u>	<u>Does not apply</u>	<u>Does not apply</u>
<u>a depositary, for complaints concerning activities carried on for an unauthorised AIF (where the AIF is not a charity AIF) or a closed-ended corporate AIF.</u>	<u>Does not apply</u>	<u>Does not apply</u>	<u>Does not apply</u>	<u>Does not apply</u>	<u>Does not apply</u>	<u>Does not apply</u>
<u>an incoming EEA AIFM, for</u>	<u>Applies for eligible</u>	<u>Applies for eligible complain-</u>	<u>Applies for eligible complain-</u>	<u>Applies for eligible complain-</u>	<u>Applies for eligible complain-</u>	<u>Does not apply</u>

<u>complaints concerning AIFM management functions carried on for an authorised AIF under the freedom to provide cross-border services</u>	<u>complain-ants</u>	<u>ants</u>	<u>ants</u>	<u>ants</u>	<u>ants</u>	
--	----------------------	-------------	-------------	-------------	-------------	--

...

## 2.6 What is the territorial scope of the relevant jurisdiction?

### Compulsory Jurisdiction

2.6.1 R (1) ...

(2) The *Compulsory Jurisdiction* also covers *complaints* about:

(a) *collective portfolio management services* provided by an *EEA UCITS management company* managing a *UCITS scheme*; and

(b) *AIFM management functions* provided by an *incoming EEA AIFM* managing an *authorised AIF*;

from an establishment in another *EEA State* under the freedom to provide *cross-border services*.

2.6.2 G This:

...

(2) excludes *complaints* about business conducted in the *United Kingdom* on a services basis from an establishment outside the *United Kingdom* (other than *complaints* about *collective portfolio management services* provided by an *EEA UCITS management company* in managing a *UCITS scheme*, and *complaints* about *AIFM management functions* provided by an *incoming EEA AIFM* managing an *authorised AIF*).

...

## Annex O

### Amendments to the Compensation sourcebook (COMP)

In this Annex, underlining indicates new text and striking through indicates deleted text.

#### 1.4 EEA firms

1.4.1 G *Incoming EEA firms* which are conducting *regulated activities* in the *United Kingdom* under a *BCD, IMD, or MiFID* ~~or UCITS Directive~~ passport are not required to participate in the *compensation scheme* in relation to those *passport activities*. They may apply to obtain the cover of, or ‘top-up’ into, the *compensation scheme* if there is no cover provided by the *incoming EEA firm’s Home State* compensation scheme or if the level or scope of the cover is less than provided by the *compensation scheme*. This is covered by COMP 14.

...

1.4.4 G *Incoming EEA firms* which are passporting into the *UK* under the *UCITS Directive* or *AIFMD* passport, to manage a *UCITS scheme* or *authorised AIF*, are required to participate in the *compensation scheme*.

1.4.5 G *Incoming EEA firms* which are passporting into the *UK* under an *AIFMD* passport, to manage an *unauthorised AIF* or to provide the services in article 6(4) of *AIFMD*, are not required to participate in the *compensation scheme* for those activities, but may choose to ‘top-up’ into the *compensation scheme* if they carry on those activities from a *branch* in the *UK* and there is no cover provided by the *incoming EEA firm’s Home State* compensation scheme, or if the level or scope of the cover is less than provided by the *compensation scheme*.

...

#### 4.2 Who is eligible to benefit from the protection provided by the FSCS?

...

4.2.2 R Table COMP 4.2.2R Persons not eligible to claim unless COMP 4.3 applies (see COMP 4.2.1R)

This table belongs to COMP 4.2.1R

...	
(18)	<u><i>Alternative investment funds</i>, and anyone who is the <i>AIFM</i> or <i>depository</i> of an <i>alternative investment fund</i>.</u>

...

## 5.5 Protected investment business

5.5.1 R *Protected investment business* is:

...

provided that the territorial scope condition in COMP 5.5.2R is satisfied and, for a firm acting as the manager or depositary of a fund, one of the conditions in COMP 5.5.3R is satisfied.

### Territorial scope condition

5.5.2 R ~~COMP 5.5.1R only applies if~~ The territorial scope condition is that the protected investment business was carried on from:

...

(4) ...

and in either case the *management company* is providing *collective portfolio management* services for a *UCITS scheme* but only if the *claim* relates to that activity; or

(5) an establishment of an incoming EEA AIFM in another EEA State if the claim relates to providing AIFM management functions on a cross-border services basis for an authorised AIF.

### Managers and depositaries of funds

5.5.3 R The conditions referred to in COMP 5.5.1R for a manager or depositary of a fund are:

(1) for the activities of managing an AIF or establishing, operating or winding up a collective investment scheme, the claim is in respect of an investment in:

(a) an authorised fund; or

(b) any other fund which has its registered office or head office in the UK or is otherwise domiciled in the UK and is not a closed-ended corporate AIF;

(2) where a firm is acting as depositary of an AIF and in so doing is carrying on the activity of acting as trustee or depositary of an AIF or safeguarding and administering assets, the claim is in respect of their activities for;

(a) an authorised AIF; or

(b) a charity AIF which is not a closed-ended corporate AIF;

...

## 6.2 Who is a relevant person?

...

6.2.2 G ...

(4) An incoming EEA AIFM managing an authorised AIF from a branch in the UK or under the freedom to provide cross-border services, is a relevant person in respect of that activity.

(5) An incoming EEA AIFM managing an unauthorised AIF is not a relevant person in respect of that activity unless it has top-up cover.

(6) An incoming EEA AIFM providing the services in article 6(4) of AIFMD is not a relevant person in relation to those activities, unless it has top-up cover.

...

## 14.1 Application and Purpose

Application

...

14.1.2 R This chapter also applies to an *incoming EEA firm* which is a *credit institution*, or an *MIFID investment firm* (or both), an *IMD insurance intermediary*, ~~or~~ a *UCITS management company* or an AIFM.

Purpose

14.1.3 G This chapter provides supplementary *rules and guidance* for an *incoming EEA firm* which is a *credit institution*, an *IMD insurance intermediary*, an *MiFID investment firm*, ~~or~~ *UCITS management company* or AIFM. It reflects in part the implementation of the *Deposit Guarantee Directive*, *Investors Compensation Directive*, and *UCITS Directive*. This sourcebook applies in the usual way to an *incoming EEA firm* which is exercising *EEA rights* under the *Insurance Directives*. Such a *firm* is not affected by the *Deposit Guarantee Directive*, the *Investors Compensation Directive* or the *UCITS Directive*.

...

14.1.4A R For an incoming EEA firm which is an AIFM, the question of whether it is a

participant firm for its passported activities depends on the type of activities it carries on under that passport. If it manages an authorised AIF from a branch in the UK or under the freedom to provide cross-border services, it is a participant firm for that activity. If it manages an unauthorised AIF, or provides the services in article 6(4) of AIFMD from a branch in the UK or on a cross-border services basis, it is not a participant firm for that activity; however, it may choose to obtain top-up cover for those activities if carried on from a branch in the UK.

- 14.1.5 G In relation to an *incoming EEA firm's passporting activities*, its *Home State* compensation scheme must provide compensation cover in respect of business within the scope of the *Deposit Guarantee Directive*, *Investors Compensation Directive*, ~~and~~ article 6(3) of the *UCITS Directive* and article 6(4) of AIFMD, whether that business is carried on from a *UK branch* or on a *cross-border services* basis. ~~(For an EEA UCITS management company this is only for certain passported activities, namely managing investments (other than collective portfolio management, advising on investments or safeguarding and administering investments. Insurance mediation activity relating to non-investment insurance contracts is not within the scope of the Deposit Guarantee Directive and the Investor Compensation Directive.~~

...

## 14.2 Obtaining top-up cover

...

- 14.2.3 G A notice under *COMP 14.2.1R* should include details confirming that the *incoming EEA firm* falls within a prescribed category. In summary:
- (1) the *firm* must be:
    - ...
    - (d) a *UCITS management company* that carries on the activities of *managing investments* (other than *collective portfolio management*), *advising on investments* or *safeguarding and administering investments*; ~~and~~ or
    - (e) an AIFM that carries on AIFM management functions for an unauthorised AIF; or
    - (f) an AIFM that provides the services in article 6(4) of AIFMD;

...

## Annex P

### Amendments to the Perimeter Guidance manual (PERG)

In this Annex, all the text is new and is not underlined.

#### 8.37 AIFMD Marketing

##### Introduction and purpose

- 8.37.1 G (1) Part 6 (Marketing) of the *AIFMD UK regulation* contains restrictions on an *AIFM* or *investment firm marketing an AIF*. Such a *person* may not *market* an *AIF* in the *UK* unless the relevant conditions set out in the *AIFMD UK regulation* are met.
- (2) The purpose of this section is to give *guidance* on:
- (a) the restrictions on an *AIFM* or *investment firm marketing an AIF* (*PERG* 8.37.2G and *PERG* 8.37.3G);
  - (b) the circumstances in which an *AIFM* or an *investment firm markets an AIF* (*PERG* 8.37.4G to *PERG* 8.37.10G);
  - (c) the exemptions from the *marketing* restrictions (*PERG* 8.37.11G and *PERG* 8.37.12G);
  - (d) the penalties for breach of the *marketing* restrictions (*PERG* 8.37.13G);
  - (e) the application of the *financial promotion* and scheme promotion restrictions (*PERG* 8.37.14G); and
  - (f) the interaction between the *marketing* of an *AIF* and the *prospectus directive* (see *PERG* 8.37.15G).

This section is not intended to have a more general application and, therefore, where *guidance* is given this should be interpreted as being limited to the *marketing* of *AIF* under the *AIFMD UK regulation*.

- (3) No *guidance* has been provided by the European Commission or *ESMA* on the meaning of *marketing* in *AIFMD* and, therefore, this *guidance* is subject to any future clarification from these (or other) European bodies. This means that other *EEA States* may take a different view on the meaning of *marketing* in *AIFMD*.
- (4) References to regulations in this section are to regulations of the *AIFMD UK regulation*.

Restrictions on an *AIFM* marketing an *AIF*

8.37.2 G Regulations 49 and 50 place restrictions on an *AIFM marketing* an *AIF*. These regulations provide that the following types of *AIFM* may not *market* the following types of an *AIF* in the *UK* unless the conditions summarised below are met.

(1) The conditions that need to be met vary depending on whether the *AIF* falls within regulation 57(1) or not. An *AIF* falls within this regulation if it is:

- (a) a *feeder AIF* that is a *UK AIF* or an *EEA AIF*, the *master AIF* of which is managed by a *non-EEA AIFM* or is a *non-EEA AIF*; or
- (b) a *non-EEA AIF*.

Such *AIFs* are not entitled to benefit from the *marketing* passport under *AIFMD* and are subject to the national private placement provisions in respect of their *marketing*.

(2) Regulation 49 (Marketing by full-scope EEA AIFMs of certain AIFs) provides that a *full-scope EEA AIFM* may not *market* an *AIF* that does not fall within regulation 57(1) in the *UK* unless:

- (a) when *marketing* to a *professional client*, the *FCA* has received a regulator's notice regarding the *marketing* of the *AIF*, in accordance with Schedule 3 to the *Act* (EEA passport rights); or
- (b) when *marketing* to a *retail client*:
  - (i) the *FCA* has received a regulator's notice regarding the *marketing* of the *AIF*, in accordance with Schedule 3 to the *Act*; or
  - (ii) the *FCA* has approved the *marketing* in accordance with regulation 54 (FCA approval for marketing) (see *FUND* 3.12 (Marketing in the home Member State of the AIFM)) and has not suspended or revoked that approval.

(3) Regulation 50 (Marketing by AIFMs of other AIFs) provides that:

- (a) a *full-scope UK AIFM* may not *market* an *AIF* that does not fall within regulation 57(1) in the *UK* unless the *FCA* has approved the *marketing* in accordance with regulation 54; and
- (b) the following types of *AIFM* may not *market* the following types of *AIF* unless the *AIFM* has complied with the national private placement provisions set out in chapter 3 (National private placement) of Part 6 of the *AIFMD UK regulation* (see *FUND* 10.5 (National private placement)):

- (i) a *full-scope UK AIFM* of an *AIF* falling within regulation 57(1);
- (ii) a *full-scope EEA AIFM* of an *AIF* falling within regulation 57(1); and
- (iii) a *non-EEA AIFM* (ie a *small non-EEA AIFM* or an *above-threshold non-EEA AIFM*) of a *UK AIF*, an *EEA AIF* or a *non-EEA AIF*.

#### Restrictions on an investment firm marketing an AIF

- 8.37.3 G Regulation 51 (Marketing of AIFs by investment firms) places a restriction on an *investment firm marketing* an *AIF*. This provides that where regulation 49 or 50 requires a condition to be met before an *AIFM* may *market* an *AIF*, an *investment firm* may not *market* that *AIF* unless that condition is met. However, as explained in *PERG* 8.37.4G(1)(b), an *investment firm* only *markets* an *AIF* if it does so at the initiative of, or on behalf of, the *AIFM* of that *AIF*.

#### The circumstances in which an AIFM or an investment firm markets an AIF

- 8.37.4 G (1) Regulation 45 (References in this part to an AIFM or an investment firm marketing an AIF) provides that:
- (a) an *AIFM markets* an *AIF* when the *AIFM* makes a direct or indirect offering or placement of *units* or *shares* of an *AIF* managed by it to an investor domiciled or with a registered office in an *EEA State*, or when another *person* makes such an offering or placement at the initiative of, or on behalf of, the *AIFM*; and
  - (b) an *investment firm markets* an *AIF* when it makes a direct or indirect offering or placement of *units* or *shares* of the *AIF* to an investor domiciled or with a registered office in an *EEA State* at the initiative of, or on behalf of, the *AIFM* of that *AIF*.
- (2) *Marketing*, therefore, has a specific meaning in the context of the *AIFMD UK regulation* which is, in some respects, different from the ordinary meaning of the term.

#### The meaning of an offering or placement

- 8.37.5 G (1) The terms ‘offering’ or ‘placement’ are not defined in the *AIFMD UK regulation* but, in our view, an offering or placement takes place for the purposes of the *AIFMD UK regulation* when a *person* seeks to raise capital by making a *unit* of *share* of an *AIF* available for purchase by a potential investor. This includes situations which constitute a contractual offer that can be accepted by a potential investor in order to make the investment and form a binding contract, and situations which constitute an invitation to the investor to make an offer to subscribe for the investment.

- (2) An ‘offering’ includes situations where the *units* or *shares* of an *AIF* are made available to the general public and a ‘placement’ includes situations where the *units* or *shares* of an *AIF* are only made available to a more limited group of potential investors.
- (3) However, an ‘offering’ or ‘placement’ does not include secondary trading in the *units* or *shares* of an *AIF*, because this does not relate to the capital raising in that *AIF*, except in situations where there is an indirect offering or placement (see *PERG* 8.37.7G). Similarly, the listing of the units or shares of an *AIF* on the *official list* maintained by the *FCA* in accordance with section 74(1) of the *Act* will not in and of itself constitute an offering or placement, although it may be accompanied by such an offering or placement.

#### Communications with investors in relation to draft documentation

- 8.37.6 G (1) Under article 31 *AIFMD*, an *AIFM* is required to submit the documentation and information in Annex III to *AIFMD* with its application for permission to *market* an *AIF* managed by it and to notify their *competent authority* of any material changes to this documentation and information. Therefore, the prescribed documentation and information should be in materially final form before the *AIFM* may apply for permission to *market* an *AIF*. Any communications relating to this draft documentation do not, in our view, fall within the meaning of an ‘offer’ or ‘placement’ for the purposes of *AIFMD*, as the *AIFM* cannot apply for permission to *market* the *AIF* at this point. For example, a promotional presentation or a pathfinder version of the private placement memorandum would not constitute an offer or placement, provided such documents cannot be used by a potential investor to make an investment in the *AIF*. However, a *unit* or *share* of the *AIF* should not be made available for purchase as part of the capital raising of the *AIF* on the basis of draft documentation in order to circumvent the *marketing* restriction.
- (2) In our view, the position for draft documentation set out in (1) should apply to *marketing* under article 32 of *AIFMD* and the national private placement provisions. However, as there is no European guidance on the meaning of *marketing*, other *EEA States* may take a different view.
- (3) Regard should be had to national law in relation to a communication which does not amount to an offering or a placement. In the *UK*, consideration needs to be given to whether such a communication is a *financial promotion* (see *PERG* 8.37.14G). If a *UK AIFM* is *marketing* in another *EEA State* using the *marketing* passport in article 32 *AIFMD*, regard should be had to the national law of that *EEA State*, as the arrangements for *marketing* are a matter for the *Host State* in accordance with article 32(5) of *AIFMD* (unless the communication is an *information society service* in which case regard should be had to the law of the *country of origin*).

