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## **THE ALTERNATIVE INVESTMENT FUND MANAGERS DIRECTIVE**

The Alternative Investment Fund Managers Directive (the “AIFMD”) is a response to difficulties in the financial markets and calls for greater regulation of alternative investment funds (“AIFs”) and alternative investment fund managers (“AIFMs”). The aim of the AIFMD is to implement a coordinated and stringent regulatory framework for AIFMs across the European Union (the “EU”).

This *Commentary* sets out the key features of the AIFMD and considers its impact on the AIFMs that fall within its scope. Throughout the *Commentary*, **Action Points** highlight suggestions as to the steps AIFMs should be taking in relation to particular aspects of the AIFMD.

## BACKGROUND AND IMPLEMENTATION

The finalisation of the AIFMD came after a protracted period of negotiation and consultation which encompassed several draft versions of the AIFMD and the extensive “trialogue” procedure involving the European Commission, European Parliament and the Council of the EU. The result was a compromise document which lacks coherence and clarity.

Eventually, the AIFMD was adopted by the European Parliament on 11 November 2010 and by the Council of the EU on 27 May 2011.

The final version of the adopted text was published in the Official Journal of the European Union on 1 July 2011, following which the AIFMD came into force on 21 July 2011. EU Member States were required to implement the AIFMD by 22 July 2013. That being said, 15 of the 27 EU Member States to which this deadline applied failed to comply with it.

On 22 March 2013, the AIFMD delegated Regulation (Regulation 231/2013) was published in the Official Journal of the European Union. The delegated Regulation entered into force 20 days after publication (11 April 2013) and applied from 22 July 2013. The delegated Regulation supplements the AIFMD in respect of exemptions, general operating conditions, depositaries, leverage, transparency and supervision, amongst other areas.

The AIFMD provides for a substantial secondary law-making procedure which has been in process for over two years, together with the issue of significant guidance level materials. Guidance, technical standards and consultation papers have been issued by the European Securities and Markets

Authority (“ESMA”), the UK’s Financial Services Authority (“FSA”) (now the Financial Conduct Authority (“FCA”), as described below) and Her Majesty’s Treasury (the “Treasury”), along with the relevant authorities in other jurisdictions.

On 1 April 2013, the FSA was abolished and replaced by a new regulatory regime comprising the Financial Policy Committee, the Prudential Regulation Authority and the Financial Conduct Authority (“FCA”). The FCA has taken over responsibility for matters relating to the AIFMD. Prior to 1 April, the FSA published a discussion paper on implementation of the AIFMD (DP12/1), together with two formal consultation papers (CP12/32 and CP13/9). The consultation papers provide further guidance on the implementation of the AIFMD; operating requirements for full-scope and sub-threshold alternative investment fund managers; prudential requirements; consumer redress; depositaries; marketing; and fees. In June, the FCA published Policy Statement (PS13/5) “Implementation of the Alternative Investment Fund Managers Directive”. The Policy Statement provides additional and revised guidance covering implementation and scope, operating requirements, prudential requirements, consumer redress, depositaries, remuneration and marketing (as discussed further below) and transposes significant content into the FCA’s Handbook of Guidance and Rules. Furthermore, now that the implementation date has passed, the FCA has adopted the practice of providing advice and clarifications through its new AIFMD portal on the FCA website. Recently, the FCA published its consultation on its intended application of the AIFMD remuneration code (6 September 2013).

The Treasury has been responsible for transposing those parts of the AIFMD that require changes to primary and secondary legislation in the UK (including the Financial Services and Markets Act 2000 and the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001). In May 2013, the Treasury published two responses to its consultation process on the transposition of the AIFMD accompanied by an amended version of the UK regulations on the AIFMD (The Alternative Investment Fund Managers Regulations 2013). The responses provide assistance on a number of areas including, in particular, clarification on the scope of the marketing provisions and confirmation that the transitional period (discussed further below) will apply to both EU and third country AIFMs. The Treasury has also published question and answer materials on the transposition of the AIFMD.