#### The meaning of indirect offering or placement

- 8.37.7 G (1) Marketing may take place by a direct or indirect offering or placement of *units* or *shares* of an *AIF*. The reference to indirect offering or placement would include situations where an *AIFM* distributes *units* or *shares* of an *AIF* through a chain of intermediaries.
- (2) For example, if the *units* or *shares* of an *AIF* are temporarily purchased by a third party (eg, an underwriter or placement agent) with the objective of distributing them to a wider investor base, this could be an indirect offering or placement when those *units* or *shares* are made available for purchase by investors, if the third party is acting at the initiative of, or on behalf of, the *AIFM*.

#### The meaning of a unit or share of an AIF

- 8.37.8 G The terms ‘unit’ and ‘share’ in the *AIFMD UK regulation* are generic and can be interpreted as encompassing all forms of equity of, or other rights in, an *AIF*. As such, the terms are not limited to *AIFs* which are structured as companies or unitised funds and may include other forms of collective investment undertakings, such as partnerships or non-unitised trusts.

#### The meaning of investor

- 8.37.9 G (1) The reference to ‘investor’ in the *AIFMD UK regulation* should be regarded as a reference to the *person* who will make the decision to invest in the *AIF*. Where that *person* acts on its own behalf and subscribes directly to an *AIF*, the investor should be considered to be the *person* who subscribes to the *unit* or *share* of the *AIF*.
- (2) However, where that *person* engages another *person* to subscribe to the *AIF* on its behalf, including, for example, where:
- (a) a nominee company will subscribe as bare trustee for an underlying beneficiary; or
  - (b) a custodian will subscribe on behalf of an underlying investor,
- the *AIFM* or *investment firm* that is *marketing* the *AIF* should ‘look through’ the subscriber to find the underlying investor who will make the decision to invest in the *AIF* and that *person* should be regarded as the investor.
- (3) Where a discretionary manager subscribes, or arranges for another *person* to subscribe, on behalf of an underlying investor to the *AIF* and the discretionary manager makes the decision to invest in the *AIF* on that investor’s behalf without reference to the investor, it is not necessary to ‘look through’ the structure and the discretionary manager should be considered to be the investor for the purposes of the *AIFMD UK regulation*.

### Territorial scope of the marketing restrictions

- 8.37.10 G (1) The restrictions on the *marketing* of an *AIF* in regulations 49 to 51 only apply to *marketing* that takes place in the *UK*. In addition, under regulation 45, an *AIFM* or an *investment firm* only *markets* an *AIF* if the investor is domiciled in an *EEA State* or has its registered office in an *EEA State*.
- (2) Under regulation 2(2)(a) (Interpretation), the reference to ‘domicile’ should be construed in line with its meaning in *AIFMD*, ie its meaning under *EU* law. This may be different to the domicile of an investor for tax purposes.

### Marketing at the initiative of the investor

- 8.37.11 G (1) Regulation 47 (Marketing at the initiative of the investor) states that regulations 49 to 51 do not apply to an offering or placement of *units* or *shares* of an *AIF* to an investor made at the initiative of that investor.
- (2) A confirmation from the investor that the offering or placement of *units* or *shares* of the *AIF* was made at its initiative, should normally be sufficient to demonstrate that this is the case, provided this is obtained before the offer or placement takes place. However, *AIFMs* and *investment firms* should not be able to rely upon such confirmation if this has been obtained to circumvent the requirements of *AIFMD*.

### Marketing under the designation “EuSEF” and “EuVECA”

- 8.37.12 G Regulation 48 (Marketing under the designation “EuSEF” and “EuVECA”) provides that regulations 49 to 51 do not apply to the *marketing* of an *AIF* under the designation “EuSEF” and “EuVECA”. To be designated as such the *AIFM* of the *AIF* is required to apply for registration of the *AIF* with its *Home State* under the *EuSEF regulation* or the *EuVECA regulation* (and in the *UK* make a notification under regulation 14 (Notification of new funds under the *EuSEF Regulation* or the *EuVECA Regulation*)). Where the *AIFM* is *established* in the *UK*, it must also register as a *small registered UK AIFM* under regulation 10. The *AIFM* of an *AIF* is then entitled to *market* the *AIF* to *professional clients* and certain categories of *retail clients* (see article 6 of the *EuSEF regulation* and article 6 the *EuVECA regulation*) under those regulations.

### Contravention of the marketing restrictions

- 8.37.13 G An *AIFM* or an *investment firm* that acts in contravention of the *marketing* restrictions in regulations 49 to 51, or an *AIFM* that acts in contravention of a provision of the *EuSEF regulation* or the *EuVECA regulation*, is deemed to have been carrying out “unlawful marketing” under regulations 52 and 53. The consequences of carrying out unlawful marketing vary, depending on whether the *AIFM* or *investment firm* concerned is an *authorised person* or an

*unauthorised person.*

- (1) If the *AIFM* or *investment firm* is an *unauthorised person*, regulation 52 (Contravention by an unauthorised person) provides that:
  - (a) section 25 of the *Act* (contravention of section 21) applies to the unlawful marketing as it applies to the contravention of section 21(1) of the *Act* (although under regulation 52(3) the reference in section 25(1)(a) to imprisonment for a term not exceeding six months is to be read as a reference to imprisonment for a term not exceeding three months);
  - (b) section 168 of the *Act* (appointment of persons to carry out investigations in particular cases) applies as if the reference at section 168(2)(c) to a contravention of section 21 of the *Act* included reference to unlawful marketing; and
  - (c) section 30 of the *Act* (enforceability of agreements resulting from unlawful communications) applies in relation to:
    - (i) *controlled agreements* entered into in consequence of unlawful marketing, as it applies in relation to *controlled agreements* entered into in consequence of an unlawful communication; and
    - (ii) the exercise of rights conferred by a *controlled investment* in consequence of unlawful marketing, as it applies in relation to the exercise of such rights in consequence of an unlawful communication.
- (2) If the *AIFM* or *investment firm* is an *authorised person*, regulation 53 (Contravention by an authorised person) provides that:
  - (a) unlawful marketing is actionable at the suit of a private person who suffers loss as a result of such *marketing*, subject to the defences and other incidents applying to actions for breach of statutory duty; and
  - (b) section 168 of the *Act* (appointment of persons to carry out investigations in particular cases) applies as if the reference at section 168(2)(c) to a contravention of section 238 of the *Act* included reference to unlawful marketing.

#### Application of the financial promotion and scheme promotion restrictions

- 8.37.14 G (1) Regulation 46 (Application of the financial promotion and scheme promotion restrictions) provides that where a *person* may *market* an *AIF* under regulation 49, 50 or 51:
- (a) to the extent that such *marketing* falls within section 21(1) (restrictions on financial promotion) or 238(1) (restrictions on promotion) of the *Act*, the *person* may *market* the *AIF* to a *retail client* only if the *person* does so without breaching the

restriction in that section; and

- (b) to the extent that any activity falling within section 21(1) or 238(1) of the *Act* does not amount to *marketing* by an *AIFM* or an *investment firm* for the purposes of Part 6 of the *AIFMD UK regulations*, the restriction in that section applies to the *person*.
- (2) The effect of the provision referred to at (1)(a) is to require an *AIFM* or an *investment firm* that *markets* an *AIF* to a *retail client* to comply with the *financial promotion* and scheme promotion restrictions in relation to that *marketing*. The provision referred to at (b) is designed to clarify that the *financial promotion* and scheme promotion restrictions continue to apply to communications by an *AIFM* or an *investment firm* that do not constitute *marketing*.
- (3) In addition, the *AIFMD UK regulation* has made amendments to article 29 (Communications required or authorised by enactments) of the *Financial Promotion Order* and article 16 (Communications required or authorised by enactments) of the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 (SI 2001/2157). The effect of which is to exempt communications to *professional clients* which are approved by the *FCA* under regulation 49 or 50 of the *AIFMD UK regulation* from the *financial promotion* and scheme promotion restrictions.
- (4) There is likely to be a considerable overlap between *marketing* and *financial promotion*, and in the case of *marketing* to *retail clients*, this can only be done if a *financial promotion* can be made to that investor, but the two concepts are not the same. In particular, it is possible for a *person* to make a *financial promotion* without *marketing* an *AIF*. For example, an *AIFM* that makes a communication in relation to an *AIF* would be making a *financial promotion* if that communication was a significant step in the chain of events leading to an agreement to *engage in investment activity* (see *PERG* 8.4.7G (Inducements)), but would not be *marketing* an *AIF* if this communication was in relation to draft documentation (see *PERG* 8.37.6G).

#### The interaction between marketing and the prospectus directive

- 8.37.15 G
- (1) The *prospectus directive* has not been amended by *AIFMD* and closed-ended *AIFs* that are making an offer of securities to the public as defined in the *prospectus directive* need to comply with the requirements under both Directives.
  - (2) However, where the *AIF* is required to publish a *prospectus* under section 85 of the *Act* or the equivalent provision implementing article 3 of the *Prospectus Directive* in the *AIF's Home State*, only information referred to in *FUND* 3.2.2R and 3.2.3R that is additional to that contained in the *prospectus* needs to be disclosed, either separately or as additional information in the *prospectus*.

After PERG 15 insert the following new chapter. All text is new and is not underlined.

## **16 Scope of the Alternative Investment Fund Managers Directive**

### **16.1 Introduction**

#### **Question 1.1: What is the purpose of the questions and answers in this chapter?**

The purpose is to consider the scope of *regulated activities* specifically relating to the Alternative Investment Fund Managers Directive 2011/61/EU (“*AIFMD*”) as implemented in the *UK* through the *RAO*.

#### **Question 1.2: What are the regulated activities specifically relating to AIFMD?**

The *regulated activities* that specifically relate to *AIFMD* are:

- (1) *managing an AIF* (see *PERG* 16.3); and
- (2) *acting as a depositary of an AIF* (see *PERG* 16.4).

#### **Question 1.3: What are the main European measures dealing with the scope?**

As well as *AIFMD* itself, they are:

- (1) Commission delegated regulation (EU) No 231/2013, supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision (the *AIFMD level 2 regulation*); and
- (2) the *ESMA* document “Guidelines on key concepts of the *AIFMD*” (the *ESMA AIFMD key concepts guidelines*).

#### **Question 1.4: What is the approach to deciding whether something is covered by the AIFMD?**

When defining what an *AIF* is, the drafters of *AIFMD* faced a dilemma. If there is a precise and detailed definition there is a risk that some funds that should be regulated would fall outside regulation, given the wide variety of legal forms they can take. However, a broad definition entails a risk that *AIFMD* is given a much wider scope than intended. The agreed definition of *AIF* is drafted at a high level of generality and uses words which have a wide meaning. So we have approached *PERG* 16 by looking at what sorts of entities are clearly meant to be caught and then using that as a guide to identify cases which are not fairly within the definition, to avoid an interpretation that would give an exorbitantly wide scope. In the same way, descriptions of what is excluded should not be read in a way that

would take cases out of scope that are fairly within it.

A number of answers in *PERG 16* take a broad purposive interpretation and look at economic substance. The definition of *AIF* is drafted at a high level without much detail and uses broad concepts rather than precise technical or legal ones, meaning that *PERG 16* takes a similar approach to interpreting it.

**Question 1.5: Are there transitional arrangements?**

Yes. Some of the transitional arrangements for implementing the *AIFMD* may affect the date by which a *person* who would otherwise be *managing an AIF* or *acting as a depositary of an AIF* needs *permission* to do so. *PERG 16* does not deal with these arrangements. Details are in Part 9 of the *AIFMD UK Regulation*.

**16.2 What types of funds and businesses are caught?**

**Question 2.1: What is the basic definition of an AIF?**

An *AIF* is a collective investment undertaking, including investment compartments of such an undertaking, which:

- (1) raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and
- (2) does not require authorisation pursuant to article 5 of the *UCITS Directive*.

The key elements of the definition are:

- (3) it is a collective investment undertaking (*CIU*);
- (4) it has a defined investment policy;
- (5) it raises capital with a view to investing that capital for the benefit of those investors in accordance with that policy;
- (6) an *AIF* does not include an undertaking that requires authorisation under article 5 of the *UCITS Directive*.

It is necessary to satisfy all the elements of the definition in order to be an *AIF*.

**Question 2.2: Does an AIF have to take any particular legal form?**

No.

- An *AIF* may be open-ended or close-ended.
- It may or may not be listed.

- It does not matter whether it is set up under contract, trust or statute or if it takes another type of legal form. It does not matter what kind of legal structure it has.
- A limited partnership, a limited liability partnership, a limited liability company, an ordinary partnership, a unit trust, an *ICVC* and a contractual scheme could all be covered.
- It does not matter where the *AIF* is formed. It may be formed under the laws of any *EEA State* (including any part of the *UK*) or any *non-EEA state*.

**Question 2.3: What is an undertaking for these purposes?**

It covers a wide range of entities and goes beyond the *Glossary* definition of *undertaking*. It will include a *body corporate*, a *partnership*, an unincorporated association and a fund set up as a trust.

**Question 2.4: Is an AIF the same as a collective investment scheme?**

No, although the two concepts overlap considerably.

**Question 2.5: Is an undertaking excluded because it has no external manager?**

No. An undertaking that has no external manager and is managed by its own *governing body* may be an *AIF*.

**Question 2.6: Is the definition restricted to funds that invest in certain kinds of asset?**

No. Assets can include traditional financial assets (equity, equity related and debt), private equity, real estate and also non-traditional asset classes such as ships, forests, wine, and any combination of these assets. These are just examples; assets can include assets of any kind or combinations.

**Question 2.7: Does the definition depend on how the underlying property is held?**

No. The investors may receive a beneficial interest in the underlying property, as might be the case in a trust structure. They may also receive no interest in the underlying property but, instead, their interest may be represented by shares or units in the *AIF*, as would be the case where the *AIF* takes the form of a company limited by shares. It might even be possible for the investors to own the assets jointly.

**Question 2.8: Must the scheme be time-limited or designed to allow investors to exit from time to time or at a particular time?**

A scheme may be an *AIF* even if there are no arrangements for units or shares to be repurchased, redeemed or cancelled. Likewise a scheme may be an *AIF* even if it does not have a finite life.

**Question 2.9: Is a business excluded because it is exclusively or largely funded by debt or other types of leverage rather than equity capital?**

No. See the answers to Questions 2.37 (Is a securitisation vehicle covered?) and 2.44 (Can an issue of debt securities be an *AIF*?).

**Key elements of the definition**

**Capital-raising**

**Question 2.10: You say that an undertaking needs to raise capital to be an *AIF*. What does capital raising involve?**

Under the *ESMA AIFMD key concepts guidelines*, the commercial activity by an undertaking or a *person* (or entity acting on its behalf – typically, the *AIFM*) of taking direct or indirect steps to procure the transfer or commitment of capital by one or more investors to the undertaking for the purpose of investing it in accordance with a defined investment policy, should amount to the activity of raising capital.

It is immaterial whether:

- (1) the activity takes place once, on several occasions or on an ongoing basis;
- (2) the transfer or commitment of capital is in the form of subscriptions in cash or in kind.

If the capital raising is complete before the *regulated activities of managing an AIF* and *acting as a depositary of an AIF* come into force, the undertaking may still be an *AIF*, although transitional arrangements may apply (see Part 9 of the *AIFMD UK Regulation*).

An undertaking which makes investments will not be an *AIF* if those investments are funded by the undertaking other than by raising capital in accordance with the definition of an *AIF*. The fact that the undertaking's shares can be bought and sold on a stock exchange is not, of itself, the raising of capital by the undertaking.

**Question 2.11: Is a fund that only allows a single investor caught?**

Under the *ESMA AIFMD key concepts guidelines*, an undertaking which is not prevented by its national law, the rules or instruments of incorporation, or any other provision or arrangement of binding legal effect, from raising capital from more than one investor should be regarded as an undertaking which raises capital from a number of investors. This is the case even if it has only one investor.

A limited partnership in which there is a single limited partner making a substantive contribution and a general partner making a nominal £1 contribution will not be an *AIF* (subject to the answer to Question 2.12 (Is a fund that only allows a single investor always outside the definition of an *AIF*?)) as the undertaking will only have raised capital from one investor. The £1 contribution should be ignored for this purpose as it is wholly nominal.

**Question 2.12: Is a fund that only allows a single investor always outside the definition of an *AIF*?**

No. Under the *ESMA AIFMD key concepts guidelines*, an undertaking which is prevented by its national law, the rules or instruments of incorporation, or any other provision or arrangement of binding legal effect, from raising capital from more than one investor should be regarded as an undertaking which raises capital from a number of investors if the sole investor:

- (1) invests capital which it has raised from more than one legal or natural person with a view to investing it for the benefit of those persons; and
- (2) consists of an arrangement or structure which in total has more than one investor for the purposes of the *AIFMD*.

Examples of arrangements or structures of this type include:

- (3) master / feeder structures where a single feeder fund invests in a master undertaking;
- (4) fund of funds structures where the fund of funds is the sole investor in the underlying undertaking; and
- (5) arrangements where the sole investor is a nominee acting as agent for more than one investor and aggregating their interests for administrative purposes.

**Defined investment policy**

**Question 2.13: What indicative criteria could be taken into account in determining whether or not an undertaking has a defined investment policy?**

Under the *ESMA AIFMD key concepts guidelines*, an undertaking which has a policy about how the pooled capital in the undertaking is to be managed to generate a pooled return (see the answer to Question 2.16 for what pooled return means) for the investors from whom it has been raised should be considered to have a defined investment policy. The following factors would, singly or cumulatively, tend to indicate the existence of such a policy.

- (1) Whether the investment policy is determined and fixed, at the latest by the time that investors' commitments to the undertaking become binding.

- (2) Whether the investment policy is in a document which becomes part of, or is referenced in, the rules or instruments of incorporation of the undertaking.
- (3) Whether the undertaking, or the legal person managing the undertaking, has an obligation (however arising) to investors, which is legally enforceable by them, to follow the investment policy, including all changes to it.
- (4) Whether the investment policy specifies investment guidelines, with reference to criteria including any or all of the following:
  - (a) to invest in certain categories of asset, or conform to restrictions on asset allocation; or
  - (b) to pursue certain strategies; or
  - (c) to invest in particular geographical regions; or
  - (d) to conform to restrictions on leverage; or
  - (e) to conform to minimum holding periods; or
  - (f) to conform to other restrictions designed to provide risk diversification.

For the purposes of (4), any guidelines for the management of an undertaking that determine investment criteria, other than those in the business strategy followed by an undertaking having a general commercial or industrial purpose, should be regarded as investment guidelines. See the answer to Question 2.18 (Is an ordinary commercial business a collective investment undertaking?) for what an undertaking having a general commercial or industrial purpose means.

Under the *ESMA AIFMD key concepts guidelines*, leaving full discretion to make investment decisions to the legal person managing an undertaking should not be used to circumvent the provisions of *AIFMD*. Part of the definition of an *AIF* is that there should be a defined investment policy. It is our view that this guidance is aimed at arrangements that whilst in form do not meet the definition, may in practice do so. For example, say that the manager has a legal discretion that is too wide to meet the definition of a defined investment policy but publishes a detailed investment policy (which is not legally binding) and leads the investors to expect that it will follow it. Under the approach in *ESMA AIFMD key concepts guidelines* that fund may still be an *AIF*.

### **Collective investment undertaking**

#### **Question 2.14: What is a collective investment undertaking?**

See Questions 2.15 to 2.25.

It is important to remember that even if a business is a *CIU* that does not necessarily mean it is an *AIF*. To be an *AIF* it must meet all the criteria set out in the answer to Question 2.1 (What is the basic definition of an AIF?).

**Question 2.15: What is the basic definition of a collective investment undertaking?**

Under to the *ESMA AIFMD key concepts guidelines*, the following characteristics, if all of them are exhibited by an undertaking, should show that the undertaking is a *CIU*:

- (1) the undertaking does not have a general commercial or industrial purpose (please see the answer to Question 2.18 (Is an ordinary commercial business a collective investment undertaking?) to see what this means);
- (2) it pools together capital raised from its investors for the purpose of investment with a view to generating a pooled return for those investors from investments; and
- (3) the unitholders or shareholders of the undertaking – as a collective group – have no day-to-day discretion or control.

For (3), the fact that one or more, but not all, of the unitholders or shareholders are granted day-to-day discretion or control should not be taken to show that the undertaking is not a *CIU*.

**Question 2.16: What is a pooled return for these purposes?**

Under the *ESMA AIFMD key concepts guidelines*, it is the return generated by the pooled risk arising from acquiring, holding or selling investment assets – including activities to optimise or increase the value of these assets – irrespective of whether different returns to investors, such as a tailored dividend policy, are generated.

**Question 2.17: The answer to Question 2.15 refers to day-to-day control. Is it necessary to show day-to-day control to show that there is no AIF?**

No. This is explained further in the answer to Question 2.47 (What factors are relevant to whether a joint venture is excluded on the basis that it is managed by its members?).

**Question 2.18: Is an ordinary commercial business a collective investment undertaking?**

No. An undertaking with a general commercial or industrial purpose is not a *CIU*. The primary purpose of a *CIU* is investment to generate a pooled return. This is in contrast to an ordinary commercial business of manufacturing, production, trading or the supply of services. Hence a supermarket, professional services firm or manufacturer is not generally a *CIU* or an *AIF*. However, distinctions between "investment" and "trading" for tax purposes are not determinative here.

A general commercial or industrial purpose is defined in the *ESMA AIFMD key concepts guidelines* as the purpose of pursuing a business strategy which includes characteristics such as running predominantly:

- (1) a commercial activity, involving the purchase, sale, and/or exchange of goods or commodities and/or the supply of non-financial services; or
- (2) an industrial activity, involving the production of goods or construction of properties; or
- (3) a combination thereof.

**Question 2.19: Does that mean that if my undertaking deals in non-financial assets it can't be a CIU?**

Not necessarily. As explained in the answer to Question 2.6 (Is the definition restricted to funds that invest in certain kinds of asset?), an *AIF* may invest in non-financial assets. In deciding whether an undertaking is for general commercial or industrial purposes you must look at all relevant factors. Other examples include:

- (1) whether the undertaking merely holds the property to take advantage of changing market prices or the income stream (which points towards it being a *CIU*), or whether the undertaking carries on construction, professional service, industrial or manufacturing works (which points away from it being a *CIU*);
- (2) if the undertaking is designed to further the existing commercial businesses of the investors, rather than to achieve gain by realisation of the underlying assets, this points away from it being a *CIU*;
- (3) whether the undertaking itself creates the property underlying the scheme (which points away from it being a *CIU*).

**Question 2.20: Are there any other factors to take into account?**

If the application of the factors in the answer to Question 2.1 (What is the basic definition of an *AIF*?) gives a clear answer then the matter is resolved. However, sometimes there will not be a clear answer. In that case, our view is that you must also look at whether the undertaking is structured like a typical fund. If it is, that points towards it being an *AIF*.

One important factor is whether there is a defined mechanism for winding up or distribution of investment returns at a particular time or over a designated period. This may apply if the undertaking is open ended, allowing an investor to redeem his interest within a reasonable time.

Hence if the undertaking is set up to carry out a particular project and then to wind itself up and distribute the profits to investors, that points towards it being an *AIF*.

Another factor is whether an offer to invest in an undertaking is marketed as an investment in a fund.

A key factor is how strongly the factors listed in the answer to Question 2.13 (What indicative criteria could be taken into account in determining whether or not an entity undertaking has a defined investment policy?) point towards a defined investment policy. If it is clear that there is no defined investment policy then there is no *AIF*, because a defined investment policy forms part of the definition of an *AIF*. However, if the application of the factors in the answer to Question 2.1 does not give a clear answer, the fact it is very clear that the undertaking has a defined investment policy points towards its being an *AIF*. In particular, the following key factors should be taken into account (in each case an affirmative answer points towards the entity being an *AIF*):

- (1) Whether the investment policy is fixed by the time that investors' commitments to the business become binding on them.
- (2) How detailed the investment policy is.
- (3) Whether the investors may take legal action against the manager of the *AIF* or the investment vehicle for a breach of the policy.
- (4) Whether the investors' consent is needed for a change to the investment policy or whether the investors have the right to redeem their holdings if the policy changes.

**Question 2.21: Please give some further examples of factors to take into account when deciding whether an undertaking is set up like a fund.**

- (1) Whether the undertaking requires substantial numbers of personnel to run it (which points away from it being an *AIF*). One would look at whether the business is carrying out commercial activities which require the employment of employees, such as for the development of properties. However, an undertaking having its own employees does not definitively mean that it is not an *AIF* – for example, it may be consistent with being a fund for it to have skeleton staff to ensure that the value of its investment is maintained, eg, to ensure adequate maintenance work on the physical investments of the fund is carried out.
- (2) The extent to which the undertaking outsources its core operations to a third party (and the large-scale outsourcing of core operations points towards its being an *AIF*).
- (3) Whether the undertaking has the skill to monitor and control the work outsourced to a delegate and whether the undertaking has expertise in the area of the work being outsourced (each of which points towards its being an *AIF*).
- (4) Whether the undertaking has an external manager (which points towards its being an *AIF*).
- (5) Whether all the directors of the undertaking are non-executive and whether their compensation packages reflect this (each of which points towards its being an *AIF*).

- (6) The frequency of board meetings (the more frequent the meetings, the more this points away from its being an *AIF*).
- (7) Whether the undertaking's business is to invest in businesses carried on by others without having control over the management of those businesses (which points towards its being an *AIF*).
- (8) Where the potential *AIFM* controls a portfolio of several different groups, it is helpful to ask whether those investee companies/groups:
  - (a) are segregated from one another and if each of them is held and structured for their most effective future disposal (which points towards its being an *AIF*); or
  - (b) support one another and the group as a whole (which points away from its being an *AIF*).
- (9) How much of the undertaking's revenue is derived from activities that are characteristic of a *CIU*.

None of these factors are conclusive.

**Question 2.22: Do the answers to Question 2.18 (Is an ordinary commercial business a collective investment undertaking?) to Question 2.21 (Please give some further examples of factors to take into account when deciding whether an undertaking is set up like a fund) apply where the relevant business is a financial business?**

If the underlying business of the undertaking relates to financial assets, it will not be an undertaking set up for a general commercial or industrial purpose. In that case it does not matter whether the business involves short-term buying and selling or holding for the medium term or until maturity.

However, a conventional non-financial business will often carry out its business through shares in its subsidiaries. A share in a subsidiary is a financial asset. Thus it is necessary to distinguish between a conventional holding company of this sort and an *AIF*. Similarly, if a business holds an asset through a shell company or bare nominee, the categorisation of the business should generally look through the shell to the underlying assets. The answer to Question 2.21 (Please give some further examples of factors to take into account when deciding whether an undertaking is set up like a fund) is relevant to identify such a case. An undertaking holding assets through subsidiaries in this way is not a financial business for the purposes of *PERG* 16.

The ordinary cash management activities and treasury functions of a general commercial venture do not indicate that the venture is a *CIU*.

**Question 2.23: What are financial assets for the purpose of Question 2.22?**

Financial assets include investments under *MiFID* and investment life insurance contracts; real estate is not considered a financial asset.

An asset held for hedging purposes is not generally considered to be a financial asset for these purposes.

**Question 2.24: What factors are relevant in the case of a financial business?**

A financial business must meet the definition of an *AIF*. In our view the answer is likely to depend on the following factors.

- (1) The need for a defined investment policy (see Question 2.13).
- (2) Whether it raises external capital (see Question 2.10).
- (3) The main activity of a *CIU* is the investment of capital, not the provision of services. Hence a professional partnership, even with outside investors, is unlikely to be a *CIU*.
- (4) The pooled return point in Question 2.15 (What is the basic definition of a collective investment undertaking?) and Question 2.16 (What is a pooled return for these purposes?).
- (5) The day-to-day discretion or control point in Question 2.15.

**Question 2.25: What is the justification for the approach in the answers to Questions 2.15 (What is the basic definition of a collective investment undertaking?) to 2.23 (What are financial assets for the purpose of Question 2.22?)?**

If the definition of *CIU* were interpreted broadly it would cover many ordinary commercial undertakings with external passive investors. The only things preventing such undertakings from being an *AIF* would then be the requirements for a defined investment policy and to raise capital.

In one sense the shareholders in a supermarket invest on a collective basis in the underlying business of the company. It invests its assets to buy goods and sell them at a profit. The supermarket may set out its policy for investing shareholder funds in a formal policy document and it may raise external capital to fund its business. On a broad reading of the *AIF* definition, that would mean that the supermarket would be an *AIF*.

Not all commercial ventures have the general commercial objects of a standard private company; many will have very specific and detailed objects. For example, say that a new business is set up to sell consumer electronics. It raises capital and to reassure its investors its constitutional documents restrict it to this business. However, in every other way it is a conventional consumer retailer. On a broad reading of the *AIF* definition, this too would be an *AIF*.

Such a wide interpretation would be unreasonable. It would be unreasonable to say that a detailed statement of commercial objects turns an undertaking into a *CIU*. It would be contrary to the early recitals of *AIFMD*. The exclusion for holding companies (see Questions 6.2 to 6.5) may not apply because the business may not be acting through subsidiaries. Therefore, it is necessary to consider the

policy objectives of *AIFMD*.

*AIFMD* is aimed at funds. This is shown by the title of the Directive itself. The lists of the main types of undertaking covered by *AIFMD* in the answer to Question 2.28 (What are the commonest types of AIFs?) are taken from formal *EU* documents, which assist in analysing *AIFMD*'s intended scope.

The *FCA* considers that the term investment is being used in contrast to "commercial". *PERG* 16.2 is designed to draw out that distinction.

The reason for looking at whether an undertaking is set up as a fund is that it helps to make the distinction required by the *AIFMD* between a fund that invests in non-financial assets and an undertaking with a general commercial or industrial purpose and to reflect the fact that the *AIFMD* is aimed at funds.

However, it is clear from *AIFMD* and the *EU* documents referred to in the answer to Question 2.28 that private equity, hedge funds and venture capital funds are intended to be within the scope of *AIFMD*. *AIFMD* expressly refers to these types of funds in a number of places.

Also, a fund controlling a business is more than an investor, as it is in a position to control and run that business. Indeed, one of the benefits of a private equity fund is that it can restructure and improve businesses of target companies for the long term. These funds may need an extensive staff to carry on the business of the fund. It is clear though that a fund that takes over a business can still be an *AIF*, as *AIFMD* has detailed requirements for *AIFs* that do that.

Another point is that, as far as financial businesses are concerned, it is not a question of identifying businesses that should not be subject to financial services legislation, as many financial services businesses that do not fall within the scope of *AIFMD* are regulated under *MiFID* instead.

Therefore, the distinctions in the answers to Question 2.19 (Does that mean that if my undertaking deals in non-financial assets it can't be a CIU?) to 2.21 (Please give some further examples of factors to take into account when deciding whether an undertaking is set up like a fund) do not work for all the types of undertakings to which *AIFMD* is meant to apply. The distinction between an undertaking with a general commercial or industrial purpose and a financial purpose made by the *ESMA AIFMD key concepts guidelines* (see the answer to Question 2.18) is the key to reconciling the aim of excluding ordinary businesses and regulating funds.

Looking at whether an undertaking is set up as a fund is less useful for a financial business as that factor is based on the distinction between an ordinary commercial business and an investment one. For the reasons discussed in this answer a financial business is not an ordinary commercial business for these purposes. However, this factor has some relevance to a financial business for the reasons explained in the answer to Question 2.22 (Do the answers to Question 2.18 to Question 2.21 apply where the relevant business is a financial business?).

## **Overview of the AIF definition**

**Question: 2.26: Could you give a brief overview of how I should go about applying the guidance in PERG 2.2 in deciding whether AIFMD applies?**

- (1) Apply the Directive definition to see if it gives a clear answer. If it does, there is no need to go further.
- (2) See whether one of the exclusions summarised in *PERG* 16.6 (Exclusions) could apply.
- (3) Look at all the factors and come to an overall judgment. In particular, look at the following issues.
  - (a) Whether it has a defined investment policy.
  - (b) Whether it raises external capital from a number of investors.
  - (c) Whether there is pooling.
  - (d) Whether capital is invested on behalf of the investors, as opposed to the parties investing the capital for themselves. In particular, see whether the undertaking is excluded as a joint venture (Questions 2.46 to 2.49).
  - (e) Whether it is structured as a typical fund. The answer to Question 2.22 (Do the answers to Question 2.18 to Question 2.21 apply where the relevant business is a financial business?) explains how this is relevant to a financial business.
  - (f) Whether it carries on an ordinary commercial business as opposed to investment and whether it is a financial business. If an undertaking carries on a commercial business, and not a financial or investment one, that points towards it not being an *AIF*.

A financial business is described in the answer to Question 2.23 (What are financial assets for the purpose of Question 2.22?).

In some cases, the factors in (3)(e) and (f) will point to different answers. One may have an otherwise conventional business that is deliberately structured as a fund. In general, it is likely that the tests of whether it is an undertaking set up for a general commercial or industrial purpose (see (3)(f)) will give the answer, as this is the most important factor in the *ESMA AIFMD key concepts guidelines* and these factors are closest to the distinction between investment and commercial activities. However, it is our view that the *AIF* definition should be interpreted in a way that allows a fund to be set up to come within the *AIF* definition, even though the underlying business of the fund is a conventional commercial one, if it is very clear that the undertaking is being set up as a fund.

**Question: 2.27: Should all the factors be considered together?**

Yes. As the *ESMA AIFMD key concepts guidelines* point out, appropriate consideration should be given to the interaction between the individual concepts

of the definition of an *AIF*. An undertaking should not be considered an *AIF* unless all the elements in the definition (summarised in the answer to Question 2.1 (What is the basic definition of an *AIF*?)) are present. For example, undertakings which raise capital from a number of investors, but not with a view to investing it in accordance with a defined investment policy, should not be considered *AIFs* for the purposes of *AIFMD*.

Another example is a company formed for the purpose of operating a family-owned business. Later, the business is sold and the proceeds of sale invested by the company. The company may have become an investment vehicle but, without any capital being raised in accordance with an investment policy, it will not be an *AIF*. See the answer to Question 2.50 (family vehicles) for another reason why the company is unlikely to be an *AIF*.

### **Examples of schemes that are *AIFs* and of ones that are likely not to be *AIFs***

#### **Question 2.28: What are the commonest types of *AIFs*?**

The Commission Staff Working Document (Impact Assessment) accompanying the Proposal for the Directive (COM(2009) 207) lists the commonest types:

- (1) hedge funds;
- (2) commodity funds;
- (3) private equity funds (including large buy-out funds, mid-cap investment funds and venture capital funds);
- (4) infrastructure funds;
- (5) real estate funds;
- (6) conventional non-UCITS investment funds. These invest primarily in traditional asset classes (such as equities, bonds and derivatives) and pursue traditional investment strategies.

The list of fund types in the reporting templates in the *AIFMD level 2 regulation* is also useful. The main types it lists are:

- (7) hedge funds;
- (8) private equity funds;
- (9) real estate funds;
- (10) fund of funds;
- (11) commodity funds;
- (12) equity funds;
- (13) fixed income funds;

(14) infrastructure funds.

**Question 2.29: Is an arrangement whose activities are for non-business purposes covered?**

No. Arrangements do not amount to an *AIF* if the predominant purpose of the arrangements is not to invest its capital for the benefit of its investors. So an undertaking is not an *AIF* if the predominant purpose of the undertaking is to enable the participants to share in the use or enjoyment of physical property or to make its use or enjoyment available gratuitously to others. The reason for this is that the purpose of the undertaking is not investment.

For example, a group of householders purchases a piece of neighbouring land to preserve or develop it as an amenity and prevent it from being used for housing or commercial exploitation. This should not be considered to be an *AIF*, since the capital raising and the investment are primarily undertaken for non-business purposes and are not intended to deliver an investment return or profit. Also, there will probably not be a commercial communication of the kind referred to in Question 2.10 (Meaning of capital raising).

However, the fact that a fund's investors are charities or not-for-profit organisations does not necessarily mean that the fund is not an *AIF*.

**Question 2.30: Is a real estate investment trust (REIT) caught?**

The meaning, substance and structure of REITs vary across European jurisdictions. So this answer looks at *UK* REITs.

A REIT is a concept used for tax purposes. So if a business is a REIT, there is no presumption either way as to whether or not it is a *CIU* or *AIF*.

**Question 2.31: Is a timeshare scheme covered?**

No. Arrangements do not amount to an *AIF* if the rights of the investors are rights under a timeshare contract or a long-term holiday product contract as defined in the Holiday Products, Resale and Exchange Contracts Regulations 2010, because these are already regulated under other European legislation.

**Question 2.32: Is a pension scheme covered?**

No. Neither an *occupational pension scheme* nor a *personal pension scheme* is covered. *PERG* 16.6 (Exclusions) sets out the relevant exclusions. The breadth of the wording in recital (8) of *AIFMD* shows that these exclusions should be interpreted broadly so as to cover both sorts of scheme. In addition, a pension scheme is sufficiently well established as a category of investment to mean that if *AIFMD* intended to catch pension schemes it would have made that clear.

However, a scheme is not excluded from being an *AIF* just because all its investors are themselves pension schemes benefitting from an exclusion.

**Question 2.33: Is a pension Common Investment Fund (CIF) covered?**

This answer deals with a scheme under which separate *occupational pension schemes* run by companies within one group co-mingle their assets or part of their assets in another trust. Typically, the operators of the pension schemes will be corporate trustees established by the employing companies, as will the trustee of the CIF. In such an arrangement, the *persons* participating in the CIF are the trustees of the *occupational pension schemes* and not the beneficiaries under the *occupational pension schemes*. Hence, the group exclusion described in *PERG* 16.6 (Exclusions) should apply.

**Question 2.34: Is an employee participation scheme covered?**

No. Employee participation schemes and employee savings schemes are not covered. *PERG* 16.6 (Exclusions) sets out the exclusion.

This exclusion covers schemes in which an employee invests in securities of the employer or in a company in the employee's group (or derivatives in relation to them such as options). As explained in the answer to Question 2.35 (Is an employee carried interest or co-investment vehicle caught?) it also covers other schemes.

In our view, the term employee is not limited to the technical definition in *UK* law. It would include personnel who work in the business of the undertaking concerned, contributing their skills and time, including partners, directors and consultants. Employee participation schemes generally allow participation by former employees and spouses/close relatives and this exclusion allows schemes that include such participants. Trustees of an employee's family trust may also participate.

The exclusion can apply however the scheme is structured and whether or not a trustee is involved in the scheme.

**Question 2.35: Is an employee-carried interest or co-investment vehicle caught?**

The carried interest participation of the employees of a private equity fund manager that manages private equity funds will typically be structured through one or more carried interest vehicles to receive the carried interest and in which employees of the manager will have a participation.

In our view, such vehicles will generally not be an *AIF* because the employee participation scheme exclusion will often apply. The exclusion applies because a scheme for carried interest participation allows the employees to benefit from the success of the *AIF* management undertaken by the employer.

Family members of an employee, or trustees of an employee's family trust, may also participate in the carried interest vehicle on this basis without that vehicle becoming an *AIF*.

Sometimes the manager may invest in the vehicle alongside the employees. This should not mean that the employee participation scheme exclusion is not available (see the answer to Question 2.52 (Is a co-investment vehicle caught?)).

**Question 2.36: Is this is the only basis on which a carried interest vehicle can be excluded?**

A carried interest vehicle may be excluded for another reason. As explained in the answer to Question 2.1 (What is the basic definition of an AIF?), part of the definition of an *AIF* is that it raises capital from a number of investors. If employees only invest a nominal amount of capital, the undertaking does not meet this criterion because the employees are not investors. An employee is not investing his salary (by being remunerated in part by way of an interest in the vehicle) if it is a term of his employment that he would be remunerated with an interest in the vehicle.

**Question 2.37: Is a securitisation vehicle covered?**

No, as long as its sole purpose is to carry on:

- (1) a securitisation or securitisations; and
- (2) other activities which are appropriate to accomplish that purpose.

Securitisation has the meaning in Regulation (EC) No 24/2009 of the European Central Bank concerning statistics on the assets and liabilities of financial vehicle corporations engaged in securitisation transactions. This says that securitisation means a transaction or scheme whereby:

- (3) an asset or pool of assets is transferred to an entity that is separate from the originator and is created for or serves the purpose of the securitisation; and/or
- (4) the credit risk of an asset or pool of assets, or part thereof, is transferred to the investors in the securities, securitisation fund units, other debt instruments and/or financial derivatives issued by an entity that is separate from the originator and is created for or serves the purpose of the securitisation.

In the case of transfer of credit risk, the transfer is achieved by either:

- (5) the economic transfer of the assets being securitised to an entity separate from the originator created for or serving the purpose of the securitisation (which is accomplished by the transfer of ownership of the securitised assets from the originator or through sub-participation); or
- (6) the use of credit derivatives, guarantees or any similar mechanism.

Where such securities, securitisation fund units, debt instruments and/or financial derivatives are issued, they should not represent the originator's payment obligations.

**Question 2.38: Can a contract of insurance itself be an AIF?**

No, as confirmed by recital (8) of the *AIFMD*.

**Question 2.39: Are funeral plans caught?**

No. A *funeral plan contract* is not caught. Neither is a contract which would be a *funeral plan contract* but for the proviso to article 59(2) of the *RAO* or the exclusion in article 60 of the *RAO*.

**Question 2.40: Are individual investment management agreements caught?**

In principle, No.

An *AIF* is an investment undertaking which pools together capital raised from investors to invest it on a collective basis. The management of a portfolio of investments or other property on an individual client-by-client basis is covered by *MiFID* rather than *AIFMD*.

The pooled return concept in the *ESMA AIFMD key concepts guidelines* (see the answer to Question 2.16 (What is a pooled return for these purposes?)) is particularly relevant here. One of the characteristics of an *AIF* is that there is pooling. An individual investment management arrangement falls outside the definition of an *AIF* as there is no pooling and thus no *CIU*. So, in principle, individual investment management arrangements do not give rise to an *AIF*.

However, an *AIF* can take any form. It may be that a scheme is set up with a separate individual investment management agreement for each investor but that the scheme is, in reality, a collective scheme. If the individual investment management agreements are being run on a common basis and as a single economic undertaking, then the arrangements may be considered as a single *CIU*. That means that the arrangements will be an *AIF* as long as the other elements of the definition are also met.

This is consistent with the pooled return concept in the *ESMA AIFMD key concepts guidelines*. Pooling for these purposes does not require that the underlying property is pooled. There must be pooling of capital, risk and return. If the capital is invested on a collective basis (in a way that creates pooled risk, for example by investment in a single project) there may be a single *CIU*.

A *firm* that manages the portfolios of a number of separate clients using the same investment strategy and taking advantage of economies of scale does not, for that reason, stop being an individual portfolio manager.

If the manager holds out his ability to provide bespoke investment management services but arranges a fair amount of bulk dealing for clients with similar investment objectives, that is compatible with individual portfolio management.

If an investment manager aggregates orders on behalf of multiple clients or accounts, which are then allocated back to the clients following execution, this does not mean that there are collective arrangements of the type that would suggest that an arrangement is a *CIU*.

The fact that the manager is obliged to protect the interests of the investors on an individual client-by-client basis points towards the arrangement being individual

portfolio management, rather than a *CIU*.

However, if each separate investment management agreement provides that the manager will carry out investments and sales in a synchronised way so that the securities to which different investors are entitled are bought and sold at the same time, this may result in the scheme being a *CIU*. The same may apply if the scheme is marketed or held out as being operated in this way, for instance as a single fund.

Therefore, a scheme may be a *CIU* if it is part of the scheme's investment policy for investors' holdings to be managed as a single holding. For example, if the policy of the scheme is to take control of a company but each individual investor's stake is too small to achieve control, the scheme as a whole may be a *CIU*. The same may apply for other large stakes. If, for some reason, a scheme's investment policy relies on the manager exercising the voting or other rights of investors in the underlying companies as a single bloc, the scheme may also be a *CIU*.

**Question 2.41: Is a stocks and shares ISA caught?**

In principle, No.

A stocks and shares ISA takes the form of a scheme of investment managed by an account manager and under which the account investments are held in the beneficial ownership of the account holder. There is no pooling of the type described in section 235 of the *Act* (Collective investment schemes)

Some ISAs are run on a self-determined basis where investors decide what might be held in the ISA. In that case, there will be no collective element and no *AIF*.

In some cases, the parts of the property held in a particular ISA scheme are bought and sold at the same time as they are for other ISAs run by the same manager, except when a particular *person* becomes or ceases to be an investor in the plan. In that case, there is a collective element in the arrangements. However, in the light of the answer to Question 2.40 (Are individual investment management agreements caught?) this will not be enough on its own to mean that the ISA is an *AIF*.

**Question 2.42: Is a child trust fund caught?**

No.

As explained in the answer to Q53A in *PERG* 13, the link between the underlying investment and the rights and interests acquired by the CTF account holder is too remote for the account holder to be considered as having acquired the underlying investment itself. Similarly, a child trust fund should not be seen as raising capital from the beneficiaries to invest it for their benefit.

In any case, it is also likely to be excluded for the reason described in the answer to Question 2.41 (Is a stocks and shares ISA caught?).

### **Question 2.43: Is an enterprise investment scheme (EIS) fund caught?**

This answer deals with a fund set up in this way. When an investor subscribes to an EIS fund, it will appoint a manager to invest his subscriptions, on a discretionary basis, in qualifying companies. The investor in the EIS fund is the beneficial owner of the shares in which the fund invests for him. The investor is entitled to a whole number of shares in each company and not just a proportionate interest in all the shares in which the fund capital is invested. There is no pooling of the type in section 235 of the *Act* (Collective investment schemes).

It is likely that the property held in a particular EIS fund, to which the different fund investors are entitled, is not bought and sold separately, except where a *person* becomes or ceases to be an investor in the fund. It is likely that the manager will exercise the voting and other rights in the EIS fund shares as a bloc and hold the investments as nominee for the investor. These arrangements are likely to be formally documented. The EIS fund may be approved by HM Revenue and Customs but need not be.

The answer to Question 2.40 (Are individual investment management agreements caught?) is relevant here. In particular, it is useful to take into account the difference between conventional individual portfolio management arrangements (where an investor entrusts a manager with a sum of money, to be invested on a discretionary basis, based on the individual circumstances of the particular investor) and EIS funds, where the manager would not be making investments on the basis of their suitability for any individual investor. Hence, it is likely that an EIS fund should be considered to be a *CIU* and an *AIF* (if all the other conditions of the *AIF* definition are met).

### **Question 2.44: Can an issue of debt securities be an AIF?**

In general, No. The arrangements for an issue of debt securities by an ordinary commercial or financial company will not generally be an *AIF* or turn the issuer into one, although an *AIF* may invest in debt securities. In general, an issuer of debt securities does not invest the capital it raises for the benefit of the subscribers for the debt securities. In any case, for there to be an *AIF* there is still a need for the investors to expect to get the return from investment by the undertaking under a defined investment policy. If the return on the debt securities was simply set at a certain rate of interest and fixed premium, and the undertaking was liable to make those payments whether or not they were generated by management of the assets in line with the investment policy, this condition would not be met.

However, other cases may not be so straightforward. For example, say that an SPV is set up to invest in financial assets. It finances the purchase of those assets by an issue of debt securities. Profits and income from the assets are channelled back to the holders of the debt securities through interest on the debt securities and a payment on redemption. In principle, such a scheme could be a *CIU* if the investors invested through shares in the SPV. If the SPV has no equity shareholders (or no significant equity shareholders) and if all the profits and

losses flow through to the investors via the return on their debt securities there is an argument that it should make no difference that the investors hold their interest through debt securities rather than through shares.

Further guidance from *ESMA* or the European Commission may be given in due course. However, given that the list of the main types of undertaking covered by *AIFMD* taken from the Commission impact assessment referred to in the answer to Question 2.28 (What are the commonest types of AIFs?) does not mention debt instruments of this kind, it seems likely that they were not meant to be caught. Pending any future clarification at the *EU* level, we shall assume that an SPV issuing debt securities in the way described in the answer to this question will not be an *AIF* if the arrangements meet the exclusion in paragraph 5 of the Schedule to the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (Debt securities).

We shall also assume that an issue of an *alternative debenture* is not an *AIF* on the same basis, although it may be clear for other reasons that it is not. For instance, in some cases the bond assets will include a promise from a substantial commercial entity to buy the other bond assets. In such a case the *alternative debenture* is essentially a credit obligation of that commercial entity. In addition, part of the definition of an *alternative debenture* is that the amount of any payments in addition to the principal amount does not exceed an amount which would, at the time at which the bond is issued, be a reasonable commercial return on a loan of the capital. The effect is that an *alternative debenture* of this type is, in substance, a form of unsecured debt obligation of an ordinary commercial company. Therefore, it is not an *AIF* any more than the arrangements for a conventional debt issue by an ordinary company are an *AIF*.

Debt securities in a securitisation special purpose vehicle are likely to be excluded, as explained in the answer to Question 2.37 (Is a securitisation vehicle covered?).

#### **Question 2.45: Is an exchange traded fund (ETF) caught?**

An ETF can take various forms. This answer focuses on a fund in the form of an undertaking that seeks to replicate or track movements in a chosen securities index by holding some or all of the underlying constituents of the index or entering into derivatives contracts that replicate their performance synthetically.

In practice, an ETF of this sort is likely to be an *AIF* unless it is a *UCITS*.

#### **Question 2.46: Is a joint venture caught?**

Not normally.

There is no exclusion for joint ventures in *AIFMD*. However, recital (8) confirms that they are not covered. Therefore, to decide what undertakings are excluded as joint ventures, one must identify the principles on which the recital appears to be based. Another reason for looking at the underlying principles is that the term 'joint venture' does not have a precise legal meaning in *EU* law or a commonly accepted meaning across the legal systems of all Member States.

The key part of the definition of *AIF* reads “collective investment undertakings ... which ... raise capital from a number of investors, with a view to investing it ... for the benefit of those investors”. Two aspects of this are particularly relevant to joint ventures.

- (1) Capital is invested on behalf of the investors, as opposed to the parties investing the capital for themselves. An *AIF* does not include an undertaking that is managed by its members jointly and that is not managed by a third party or by only some of the investors.
- (2) A venture that does not raise external capital (see the answer to Question 2.50 (Are family investment vehicles AIFs?) for a discussion of external capital) is not an *AIF*. The clearest example of this is the family investment vehicle but it is relevant to joint ventures too.

This approach to joint ventures means that if an undertaking meets the definition of an *AIF* it will be an *AIF* even if it is referred to as, or intended to be, a joint venture. Similarly, just because something is set up as a joint venture but is not excluded on the grounds in this answer does not mean that it must be an *AIF*. In all cases it is necessary to apply the *AIF* definition to the specific undertaking.

**Question 2.47: What factors are relevant to whether a joint venture is excluded on the basis that it is managed by its members?**

The clearest example of a joint venture is when all the parties have day-to-day control (in the ordinary sense) over its activities. However, it is still possible to have a joint venture in which not all the parties have day-to-day control.

This point is made by the definition of day-to-day discretion or control in the *ESMA AIFMD key concepts guidelines*. They define it as a form of direct and ongoing power of decision – whether exercised or not – over operational matters relating to the daily management of the undertakings’ assets and which extends substantially further than the ordinary exercise of decision or control through voting at shareholder meetings on matters such as mergers or liquidation, the election of shareholder representatives, the appointment of directors or auditors or the approval of annual accounts.

Joint ventures are often a marriage of equity and expertise, with one partner having the necessary experience to carry out the day-to-day management and the equity partner being involved in making more key, strategic decisions. The parties may also hire an outside *person* to manage the venture. These factors do not necessarily mean that the undertaking is an *AIF*. Such an undertaking may still be excluded as a joint venture if the strategic financial and operating decisions are under the control of all the parties. Each of the parties should have a continuous involvement in the overall strategic management of the undertaking.

For these purposes, a party does not manage the undertaking just because he is consulted or has the right to give directions.

No single party should be in a position to control the activity unilaterally. One factor to take into account is whether strategic decisions require the unanimous consent of the parties sharing control.

The requirement that all take part in strategic management also means that the number of parties should be sufficiently low for joint management to be practical.

If the parties carry on the venture through a corporate vehicle, an investor may exercise this control through a nominee it appoints to the board of the undertaking.

This approach to the exclusion of a joint venture is not based on a formal legal definition of a joint venture but on the application of the broad concepts included in the *AIF* definition. Therefore, in looking at control, it is necessary to take account of commercial substance as well as legal relationships.

For example, it is quite common for a joint venture in England and Wales to be structured as a limited partnership under the Limited Partnerships Act 1907 for reasons of commercial flexibility and tax transparency. To maintain the limited liability conferred by limited partner status, investors investing in the joint venture through limited partners must not take part in the management of the partnership business. Therefore, the business of the partnership is managed by a general partner, which is controlled (through the exercise of voting rights or the appointment of nominees to the board of directors) by the investors. In such a structure, each investor in the joint venture structure has economic participation (through its limited partner) and strategic management control (through the general partner) but those two roles are separated and carried on through different entities.

Notwithstanding that separation of roles, as a matter of commercial substance, that arrangement can still be an excluded joint venture. The investing organisations will exercise control through the general partner, as well as investing economically through their respective limited partners.

If an undertaking switches from one in which all parties have control to one in which some do not, that does not necessarily mean that it ceases to be a joint venture. In particular, if at the time that it was set up and the capital was put in all parties had joint control, but later one retires but remains a party to the investment, it should not be transformed into an *AIF* merely by virtue of the retirement of that party.

If any of the investors are retail investors, it is unlikely that an undertaking will be excluded from the definition of an *AIF* on the ground that the venture is managed by its investors. This is because the requirement for joint control takes into account the practical ability to participate in joint decision-making (as well as the right to do so), including skills and bargaining power. It is unlikely that retail investors will have such ability as against professional investors or managers.

An example of where a retail investor might be able to take part in joint decision making would be if the investor is a member of the management team. A member

of the management team may have the practical ability to participate in joint decision-making with the professional investors.

**Question 2.48: What factors are relevant to whether a joint venture is excluded on the basis that it does not raise external capital?**

The definition of *AIF* envisages a distinction between the undertaking that raises capital and the parties who invest capital. In some cases, there may be no such distinction. For instance, commercial parties may come together on their own joint initiative. There is no external capital because the *persons* raising and providing capital are the same. This is explained further in the answer to Question 2.50 (Are family investment vehicles AIFs?).

**Question 2.49: Can you give me some practical factors to take into account when deciding whether a commercial venture is excluded as a joint venture?**

- (1) Whether the parties come together in the proposed project before the structure of the venture is determined and capital is raised.
- (2) Whether the venture relates to a business the parties are already carrying on at the time it is set up. For example, the joint venture vehicle may merely be a legally convenient means by which joint venture parties combine their resources and skills to carry out a business activity. When looking at whether a party is already carrying on an activity, one looks at whether it has been doing so on its own account, rather than through investing in funds.
- (3) Whether the parties have an existing relationship.
- (4) Joint ventures are more likely to have a policy focussed on the achievement of the parties' commercial goals, as opposed to a defined investment policy.

The factors in (1) to (3) are based on the answer to Question 2.48 (What factors are relevant to whether a joint venture is excluded on the basis that it does not raise external capital?). The factor in (3) is also based on the answer to Question 2.47 (What factors are relevant to whether a joint venture is excluded on the basis that it is managed by its members?). An undertaking in (4) may fall outside the *AIF* definition on the grounds that to be an *AIF* there must be a defined investment policy.

In some cases, a joint venture may be set up between a single investor providing capital and an active participant providing the expertise to manage the business. The investor providing the capital may choose not to be involved in the running of the venture. One reason why such a venture might not be an *AIF* is explained in the answer to Question 2.52 (Is a co-investment vehicle caught?).

**Question 2.50: Are family investment vehicles AIFs?**

No. There is no specific exclusion for family investment vehicles in the operative parts of the *AIFMD*. Recital (7) of *AIFMD* says that a family office vehicle that invests the private wealth of investors without raising external capital is not an

*AIF*. To decide what undertakings are excluded as family investment vehicles, one must identify the principles on which the recital appears to be based. The recital is making a distinction between external and internal capital. In our view this recital is based on the part of the *AIF* definition that requires capital to be raised. The recital explains that the *AIF* definition does not cover an arrangement in which the *persons* raising and providing capital are the same. Based on this, features of a family investment vehicle are likely to include:

- (1) a family relationship between the investors;
- (2) no raising of capital from investors outside the relationship.
- (3) the money or assets to be invested and the relationship between the investors pre-date the relationship between the investors and the vehicle. Even though the family should pre-date the relationship between the investors and the vehicle, that does not mean that a vehicle becomes an *AIF* if an individual joins the family later.

Family investment vehicles can be used by large extended families spanning a number of generations and those born, or joining the family, before and after investment arrangements are made. Civil partnership and marriage may be included. A family can include step and cohabitation relationships, as well as blood and other immediate family relationships, such as adoption. *Persons* or vehicles representing eligible family members (such as the trustees of a family trust holding money or assets beneficially for a family member) may also be included.

This is confirmed by the *ESMA AIFMD key concepts guidelines*. They say that when capital is invested in an undertaking by a member of a pre-existing group, for the investment of whose private wealth the undertaking has been exclusively established, this is not likely to be within the scope of raising capital.

The *ESMA AIFMD key concepts guidelines* define a pre-existing group as a group of family members, irrespective of the legal structure put in place to invest in an undertaking and provided that the sole ultimate beneficiaries are family members, where the existence of the group pre-dates the establishment of the undertaking. The guidelines say that this does not prevent family members joining the group after the undertaking has been established. The guidelines say that ‘family members’ means the spouse of an individual, the person who is living with an individual in a committed intimate relationship, in a joint household and on a stable and continuous basis, the relatives in direct line, the siblings, uncles, aunts, first cousins and the dependants of an individual.

**Question 2.51: What happens if a family group invests alongside others investors?**

The *ESMA AIFMD key concepts guidelines* say that the fact that a member of a pre-existing group invests alongside investors not being members of a pre-existing group, should not have the consequence that the part of the *AIF* definition requiring the raising of capital is not fulfilled. Whenever such a situation does arise, all the investors should enjoy full rights under *AIFMD*. If a

family group invests in an undertaking alongside other investors and the undertaking meets the other parts of the *AIF* definition, that undertaking is an *AIF* and the family members are treated as investors with the same protections under *AIFMD* as other investors. However, please also see the answer to Question 2.52 (Is a co-investment vehicle caught?).

A manager may establish a vehicle to invest the wealth of several families. Such a vehicle will not be excluded on the grounds in Question 2.50 (Are family investment vehicles AIFs?).

**Question 2.52: Is a co-investment vehicle caught?**

Co-investment vehicles come in many forms. This question refers to a case in which an institutional investor confers a substantial mandate on an investment manager and structures the mandate through an investment vehicle (the co-investment vehicle). The other investors are the manager itself and its employees, or a vehicle taking a carried interest for the benefit of employees of the manager. The manager and carried interest vehicle may make a nominal contribution for tax or other structuring reasons.

A similar issue can arise with family investment vehicles. The family vehicle may employ third-party professional investment managers, who have no family relationship, to manage the assets of the family. To align their interests with those of the family, the employees and managers invest in the co-investment vehicle alongside the family vehicle.

In our view, a co-investment vehicle of the type covered by this question should not be seen as an *AIF*. If the manager or employees only make a nominal investment, there is no *AIF* as nominal investments should be disregarded (see the answer to Question 2.11 (Is a fund that only allows a single investor caught?)). Even if the investment is more than nominal, the undertaking only raises capital from a single external investor, which is the institutional investor. Please see the answer to Question 2.50 (Are family investment vehicles AIFs?) as to why the *FCA* believes that the concept of an external investor is part of *AIFMD*.

In addition, in our view, an investment by the manager should not normally change an undertaking into an *AIF*. The purpose of the *AIFMD* is to protect the investors from whom capital is raised as referred to in the answer to Question 2.1 (What is the basic definition of an AIF?) and Question 2.10 (You say that an undertaking needs to raise capital to be an AIF. What does capital raising involve?) by regulating, among others, the manager. In our view, this means that co-investment by the manager should not generally affect the status of an undertaking as an *AIF*.

The vehicle through which employees invest is not itself an *AIF* because of the exclusion for employee participation schemes (see Question 2.34).

Another type of co-investment vehicle is where the employees of a private equity fund manager invest alongside the manager in private equity funds managed by the manager. This is dealt with by Question 2.35 (Is an employee carried interest

or co-investment vehicle caught?) and Question 2.36 (Is this is the only basis on which a carried interest vehicle can be excluded?).

**Question 2.53: Is an acquisition vehicle for an AIF itself a separate AIF?**

Sometimes, an *AIFM* establishes an SPV or acquisition vehicle as an administrative convenience, to facilitate a specific transaction(s) to be carried out by the *AIFM*.

Generally, the SPV should not be treated as a separate *AIF* for the purposes of *AIFMD*. The vehicle does not raise capital from investors. Rather, it would merely be a means of investing capital already raised by the *AIF*. It is merely part of the mechanical and administrative mechanisms for putting into operation a scheme of investment that has already been set up.

**Question 2.54: Is an arrangement for multiple participation by a number of funds in a single investment, a single AIF?**

Sometimes a manager may set up an arrangement under which a number of *AIFs* participate in a particular investment.

The question is then whether this creates a new *AIF* alongside the *AIFs* that invest in it or creates a single *AIF* made up of the participating *AIFs*.

As explained in the answer to Question 2.40 (Are individual investment management agreements caught?) the starting position is that a series of investments in parallel do not amount to a single *AIF*. The fact that each fund has different investors and its own arrangements between its investors is an additional factor that points towards there being separate funds.

It is also necessary to take into account article 26 of *AIFMD* (Obligations for AIFMs managing *AIFs* which acquire control of non-listed companies and issuers: Scope), which contemplates that several *AIFs* may agree jointly to acquire control of a non-listed company without that resulting in all the *AIFs* being considered as a single *AIF*.

This is consistent with the policy of *AIFMD*, because the investors will still have the protections given by national laws implementing *AIFMD*.

The factors relating to whether an undertaking is excluded as a joint venture are likely to be relevant (see the answer to Questions 2.46 to 2.49). For these purposes, it will normally only be necessary to consider the involvement of the *AIFs* themselves and not the individual investors in each *AIF*.

**Question 2.55: Does it make a difference if there are co-investors?**

Sometimes not all of the co-investors participating in an investment will themselves be *AIFs*. An acquisition vehicle may be set up for the *AIF* and the other co-investors. Such an arrangement might not be a separate *AIF*. Many of the points in the answer to Question 2.54 (Is an arrangement for multiple participation by a number of funds in a single investment, a single AIF?) apply here too. The factors relating to whether an undertaking is excluded as a joint

venture are likely to be relevant (see the answers to Questions 2.46 to 2.49).

**Question 2.56: Is a central counterparty in a clearing system an AIF?**

No.

The undertaking is providing a service to members of the system in its role as central counterparty and not investing in the securities bought and sold for their benefit.

**Question 2.57: Is a firm that deals in financial instruments on its own account caught?**

As explained in the answer to Question 43 in *PERG* 13.5 (Exemptions from MiFID), *CIUs* are specifically exempt from *MiFID*, as are their depositaries and managers. An *AIF* is a *CIU* and an *AIFM* is a manager.

However, that does not mean that a company that buys and sells financial instruments for its own account is covered by *AIFMD* rather than covered by *MiFID*, or rather than excluded from both *AIFMD* and *MiFID*.

The answer to Question 2.24 (What factors are relevant in the case of a financial business?) sets out the key factors in deciding whether a financial services company is an *AIF*.

**Question 2.58: Is a bank or insurer caught?**

An undertaking authorised under the *Insurance Directives* or the *Banking Consolidation Directive* will not be an *AIF*.

**Question 2.59: Is a depositary receipt caught?**

In our view, *certificates representing certain securities* are unlikely to be units in an *AIF*. This is because they simply involve a method of investing in the underlying security without a collective investment element. However, the fact that units of an *AIF* are issued in the form of *certificates representing certain securities* does not mean that it stops being an *AIF*.

**Question 2.60: Is a client account caught?**

A solicitor's client account or a client money account which is ancillary to the true *AIF* are not themselves *AIFs*.

**Investment compartments**

**Question 2.61: What is an investment compartment of an AIF?**

An investment compartment is similar to, and corresponds with, the *Glossary* term *sub-fund*. It refers to an undertaking whose property is divided into separate pools, each of those pools being a compartment.

**Question 2.62: How do I tell the difference between investment compartments of a wider fund and separate funds?**

Sometimes it is necessary to decide whether investment pools that are linked in some way should be treated as being investment compartments of the same fund or as separate funds. A key factor is whether the investment pools are documented and operated as a single fund. This takes into account whether the investment pools are documented as separate funds and managed as a whole, and whether an investor in one pool is entitled to exchange his investment in that pool for an investment in another one. If a creditor has recourse to the assets of all the pools, that is likely to mean that there is a single fund, but if a creditor does not have such recourse this is neutral as to whether the pools are separate funds or investment compartments of the same fund.

The fact that one fund invests all its assets in another does not make them into a single fund, as *AIFMD* recognises that feeder and master funds can remain separate funds.

**Question 2.63: Is each investment compartment a separate AIF?**

In our view, an investment compartment of an *AIF* should not be treated as a separate *AIF* for the purpose of the *general prohibition*. The phrase “including investment compartments of such an undertaking” in the definition of an *AIF* means that an investment compartment of an *AIF* is treated as being part of that *AIF*.

An alternative approach is that each compartment should be treated as a separate *AIF* but the overall fund should not. We do not agree with this interpretation because a compartment in its ordinary meaning is something that is part of something bigger. Also, potentially the role of manager of the overall fund is significant and it is unlikely that it would fall outside regulation altogether. This alternative approach would be inconsistent with the part of the *ESMA AIFMD key concepts guidelines* discussed in the answer to Question 2.65 (What if part of an undertaking meets the *AIF* definition and part does not?).

Another argument against this alternative approach is the requirement in article 5(1) of *AIFMD* that each *AIF* have a single *AIFM*. It would be difficult to meet that requirement if each compartment is subject to the management of the manager of the overall fund. It would also seem unlikely that *AIFMD* would get round that problem by implicitly prohibiting funds from having an overall manager.

Another interpretation is that the undertaking as a whole and each compartment are separate *AIFs*. We do not agree with that interpretation for similar reasons.

Hence, an investment compartment of an *AIF* should not be treated as a separate *AIF*. It is part of the overall *AIF*. The manager of the sub-fund is not *managing an AIF* whereas the manager of the overall fund is.

**Question 2.64: How do Questions 2.62 and 2.63 apply to umbrellas?**

This answer only relates to an *umbrella* as defined in the *Glossary*. Broadly, this defines an *umbrella* as a single scheme that provides for pooling of the type mentioned in section 235(3)(a) of the *Act* (Collective investment schemes) in relation to separate parts of the scheme property and whose unitholders are entitled to exchange rights in one part for rights in another. These two factors are likely to mean that (assuming all the requirements of the *AIF* definition are met) the *umbrella* should be treated as a single *AIF* with each sub-fund being treated as an investment compartment of that *AIF*. If this is the case, the sub-funds will not be separate *AIFs* in their own right.

**Question 2.65: What if part of an undertaking meets the AIF definition and part does not?**

Under the *ESMA AIFMD key concepts guidelines*, where an investment compartment of an undertaking exhibits all the elements in the definition of an *AIF* this should be sufficient to determine that the undertaking as a whole is an *AIF*.

**Other general points**

**Question 2.66: Does the interpretation of a CIU in PERG 16 apply to MiFID?**

*PERG 16* is not intended to cover the meaning of a collective investment undertaking in other *EU* Directives. This reflects the fact that the *ESMA AIFMD key concepts guidelines* do not apply to *MiFID*.

**16.3 Managing an AIF**

**Question 3.1: What does managing an AIF mean?**

A *person* manages an *AIF* when the *person* performs:

- (1) risk management; or
- (2) portfolio management;

for the *AIF*.

**Question 3.2: If a person performs only one of the activities listed in the answer to Question 3.1 does it manage an AIF?**

Yes. However, an *AIFM* is not permitted to be authorised to manage an *AIF* on that basis (see *FUND 1.4.4R(4)*). An undertaking that is seeking *permission* to manage an *AIF* will not be given *permission* to provide portfolio management without also providing risk management or vice versa.

**Question 3.3: Are the activities mentioned in the answer to Question 3.1 the only activities included in managing an AIF?**

No. If a *person* manages an *AIF* (within the meaning set out in the answer to Question 3.1), and also carries on:

- (1) one or more of the additional activities listed in the answer to Question 3.4); or
- (2) one or more other activities in connection with or for the purposes of the management of that *AIF*;

those activities are included in the *regulated activity* of *managing an AIF*.

**Question 3.4: What are the additional activities referred to paragraph (1) of the answer to Question 3.3?**

They are as follows:

- (1) administration:
  - (a) legal and fund management accounting services;
  - (b) *customer* inquiries;
  - (c) valuation and pricing (including tax returns);
  - (d) regulatory compliance monitoring;
  - (e) maintenance of *unit / share* holder register;
  - (f) distribution of income;
  - (g) *unit* issues and redemptions;
  - (h) contract settlements (including certificate dispatch) and;
  - (i) record keeping;
- (2) *marketing*; and
- (3) activities related to the assets of *AIFs*, namely:
  - (a) services necessary to meet the fiduciary duties of the *AIFM*;
  - (b) facilities management;
  - (c) real estate administration activities;
  - (d) advice to *undertakings* on capital structure, industrial strategy and related matters;
  - (e) advice and services related to mergers and the purchase of *undertakings*; and

- (f) other services connected to the management of the *AIF* and the companies and other assets in which it has invested.

**Question 3.5: Does anyone carrying on only the activities listed in the answer to Question 3.4 carry on the regulated activity of managing an AIF?**

No. Those activities only involve *managing an AIF* for a particular *AIF* if the *person* doing them is carrying on, for that *AIF*, the part of the *regulated activity* of *managing an AIF* described in the answer to Question 3.1. If an *AIFM* carries on the activities listed in the answer to Question 3.4 in relation to a fund of which it is the *AIFM* those activities are included in the *regulated activity* of *managing an AIF*. But, if the activities listed in the answer to Question 3.4 are carried on by a third party, that third party will not be carrying on the *regulated activity* of *managing an AIF* for that *AIF*, although that third party may be carrying on other *regulated activities*, such as *arranging (bringing about) deals in investments* or *making arrangements with a view to transactions in investments*.

**Question 3.6: Can an AIF manage itself?**

Yes. An *AIFM* may be:

- (1) another *person* appointed by or on behalf of the *AIF* and which through that appointment is responsible for managing the *AIF* (an external *AIFM*);  
or
- (2) where the legal form of the *AIF* permits internal management and where the *AIF*'s *governing body* chooses not to appoint an external *AIFM*, the *AIF* itself (an internal *AIFM*).

**Question 3.7: What effect does delegation have?**

An *AIFM* is permitted to appoint a delegate to provide portfolio management and/or risk management services for the *AIFM* (see *FUND* 3.10 and regulation 26 of the *AIFMD UK regulation*).

If the delegation relates to the additional services described in the answer to Question 3.4 (What are the additional activities referred to paragraph (1) of the answer to Question 3.3?) the delegate will not be *managing an AIF*, for the reason in the answer to Question 3.5 (Does anyone carrying on only the activities listed in the answer to Question 3.4 carry on the regulated activity of managing an AIF?).

In any case, under article 51ZC(3) of the *RAO* a *person* does not *manage an AIF* if the functions it performs for the *AIF* have been delegated to it by another *person*, provided that such other *person* is not an *AIFM* that has delegated such functions to the extent that it is a letter-box entity. So a *person* who has received a delegation of some of the *AIFM*'s core functions (ie, the functions listed in the answer to Question 3.1 (What does managing an AIF mean?)) generally does not *manage an AIF*. Letter box entities are described in the answer to Question 3.8 (Does this mean that delegation can never affect who is doing the regulated activity of managing an AIF?).

This answer reflects *AIFMD*, which envisages that generally an *AIFM* may delegate functions without the delegate becoming the *AIFM* in place of the original manager, or the delegate becoming the *AIFM* alongside the original manager, in breach of the requirement that there be only one *AIFM*.

**Question 3.8: Does this mean that delegation can never affect who is doing the regulated activity of managing an AIF?**

Delegation can sometimes affect who is *managing an AIF*.

Article 82 of the *AIFMD level 2 regulation* says that an *AIFM* shall be deemed a letter-box entity and shall no longer be considered to be the manager of the *AIF* at least in any of the situations set out in that article, which is reproduced in *FUND* 3.10.9EU.

This raises four questions. First, whether an *AIFM* that delegates in such a way as to make itself into a letter-box entity is still carrying on the *regulated activity of managing an AIF*. This is dealt with in Question 3.9. Secondly, whether the delegate is carrying on the *regulated activity of managing an AIF*. This is dealt with in Question 3.10. The third question is whether this only applies when article 20 of *AIFMD* (which contains the letter-box entity provisions elaborated by article 82) applies. This is dealt with by Question 3.12. The fourth question is what the test for a letter-box entity is. This is dealt with in Question 3.13.

**Question 3.9: Does delegation by the manager mean that it is no longer carrying on the regulated activity of managing an AIF?**

The fact that article 82 of the *AIFMD level 2 regulation* says that a letter-box entity shall no longer be considered to be the manager of the *AIF* would appear to mean that an *AIFM* that delegates in this way is no longer *managing an AIF*. However, in our view, an *AIFM* that delegates in such a way as to make itself into a letter-box entity is still carrying on the *regulated activity of managing an AIF*. The following points support this:

- (1) Article 82 of the *AIFMD level 2 regulation* describes who is acting as the manager. The *regulated activity* does not refer to acting as an *AIFM*; it simply refers to managing an *AIF*. The *regulated activity* does not expressly incorporate article 82 as part of the definition.
- (2) The *RAO* does not include the requirement in the *AIFM* definition that the *AIFM* be a legal *person*, which shows that the definition of *AIFM* is not fully aligned with the definition of *managing an AIF*.
- (3) Regulation 4(3) of the *AIFMD UK regulation* envisages that the *AIFM* will be appointed by or on behalf of the *AIF* or by its *governing body*. This is not reflected in the *RAO* either.
- (4) Article 20 of *AIFMD* (which contains the letter-box entity provisions elaborated by article 82) deals with regulating how an *AIFM* should manage its *AIF*.

- (5) There is a good reason why an *AIFM* that has delegated its functions in a way that means it has become a letter-box entity should still be carrying on the *regulated activity of managing an AIF*. It is necessary to avoid the risk that a manager that delegates to this degree falls out of regulation, because it stops carrying on a *regulated activity*. One of the purposes of regulation is to stop a manager doing this and effective implementation of *AIFMD* requires us to be able to do so.

**Question 3.10: Does delegation by the manager mean that the delegate is carrying on the regulated activity of managing an AIF?**

The factors listed in the answer to Question 3.9 (Does delegation by the manager mean that it is no longer carrying on the regulated activity of managing an AIF?) support the view that a delegate of a letter-box entity does not *manage an AIF*. However, despite this, we believe that a delegation by the *AIFM* to a delegate can result in the delegate *managing an AIF* if the delegation results in the *AIFM* becoming a letter-box entity.

- (1) Recital (9) of *AIFMD* confirms that the letter-box entity provision is an anti-avoidance provision preventing circumvention of *AIFMD* by means of turning the *AIFM* into a letter-box entity. A provision of this kind reflects a more general principle that rights given by European law (such as the right of a manager to delegate or the right of a delegate to carry on its business without being authorised as an *AIFM*) should not be abused. It is important to know who the real manager of an *AIF* is, so as to know whether an *EEA State* is responsible for its supervision or whether the *AIF* is managed from outside the *EEA*. If the real manager is not *managing an AIF*, it may not be carrying on any *regulated activity* and may not fall under any *EEA* financial services regulation, even though effective implementation of *AIFMD* would require the situation to be regularised.
- (2) Article 51ZC(3) of the *RAO* implies that a *person* that has accepted a delegation from a manager that results in the manager becoming a letter-box entity, can be *managing an AIF*.
- (3) It is not unreasonable to say that, if the delegate is in practice carrying out the management activities described in the answer to Question 3.1 (What does managing an AIF mean?), it should be treated as carrying on the *regulated activity*.

**Question 3.11: Does this mean that delegation that results in the manager being a letter-box entity always means that the delegate will be carrying on the regulated activity of managing an AIF?**

No. In each case it is necessary to apply the tests set out in *PERG* 16.3. If all the functions that have been delegated by the letter-box entity manager have been delegated to the same delegate, it is likely that that delegate is *managing an AIF*. However, if the delegation is to a number of delegates, it may be that none of those delegates is *managing an AIF*.

**Question 3.12: Do the answers to Questions 3.7 to 3.11 apply just to delegation by a full-scope UK AIFM?**

No. For example, they would be relevant to whether a delegate in the *UK* is *managing an AIF* if it accepts a delegation from an overseas manager. We take this approach for the following reasons.

- (1) The arguments in Question 3.10 (Does delegation by the manager mean that the delegate is carrying on the regulated activity of managing an AIF?) are also in favour of the view that the effect of delegation on a delegate should not be confined to delegation by an authorised *AIFM*. In any case, it would be anomalous for delegation to affect who is *managing an AIF* only when article 20 of *AIFMD* applies, particularly given that article 82 is, in our view, an anti-avoidance provision (see the answer to Question 3.10).
- (2) Article 51ZC(3) of the *RAO* is not specifically limited to circumstances in which article 20 applies. It applies in any situation in which it is necessary to decide whether a *person* is *managing an AIF* for the purpose of the *general prohibition*.

**Question 3.13: What is the test for a letter-box entity?**

In our view, the test of whether delegation results in the delegate *managing an AIF* is decided by article 82 of the *AIFMD level 2 regulation* in circumstances when article 82 and article 20 of *AIFMD* apply to the delegating *AIFM*.

When article 20 does not apply we look at whether the delegation is to such a degree that the manager can no longer be considered to be carrying out the activities in the answer to Question 3.1 (What does managing an AIF mean?). We take the various factors elaborated in article 82 into account but they will not necessarily decide the matter because article 82 is, on its face, linked to article 20 and article 51ZC(3) of the *RAO* does not specifically refer to article 20 or 82.

If a manager to which article 82 does not apply can nevertheless satisfy all the conditions set out in that article to demonstrate that it has not become a letter-box entity, any delegation by it will not result in the delegate *managing an AIF*.

However, we do not necessarily require that delegate to demonstrate to us that every condition of article 82 is satisfied, to conclude that the manager is not a letter-box entity and that the delegate is not *managing an AIF*. The importance of the tasks carried out by the manager is a key consideration, taking particular account of the right and ability of the manager to exercise oversight and control and the degree to which these rights are exercised. In our view, these factors reflect the fact that we are applying a broad anti-avoidance approach to a letter-box entity rather than the detailed requirements of article 82.

**Question 3.14: Is the material in PERG 16.3 about delegation relevant to delegation between branches of the same firm?**

No. Please see Question 8.4 (Is the material in PERG 16.3 about delegation of

management functions from one firm to another relevant to delegation from one branch to another?).

**Question 3.15: If a person is not eligible to be appointed as an AIFM because it is not a legal person but is appointed to manage an AIF, does that mean that it cannot carry on the regulated activity of managing an AIF?**

No. The fact that it is not eligible to be appointed as an *AIFM* does not mean that it is not *managing an AIF*. That means that an *unauthorised person* may breach the *general prohibition* by carrying on the *regulated activity of managing an AIF*, even though the *person* does not qualify for a *Part 4A permission* because that *person* is not a legal *person*.

Article 6(1) of *AIFMD* provides that no *AIFMs* should manage *AIFs* unless they are authorised in accordance with that Directive. An *AIFM* must be a legal *person*. So it appears that the *regulated activity of managing an AIF* cannot apply to someone who is not a legal *person*. However, in our view, this is not the case. As explained in the answer to Question 3.9 (Does delegation by the manager mean that it is no longer carrying on the regulated activity of managing an AIF?), the definition of an *AIFM* is not fully aligned with the definition of *managing an AIF*. In particular, the *regulated activity* does not refer to acting as an *AIFM* (the definition of *AIFM* in the *AIFMD UK Regulation* includes the legal *person* requirement), it simply refers to managing an *AIF*. There is a good policy reason for this. It is not the intention of the legislation to allow someone who is not a legal *person* to manage an *AIF* without being authorised, but to stop an *AIF* being managed by someone who is not a legal *person*.

**Question 3.16: Can an AIF in the form of a limited partnership under the Limited Partnerships Act 1907 appoint its general partner as the AIFM?**

Yes. If the general partner is the *AIFM* it will be an external *AIFM*.

Strictly speaking this question is not relevant to the definition of *managing an AIF* but this is a convenient place to discuss the point.

On the face of it the answer should be No. The starting position is that if an *AIF* is managed by the body that has responsibility for governing it under the legislation under which the *AIF* is formed, the *AIF* is internally managed, particularly if there is no *governing body* that appoints and supervises the manager and the manager is a member of that *AIF*. A general partner is a partner and there will usually be no *governing body* separate from the general partner. Under this approach, a limited partnership would be internally managed, which would be contrary to *AIFMD*, as an *AIFM* must be a legal *person* and an English and Welsh limited partnership is not a legal *person*.

However, in our view, the roles of the limited and general partners are sufficiently distinct for one to be able to say that the limited partnership does not manage itself. The distinction between the two roles does not stem from the fact that the general partner manages the partnership, but from the facts that:

- (1) the roles of general and limited partner are provided for by the legislation

under which limited partnerships are formed; and

- (2) the legislation, in practice, prevents the limited partners from managing the partnership (because for as long as a limited partner takes part in the management of the partnership business, it is liable for the partnership's debts as though it were a general partner).

In principle, the same should apply for jurisdictions outside England and Wales with legislation drafted in the same way. We understand that this is the case with a Scottish limited partnership (which has legal personality) and so if its general partner is appointed as its *AIFM* it will also be an external *AIFM*.

## 16.4 Acting as a depositary of an AIF

### Question 4.1: What does acting as a depositary of an AIF involve?

Acting as:

- (1) the depositary of an *AIF* managed by a *full-scope UK AIFM*; or
- (2) the depositary of a *UK AIF* managed by an *EEA AIFM*; or
- (3) the depositary of any other *AIF*, if the *FCA* or an authority in another *EEA State* has permitted a *person* with its registered office or a branch in the *UK* to be appointed as a depositary of that *AIF* under article 61.5 of *AIFMD*; or
- (4) the *trustee* of an *AIF* that is an *authorised unit trust scheme* but is not an *AIF* to which (1) to (3) apply; or
- (5) the depositary of an *AIF* that is an *open-ended investment company* or *authorised contractual scheme* but is not an *AIF* to which (1) to (3) apply.

(3) only applies until 22 July 2017.

### Question 4.2: What does depositary mean?

For the purposes of paragraphs (1) to (3) of the answer to Question 4.1, depositary means:

- (1) a *person* appointed in compliance with the requirement for the *AIFM* to appoint a depositary in article 21.1 of *AIFMD*; or
- (2) an Article 36 custodian as defined in regulation 57(5)(a) of the *AIFMD UK regulation*.

For the purpose of paragraph (5) of the answer to Question 4.1, depositary has the meaning in section 237 of the *Act*.

### Question 4.3: The AIFMD allows the depositary to delegate some functions

**to a third party. Is that third party acting as the depositary of an AIF?**

No. Article 21 of *AIFMD* envisages that a *depositary* remains the sole depositary even if, in accordance with that article, it delegates certain of its functions.

## 16.5 How AIFMD affects other regulated activities

### Overlap with the collective investment scheme definition

**Question 5.1: Do the definitions of collective investment scheme and AIF overlap?**

Yes. The definition of a *collective investment scheme* does not exclude an *AIF*. The two definitions sit alongside each other and overlap extensively. Many *AIFs* will also be *collective investment schemes*. Therefore, it is possible that an *unauthorised person* who operates a fund will be *establishing, operating or winding up a collective investment scheme* and *managing an AIF*.

However, not every *AIF* is a *collective investment scheme*. The main example of an *AIF* that is not a *collective investment scheme* is an *AIF* in the form of a body corporate other than an *open-ended investment company*. Therefore, the existing case law on the definition of a *collective investment scheme* does not decide whether an undertaking is an *AIF* or *CIU* and the material in *PERG 16* about the definition of an *AIF* and *CIU* does not determine whether an undertaking is a *collective investment scheme*.

**Question 5.2: Won't the overlap between collective investment schemes and AIFs mean that an AIFM will need unnecessarily overlapping permissions?**

No. There are two important exclusions.

- (1) If a *person* has a *Part 4A permission to manage an AIF*, activities carried on by that *person* in connection with or for the purposes of *managing an AIF* are excluded from all other *regulated activities*.
- (2) A *person* (A) does not carry on the *regulated activity* of *establishing, operating or winding up a collective investment scheme* if A carries on that activity in relation to an *AIF*, and:
  - (a) at the time A carries on the activity, the *AIF* is managed by:
    - (i) a *person* with a *Part 4A permission to manage an AIF* (who may be a third party or A itself); or
    - (ii) a *person* registered as a *small registered UK AIFM* because the conditions in regulation 10(4) of the *AIFMD UK Regulation* are met in respect of that *AIF*; or
  - (b) no more than 30 days have passed since the *AIF* was managed by

a *person* with that *permission* or registration.

The 30-day period in (b) can be extended in certain circumstances, as set out in article 51ZG(2) of the *RAO*.

### **Overlap between the depositary and custody activities**

#### **Question 5.3: Does the depositary of an AIF also need permission for safeguarding and administering investments?**

No. A *person* does not *safeguard and administer investments* if the *person* carries on the activity in relation to an *AIF* and the *person* has a *Part 4A permission* to *act as a depositary of an AIF* in respect of that *AIF*.

### **Interests in an AIF as specified investments**

#### **Question 5.4: How do the advising and intermediary activities relate to an AIF?**

Although an interest in an *AIF* is not separately specified by the *RAO* as a type of *security* or *relevant investment* in its own right it will normally fall within one of the other categories of *security* or *relevant investment*, such as a *share* or *unit*. That means that the *regulated activities* of:

- (1) *dealing in investments as agent*;
- (2) *arranging (bringing about) deals in investments*;
- (3) *making arrangements with a view to transactions in investments*; and
- (4) *advising on investments*;

will apply in the same way as they do to other investments of the relevant type. Therefore, for example, a *firm* that advises on investing in an *AIF* that is a *collective investment scheme* will be advising on *units*.

### **Examples**

#### **Question 5.5: Please give me some examples of how the regulated activities specific to AIFs interact with other regulated activities.**

Please see the following table. All the examples involve *UK persons* and activities carried on in the *UK*. It is assumed that any manager delegating functions is not a letter-box entity.

Part 1: Examples of how the <i>regulated activities</i> specific to <i>AIFMs</i> interact with other <i>regulated activities</i>	
Example	Explanation of interaction with other <i>regulated activities</i>

<p>(1) A firm (A) with <i>permission to manage an AIF</i>, manages an AIF that is also a <i>collective investment scheme</i></p>	<p>A does not need <i>permission to establish, operate or wind up a collective investment scheme</i>. The CIS exclusion applies.</p>
<p>(2) A firm (A) with <i>permission to establish, operate or wind up a collective investment scheme</i> wants to <i>manage an AIF</i></p>	<p>A needs to vary its <i>permission</i> to cover <i>managing an AIF</i></p>
<p>(3) An <i>unauthorised person</i> (A) <i>manages an AIF</i> that is also a <i>collective investment scheme</i> and also operates it. No <i>authorised AIFM</i> is in place.</p>	<p>A will be <i>establishing, operating or winding up a collective investment scheme</i> and <i>managing an AIF</i>. The effect on <i>unauthorised persons</i> of the overlap between the definitions of <i>AIF</i> and <i>collective investment schemes</i> is different to the effect on <i>authorised persons</i>. The CIS exclusion does not apply as A is not an <i>authorised person</i>.</p>
<p>(4) A firm (A) with <i>permission to manage a UCITS</i> wishes to act as an <i>AIFM</i></p>	<p>A needs to vary its <i>permission</i> to cover <i>managing an AIF</i>.</p>
<p>(5) A firm (A) with <i>permission to manage an AIF</i> delegates the management of some of the AIF's <i>securities</i> portfolios to B.</p>	<p>B does not <i>manage an AIF</i> for the reasons described in the part of the answer to Question 3.7 (What effect does delegation have?) dealing with the delegation of core functions. However, B <i>manages investments</i>. See article 78 of the <i>AIFMD level 2 regulation</i> (Delegation of portfolio or risk management) on the ability of an <i>AIFM</i> to delegate portfolio management or risk management to a <i>person</i> authorised or registered for the purpose of asset management.</p> <p>Even if B's activity could otherwise be <i>establishing, operating or winding up a collective investment scheme</i>, it will not be in this case because A's role means that the CIS exclusion is available to B.</p>
<p>(6) Same as (5). B's <i>Part 4A permission</i> covers <i>managing an AIF</i> or <i>managing a UCITS</i>.</p>	<p>Same answer. B's <i>Part 4A permission</i> should be amended to cover <i>managing investments</i>.</p>
<p>(7) A has <i>permission to manage an AIF</i>. The AIF has several investment compartments. A appoints B to manage</p>	<p>The answer in (5) applies here too. The investment compartment is not treated as a separate <i>AIF</i> (see Question 2.63 (Is</p>

<p>the <i>securities</i> portfolio which makes up one of these compartments.</p>	<p>each investment compartment a separate AIF?). This arrangement is not contrary to the requirement in article 5(1) of <i>AIFMD</i> that each <i>AIF</i> have only one <i>AIFM</i>, as that requirement operates at the level of the <i>AIF</i> and not each separate investment compartment.</p>
<p>(8) A firm (A) with <i>permission</i> to <i>manage an AIF</i> delegates risk management to a <i>UK firm</i>, B.</p>	<p>B does not <i>manage an AIF</i>. If the fund is also a <i>collective investment scheme</i>, B does not need <i>permission to establish, operate or wind up a collective investment scheme</i>. (5) explains the reasons for this.</p> <p>If B's functions involve <i>managing investments</i> it will need <i>permission</i> for that (see (5)).</p> <p>Even if B's activities are not <i>regulated activities</i>, A will not be able to delegate to B unless B has <i>permission to manage investments, manage an AIF or manage a UCITS</i> because of article 78 of the <i>AIFMD level 2 regulation</i> (Delegation of portfolio or risk management).</p>
<p>(9) A carries out portfolio and risk management of an <i>AIF</i>. B runs the rest of the scheme.</p>	<p>A is <i>managing an AIF</i>. The difference from (5) is that B has not delegated portfolio management to A.</p>
<p>(10) A is <i>managing an AIF</i> (and has <i>permission</i> to do so). B is in charge of administering the scheme.</p>	<p>B is not <i>establishing, operating or winding up a collective investment scheme</i> because of the CIS exclusion. B is not <i>managing an AIF</i> for the reasons described in the answer to Question 3.5 (Does anyone carrying on only the activities listed in the answer to Question 3.4 carry on the regulated activity of managing an AIF?).</p>
<p>(11) Same as (11). Then A resigns as manager.</p>	<p>Same answer as (10). B may carry on its activities for 30 days while a new <i>AIFM</i> is put in place. That 30-day period may be extended in certain circumstances.</p>
<p>(12) A is <i>managing an AIF</i> (and has <i>permission</i> to do so) and is responsible for issuing and selling <i>units</i> or <i>shares</i> in</p>	<p>Selling <i>shares</i> or <i>units</i> often involves <i>dealing in investments as principal or dealing in investments as agent</i>. However, A does not need these</p>

<p>the <i>AIF</i>.</p>	<p><i>permissions</i> as the activities are covered by the extended definition of <i>managing an AIF</i> described in the answer to Question 3.4 (What are the additional activities referred to paragraph (1) of the answer to Question 3.3?) and hence the connected purposes exclusion applies.</p>
<p>(13) A <i>firm</i> (A) with <i>permission to manage an AIF</i> sets up an <i>AIF</i> that is also a <i>collective investment scheme</i>. A intends to manage it.</p>	<p>The fact that A is establishing a <i>collective investment scheme</i> does not mean A needs <i>permission to establish, operate or wind up a collective investment scheme</i>. In our view, taking preliminary steps towards the carrying on of a <i>regulated activity</i> is itself carrying on that activity. A manager who is setting up a scheme is taking preliminary steps of that kind to <i>manage an AIF</i>. Hence, the connected purposes and CIS exclusions apply.</p>
<p>(14) A (acting by way of business) sets up an <i>AIF</i> that is also a <i>collective investment scheme</i>. A does not intend to manage it. B has been appointed as <i>AIFM</i>. B has <i>permission to manage an AIF</i>.</p>	<p>As explained in (13), taking preparatory steps towards carrying on a <i>regulated activity</i> is itself a <i>regulated activity</i>. On this approach, as B has started <i>managing an AIF</i>, the CIS exclusion comes into play and A does not need <i>permission</i> for establishing a <i>collective investment scheme</i>.</p>
<p>(15) A (acting by way of business) sets up an <i>AIF</i> that is also a <i>collective investment scheme</i>. A does not intend to manage it. A has lined up a <i>firm</i> (B) with <i>permission to manage an AIF</i> to be the <i>AIFM</i> but B has not been appointed yet.</p>	<p>A will require <i>permission to establish, operate or wind up a collective investment scheme</i> as B has not begun to <i>manage an AIF</i>.</p>
<p>(16) A <i>firm</i> (A) with <i>permission to manage an AIF</i> <i>manages an AIF</i> and carries out portfolio and risk management for the <i>AIF</i>. A also is in charge of marketing and issuing units in the <i>AIF</i>. As part of that process A gives investment advice to potential investors.</p>	<p>A does not need <i>permission</i> for <i>advising on investments</i>. Instead the advisory activity is included within <i>managing an AIF</i>. The reasons are similar to those in (12).</p> <p>Marketing and issuing units in the <i>AIF</i> is part of the extended managing activity (see Question 3.4).</p> <p>The advising is carried on by A in connection with, or for the purposes of, marketing and issuing. As explained in</p>

	<p>paragraph (2) of the answer to Question 3.3 (Are the activities mentioned in the answer to Question 3.1 the only activities included in managing an AIF?), this means that the advising is included in <i>managing an AIF</i>. Therefore, the connected purposes exclusion excludes it from <i>advising on investments</i>.</p>
<p>(17) Same as (16). However, (leaving aside the <i>RAO</i> provisions explained in <i>PERG</i> 16.3 and <i>PERG</i> 16.5) the advisory activity would not have involved <i>advising on investments</i>.</p>	<p>For the reason in (16) the advisory activity is still a <i>regulated activity</i>, as part of <i>managing an AIF</i>.</p>
<p>References to the “connected purposes exclusion” are to the exclusion described in paragraph (1) of the answer to Question 5.2 (Won’t the overlap between collective investment schemes and AIFs mean that an AIFM will need unnecessarily overlapping permissions?). References to the “CIS exclusion” are to the exclusion described in paragraph (2) of the answer to Question 5.2.</p>	

<p>Part 2: Examples of how the <i>regulated activities</i> specific to depositaries interact with other <i>regulated activities</i></p>	
<p>Example</p>	<p>Explanation of interaction with other <i>regulated activities</i></p>
<p>(1) A is the depositary of an <i>AIF</i> and its <i>permission</i> covers this activity</p>	<p>A acts as a depositary of an <i>AIF</i>. A does not <i>safeguard and administer investments</i>.</p>
<p>(2) A is the depositary of an <i>AIF</i> and its <i>permission</i> covers this activity. A delegates some of the custody activities to B.</p>	<p>For A, the result is the same as under (1). B does not act as a depositary of an <i>AIF</i> but instead <i>safeguards and administers investments</i>.</p>
<p>(3) A is depositary of an <i>AIF</i>. A carry vehicle or co-investment scheme invests alongside the <i>AIF</i>. That vehicle is a <i>collective investment scheme</i> and A is its custodian. The schemes invest in financial assets.</p>	<p>A’s role in relation to the <i>AIF</i> means that its <i>permission</i> should cover <i>acting as a depositary of an AIF</i>. A’s role in relation to the carry or co-investment vehicle means that its <i>permission</i> should cover <i>safeguarding and administering investments</i>. The exclusion described in the answer to Question 5.3 (Does the depositary of an <i>AIF</i> also need permission for safeguarding and administering investments?) does not apply in relation</p>

	to the carry or co-investment vehicle.
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## 16.6 Exclusions

### Question 6.1: What exclusions from the regulated activities specific to AIFs are there?

The following table lists the exclusions. Some exclusions are relevant to the definition of an *AIF*, some to the definition of an *AIFM* and some to both.

Table: Exclusions		
Entities that are not <i>AIFs</i>	<i>Persons excluded from the definition of managing an AIF</i>	Where further <i>Handbook</i> material can be found
An institution for occupational retirement provision which falls within the scope of Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision	An institution for occupational retirement provision which falls within the scope of Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision, including, where applicable, the authorised entities responsible for managing such institutions and acting on their behalf referred to in article 2.1 of that directive, or the investment managers appointed pursuant to article 19.1 of that directive, in so far as they do not manage <i>AIFs</i>	Question 2.32
	A national, regional or local government or body or other institution which manages funds supporting social security and pension systems	
An employee participation scheme or employee savings scheme	An employee participation scheme or employee savings scheme	Question 2.34
A securitisation special purpose entity	A securitisation special purpose entity	Question 2.37

A holding company	A holding company	Questions 6.2 to 6.5
	<i>A small registered UK AIFM, in respect of the AIFs managed by it by virtue of which it is entitled to be registered as a small registered UK AIFM (but not in respect of any other AIFs managed by it)</i>	<i>FUND 1</i>
	<i>An AIFM that manages a group AIF</i>	Question 6.6
	A national central bank	None
	The European Central Bank, the European Investment Bank, the European Investment Fund, a bilateral development bank, the World Bank, the International Monetary Fund, any other supranational institution or similar international organisation, or a European Development Finance Institution, in the event that such institution or organisation manages <i>AIFs</i> and in so far as those <i>AIFs</i> act in the public interest	None
	<i>An AIFM, the registered office of which is not in an EEA State</i>	Question 8.3
Note 1: All references are to this chapter of <i>PERG</i> unless otherwise stated		
Note 2: In general the meaning of <i>AIF</i> in the <i>RAO</i> is the one in the <i>AIFMD UK Regulation</i> . The exclusions from the <i>AIF</i> definition noted in this table come from the <i>AIFMD UK Regulation</i> . However, the <i>RAO</i> article dealing with <i>managing an AIF</i> says that any expression used in that article which is not defined in the <i>AIFMD UK Regulation</i> and is used in <i>AIFMD</i> has the same meaning as in that directive. This makes no difference as, in our view, the <i>AIFMD UK Regulation</i> implements <i>AIFMD</i> .		

**Question 6.2: Is a holding company subject to AIFMD?**

No. There is a specific exclusion for a holding company.

For these purposes, a holding company means a company with shareholdings in one or more other companies, the commercial purpose of which is to carry out a business strategy(s) through its subsidiaries, associated companies or participations in order to contribute to their long-term value and which is either a company:

- (1) operating on its own account and whose shares are admitted to trading on a regulated market in the European Union; or
- (2) not established for the main purpose of generating returns for its investors by means of divestment of its subsidiaries or associated companies, as evidenced in its annual report or other official documents.

In our view, this exclusion is at least in part by way of clarification. In some circumstances, compliance with the conditions of the exclusion will mean that there is no *AIF* in the first place.

### **Question 6.3 How wide does the holding company exclusion go?**

Broadly speaking, therefore, an undertaking will be able to use the holding company exclusion if:

- (1) it carries out a commercial business strategy through its participations by contributing to their long-term value; and
- (2) it does not generate its returns for its investors by means of divestment of its participations.

The question then is what else the exclusion covers.

Recital (8) of *AIFMD* says that managers of private equity funds or *AIFMs* managing *AIFs* whose shares are admitted to trading on a regulated market should not be excluded from its scope.

However, the exclusion envisages that an undertaking, whose main purpose is generating returns for its investors by means of divestment of its subsidiaries or associated companies, may still be excluded from *AIFMD* if its shares are listed.

The question then is how the recital and the exclusion are to be reconciled.

There is guidance on this on the *AIFMD* section of the European Commission's webpages "Questions on Single Market Legislation". The answer to Question ID 1146 says that the definition has to be read as a whole and jointly with recital (8). Consequently, private equity as such should not be deemed to be a holding company. The concept of "operating on its own account" should also be interpreted in the context of the requirement that the shares of such holding company are admitted to trading on an EU regulated market. Hence, says the guidance, this means that a holding company is a separate legal entity that carries out the business of owning and holding equity shares of other companies without the intent to dispose of such shares. Such business is done on the own account of the holding company and not on behalf of a third party. The answer says that the

exemption is meant to cover “large corporates such as Siemens or Shell”.

In theory, there is no distinction between a company whose returns are for itself and one whose returns are for its investors, as the returns of any company are generated for its investors as they change over time. However, in our view, this distinction is pointing towards the factors that distinguish a typical fund from a commercial company.

This does not completely explain the part of the exclusion that refers to shares being admitted to trading (see paragraph (1) of the answer to Question 6.2 (Is a holding company subject to AIFMD?)). In our view, this part of the exclusion is limited to internally managed *undertakings*. Therefore, this part of the exclusion applies to a business if:

- (3) it carries out a commercial business strategy through its participations by contributing to their long-term value;
- (4) the *AIF* is self-managed;
- (5) it is not clearly acting as a fund taking into account the factors in the answers to Question 2.20 (Are there any other factors to take into account?) and Question 2.21 (Please give some further examples of factors to take into account when deciding whether an undertaking is set up like a fund); and
- (6) the *AIF*'s shares are admitted to trading on a regulated market in the European Union.

Paragraphs (3) to (6) do not apply to an undertaking that meets the criteria in paragraphs (1) and (2).

**Question 6.4: Is the holding company exclusion always available where the fund holds controlling stakes in the businesses in which it invests so that the businesses are its subsidiaries?**

No. It is important to remember that the exclusion is only available if the company carries out a business strategy(s) through its subsidiaries. The company should act in the same way that a conventional holding company of an industrial group would act. This means that the holding company must be responsible (with the subsidiaries) for the overall strategy of the subsidiaries. So, if the manager's subsidiaries are manufacturers, the manager must be responsible, with the subsidiaries themselves, for the manufacturing strategy of the subsidiaries.

The European Commission's Q&A about *AIFMD* say (Question ID 1146) that it is inherent in the concept of a holding company that all operations apart from those related to the ownership of shares and assets are done via its subsidiaries, associated companies or participations. In our view, the exemption is available only to the extent that the undertaking is acting as a holding company. It does not matter if the undertaking carries out other activities but any such activities will not get the benefit of the holding company exclusion. Those activities should be entirely ancillary to its role as a holding company or otherwise outside *AIFMD*.

Thus, for example, a holding company may also provide services to other members of the group such as raising capital through the capital markets, treasury functions and human resources services.

If a holding company manages an *AIF* as well as acting as a holding company, its activities in managing that *AIF* are not excluded. The exclusion applies only in so far as it acts as a holding company. For example, if a holding company manages a conventional unit trust scheme it would not be excluded for that activity.

**Question 6.5: What does company mean in the holding company exclusion?**

As explained in the answer to Question 2.25 (What is the justification for the approach in the answers to Questions 2.15 to 2.23?), the basic distinction in *AIFMD* is between investment activities and commercial/industrial activities. The holding company exclusion is an illustration of this basic approach. For that reason, we believe that the term ‘company’ should be broadly interpreted to cover any undertaking such as, for example, a *limited liability partnership*.

**Question 6.6: What does the group AIF exclusion involve?**

An *AIFM* in so far as it manages one or more *AIFs* whose only investors are:

- (1) the *AIFM*; or
- (2) the *parent undertakings* of the *AIFM*; or
- (3) the *subsidiary undertakings* of the *AIFM*; or
- (4) other *subsidiary undertakings* of those *parent undertakings*;

is excluded from the *regulated activity of managing an AIF* provided that none of the investors is an *AIF*.

**16.7 By way of business**

**Question 7.1: Must the AIFMD regulated activities be carried on by way of business for authorisation to be required?**

Yes. Under section 22 of the *Act* (Regulated activities), for any activity to be a *regulated activity* it must be carried on by way of business.

**Question 7.2: What is the test for whether activities are carried on by way of business?**

The test for whether the *regulated activities of managing an AIF* and *acting as a depositary of an AIF* are carried on by way of business is the one described in *PERG 2.3.2G(2)*.

## 16.8 Territorial scope

### **Question 8.1: What is the territorial scope of the AIFMD regulated activities?**

*PERG 2.4* (Link between activities and the United Kingdom) describes the general principles.

Section 418 of the *Act* (Carrying on regulated activities in the United Kingdom) describes the circumstances in which an activity is treated as carried on in the *UK* in circumstances in which it would not otherwise be, as described by *PERG 2.4.3G*.

Leaving aside section 418, generally speaking the activities of *managing an AIF* and *acting as a depositary of an AIF* are carried on where the place of business of the *AIFM* or depositary from which those activities are carried out is located.

If one of these activities is carried on from a number of locations, some in the *UK* and some not, the activity is treated as being carried on in the *UK* if there is some continuity or regularity of provision within the *UK* of activities which are a significant part of the activity of *managing an AIF* or *acting as a depositary of an AIF*.

### **Question 8.2: Are the additional activities described in the answer to Question 3.3 relevant?**

Yes. When deciding whether a company is *managing an AIF* in the *UK* if it splits the work between an office in the *UK* and one outside, one should take into account any of the additional activities described in the answer to Question 3.3 (Are the activities mentioned in the answer to Question 3.1 the only activities included in managing an AIF?) if the manager is performing risk management or portfolio management, even if all the risk management and portfolio management is carried on outside the *UK*.

### **Question 8.3: Can the AIF activities be carried on by an overseas firm?**

As explained in the answer to Question 6.1 (What exclusions from the regulated activities specific to AIFs are there?), the *regulated activity* of *managing an AIF* does not apply to an *AIFM* whose registered office is not in an *EEA State*. Regulation 81 of the *AIFMD UK Regulation* restricts the scope of this exclusion from the date that the *EU* brings in certain further legislation relating to non-*EU AIFs* and *AIFMs*.

The *regulated activity* of *acting as a depositary of an AIF* can apply to a person whose registered or head office is outside the *UK*.

### **Question 8.4: Is the material in PERG 16.3 about delegation of management functions from one firm to another relevant to delegation from one branch to another?**

This question is about the branch in one country of an undertaking being appointed as an *AIFM* and then delegating some or all of its tasks to another

branch of the same undertaking. The question is whether any of the material in *PERG* 16.3 about the effect of delegation on who *manages an AIF* is relevant to whether that undertaking is carrying on those activities in the *UK* if one of those branches is in the *UK* and the other is not.

The answer is that it is not relevant. The two branches are part of the same legal entity. The relevant factors are the ones in the answer to Question 8.1 (What is the territorial scope of the AIFMD regulated activities?).

**DISPUTE RESOLUTION: COMPLAINTS (AMENDMENT NO 6) INSTRUMENT  
2013**

**Powers exercised by the Financial Ombudsman Service**

- A. The Financial Ombudsman Service Limited makes the rules and guidance and varies the standard terms in the Annex to this instrument for Voluntary Jurisdiction participants in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):
- (1) section 227 (Voluntary jurisdiction);
  - (2) paragraph 8 (Guidance) of Schedule 17;
  - (3) paragraph 14 (The scheme operator’s rules) of Schedule 17;
  - (4) paragraph 18 (Terms of reference to the scheme) of Schedule 17;
  - (5) paragraph 20 (Voluntary jurisdiction rules: procedure) of Schedule 17;
  - (6) paragraph 22 (Consultation) of Schedule 17.
- B. The making of these rules and the variation of the standard terms by the Financial Ombudsman Service Limited is subject to the consent and approval of the Financial Conduct Authority (“FCA”).

**Powers exercised by the Financial Conduct Authority**

- C. The FCA approves and consents to the making of the rules and the variation of the standard terms made by the Financial Ombudsman Service Limited under this instrument pursuant to the following powers and related provisions in the Act:
- (a) section 227 (Voluntary jurisdiction);
  - (b) paragraph 14 (The scheme operator’s rules) of Schedule 17; and
  - (c) paragraph 18 (Terms of reference to the scheme) of Schedule 17.

**Commencement**

- D. This instrument comes into force on 22 July 2013.

**Amendments to the FCA Handbook**

- E. The Dispute Resolution: Complaints sourcebook (DISP) is amended by the Board of the Financial Ombudsman Service Limited in accordance with the Annex to this instrument.

**Citation**

- F. This instrument may be cited as the Dispute Resolution: Complaints (Amendment No 6) Instrument 2013.

By order of the Board of the Financial Ombudsman Service Limited  
19 June 2013

By order of the Board of the FCA  
27 June 2013

## Annex

### Amendments to the Dispute Resolution: Complaints sourcebook (DISP)

In this Annex, underlining indicates new text and striking through indicates deleted text.

#### 2.5 To which activities does the Voluntary Jurisdiction apply?

2.5.1R The *Ombudsman* can consider a *complaint* under the *Voluntary Jurisdiction* if:

...

- (2) it relates to an act or omission by a *VJ participant* in carrying on one or more of the following activities:

...

- (c) activities which (at ~~30 April 2011~~ 22 July 2013) ~~were regulated activities or would be regulated activities~~ covered by the *Compulsory Jurisdiction*, if they were carried on from an establishment in the *United Kingdom* (these activities are listed in *DISP 2 Annex 1G*);

...

- (l) ~~activities which (at 1 November 2009) were payment services or would be payment services if they were carried on from an establishment in the *United Kingdom*; [deleted]~~

- (m) ~~issuance of *electronic money*; [deleted]~~

...

#### 2 Annex 1G Regulated activities for the Voluntary Jurisdiction at ~~30 April 2011~~ 22 July 2013

The activities which were covered by the *Compulsory Jurisdiction* (at 22 July 2013) were:

(1) for firms:

- (a) *regulated activities* (other than *auction regulated bidding*);
- (b) *payment services*;
- (c) *consumer credit activities*;
- (d) *lending money* secured by a charge on land;
- (e) *lending money* (excluding *restricted credit* where that is not a *consumer credit activity*);

- (f) paying money by a plastic card (excluding a store card where that is not a consumer credit activity);
- (g) providing ancillary banking services;  
or any ancillary activities, including advice, carried on by the firm in connection with them.
- (2) for payment service providers:
  - (a) payment services;
  - (b) consumer credit activities;  
or any ancillary activities, including advice, carried on by the payment service provider in connection with them.
- (3) for electronic money issuers:
  - (a) issuance of electronic money; or
  - (b) consumer credit activities;  
or any ancillary activities, including advice, carried on by the electronic money issuer in connection with them

The activities which (at ~~30 April 2011~~ 22 July 2013) were *regulated activities* for the ~~Voluntary Jurisdiction~~ were, in accordance with section 22 of the *Act* (The classes of activity and categories of investment), any of the following activities specified in Part II of the *Regulated Activities Order*.

...

(21A) acting as the depositary of an authorised contractual scheme (article 51(1)(bb));

(22) ...

(22A) managing a UCITS (article 51ZA);

(22B) acting as a trustee or depositary of a UCITS (article 51ZB);

(22C) managing an AIF (article 51ZC);

(22D) acting as a trustee or depositary of an AIF (article 51ZD);

(22E) establishing, operating or winding up a collective investment scheme (article 51ZE);

...

(38C) meeting of repayment claims (article 63N(1)(a));

(38D) managing dormant account funds (including the investment of such funds) (article 63N(1)(b));

(38E) providing information in relation to a specified benchmark

(article 63O(1)(a)):

(38F) *administering a specified benchmark* (article 63O(1)(b)):

...

**DISPUTE RESOLUTION: COMPLAINTS (ALTERNATIVE INVESTMENT FUND MANAGERS DIRECTIVE) INSTRUMENT 2013**

**Powers exercised by the Financial Ombudsman Service Limited**

- A. The Financial Ombudsman Service Limited:
- (a) makes the rules in the Annex to this instrument for licensees relating to the Consumer Credit Jurisdiction; and
  - (b) varies the standard terms in the Annex to the instrument for Voluntary Jurisdiction participants relating to the Voluntary Jurisdiction;

in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):

- (1) section 226A (Consumer credit jurisdiction);
  - (2) section 227 (Voluntary jurisdiction);
  - (3) paragraph 14 (The scheme operator’s rules) of Schedule 17;
  - (4) paragraph 16B (Procedure for complaints etc) of Schedule 17;
  - (5) paragraph 16E (Procedure for consumer credit rules) of Schedule 17;
  - (6) paragraph 16G (Consultation) of Schedule 17;
  - (7) paragraph 18 (Terms of reference to the scheme) of Schedule 17;
  - (8) paragraph 20 (Voluntary jurisdiction rules: procedure) of Schedule 17; and
  - (9) paragraph 22 (Consultation) of Schedule 17.
- B. The making of these rules and the varying of the standard terms by the Financial Ombudsman Service Limited is subject to the consent and approval of the Financial Conduct Authority (“FCA”).

**Powers exercised by the Financial Conduct Authority**

- C. The FCA makes the Annex to this instrument relating to the Compulsory Jurisdiction in the exercise of the following powers and related provisions in the Act:
- (1) section 137A (The FCA’s general rules);
  - (2) section 137T (General supplementary powers); and
  - (3) section 226 (Compulsory jurisdiction).
- D. The rule-making powers listed above are specified for the purpose of section 138G(2) (Rule-making instruments) of the Act.
- E. The FCA approves and consents to the Financial Ombudsman Service Limited making the rules and varying the standard terms under this instrument pursuant to the following powers and related provisions in the Act:
- (a) section 226A (Consumer credit jurisdiction);
  - (b) section 227 (Voluntary jurisdiction);
  - (c) paragraph 14 (The scheme operator’s rules) of Schedule 17; and
  - (d) paragraph 18 (Terms of reference to the scheme) of Schedule 17.

**Commencement**

F. This instrument comes into force on 22 July 2013.

**Amendments to the Handbook**

G. The Dispute Resolution: Complaints Sourcebook (DISP) of the FCA's Handbook of rules and guidance is amended in accordance with the Annex to this instrument.

**Citation**

H. This instrument may be cited as the Dispute Resolution: Complaints (Alternative Investment Fund Managers Directive) Instrument 2013.

By order of the Board of the Financial Ombudsman Service Limited  
19 June 2013

By order of the Board of the FCA  
27 June 2013

## Annex

### Amendments to the Dispute Resolution: Complaints sourcebook

In this Annex, underlining indicates new text and striking through indicates deleted text.

#### 2.7 Is the complainant eligible?

...

Eligible complainants

...

2.7.6 R To be an *eligible complainant* a person must also have a *complaint* which arises from matters relevant to one or more of the following relationships with the *respondent*:

...

(3) the complainant is the holder, or the beneficial owner, of *units* in a *collective investment scheme* and the *respondent* is ~~the operator or depositary of the scheme;~~

(a) the operator of a scheme;

(b) the depositary of an authorised fund; or

(c) the depositary of a charity AIF;

(3A) the complainant is the holder, or the beneficial owner, of *units* or *shares* in an *AIF* where the *respondent* is:

(a) the AIFM of an unauthorised AIF (apart from a closed-ended corporate AIF);

(b) the AIFM or depositary of an authorised AIF; or

(c) the AIFM or depositary of a charity AIF (apart from a charity AIF which is a closed-ended corporate AIF);

...



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