The official translation of the final version of ESMA's guidance on the key concepts of the AIFMD (ESMA/2013/611) was published on 14 August 2013 and took effect two months after this date (14 October 2013). The final guidelines follow the report which was published in May 2013 on the related consultation process which revolved around a consultation paper published in December 2012. The final guidelines are useful for AIFMs and regulatory authorities and explain the concepts relating to AIFs (including the meaning of collective investment undertaking, defined investment policy and capital raising, amongst others). ESMA has also recently published (on 21 August 2013) an opinion on technical standards in respect of types of AIFM which is designed to ensure consistent application of the AIFMD. In addition, at the start of October 2013, ESMA published final guidelines on the reporting obligations for AIFMs requiring regular reporting of certain information to national supervisors (please see further details in the disclosure and transparency section).

It is also worth noting that in March 2013 the European Commission published a webpage containing its answers to questions submitted to it on the AIFMD. The topics covered include: passporting; master AIFs and feeder AIFs; private equity; scope and exemptions; transitional provisions; and depositaries. On a cautionary note, fund managers should think carefully about using the question and answer portal as there is potential for this informal process to result in the Commission providing binding answers which might not be consistent with application of the AIFMD itself.

The developments described above have improved understanding of the AIFMD and the manner in which it will be implemented. As such, the detail that follows incorporates relevant secondary material, where appropriate.

## COVERAGE AND RECEPTION

The AIFMD generated considerable debate during its finalisation and it has consistently attracted disparaging reviews from certain parties, not least because it is regarded in some quarters as a politically motivated attack on hedge funds and private equity funds. Unsurprisingly, the British Venture Capital Association described the AIFMD as manifestly unfair and bad for British business. The FSA (as it was) criticised the AIFMD for adopting a "one size fits all" approach to market regulation and this criticism has been echoed by the Investment Management Association.

On the other hand, supporters of the AIFMD have argued that improved levels of transparency and supervision will provide better protection for investors from the riskier investment strategies employed by AIFMs. Furthermore, the AIFMD aims to develop a single EU market for AIFs (by way of the marketing passport—see below) which would alleviate the current complexities of complying with the different marketing regimes in each EU Member State.

## APPLICATION AND SCOPE

Subject to certain exemptions (outlined below), the AIFMD applies to:

- All EU AIFMs managing EU AIFs or non-EU AIFs (irrespective of whether they are marketed in the EU);
- Non-EU AIFMs managing EU AIFs (irrespective of whether they are marketed in the EU); and
- Non-EU AIFMs marketing AIFs (whether EU AIFs or non-EU AIFs) within the EU.

The AIFMD thus applies to AIFMs, not directly to AIFs themselves.

**What is an AIFM?** An AIFM is any legal person whose regular business is managing one or more AIFs. "Managing" for these purposes is broadly defined as providing investment management services, being portfolio management or risk management. AIFMs may also undertake administration, marketing and activities related to the assets of AIFs. "Activities related to the assets of AIFs" include real estate administration activities and advice given to undertakings on capital structure, industrial strategy and related matters, as well as other services connected to the management of the AIF and its investments.

**What is an AIF?** An AIF is any collective investment undertaking which raises capital from a number of investors with a view to investing it for the benefit of those investors according to a defined investment policy. Broadly, all funds which are not covered by the Directive on Undertakings for Collective Investment in Transferable Securities ("UCITS") may be caught (including direct and indirect real estate funds), save for those structures specifically carved out or exempted from the scope of the AIFMD.

## KEY PROVISIONS

The AIFMD introduces significant obligations and restrictions on AIFMs relating to operational and compliance matters. A number of the provisions in the AIFMD have ramifications for the relationship between AIFMs and their service providers. The AIFMD also regulates the way in which AIFMs may market AIFs. The key provisions of the AIFMD are described in this Commentary. *Furthermore, a table setting out the applicability and requirements of the AIFMD in respect of EU/non-EU AIFMs managing and/or marketing EU/non-EU AIFs is included in the Appendix.*

## AUTHORISATION OF AIFMS AND TRANSITIONAL ARRANGEMENTS

The long-term aim of the AIFMD is that all firms which fall within the scope of the AIFMD will eventually be authorised and regulated by an EU financial services regulator.

The AIFMD provides a one-year transitional period for firms managing AIFs (and non-EU AIFs marketing AIFs to EU investors) before 22 July 2013. Such firms will have until July 2014 to comply with the requirements of the AIFMD. Furthermore, such firms will be permitted to continue their activities in accordance with the FCA Handbook of Rules and Guidance applying before 22 July 2013.

However, an EU AIFM wishing to start managing an AIF (whether an EU AIF or non-EU AIF) or a non-EU AIFM wishing to start managing an EU AIF or marketing a non-EU AIF to EU investors after 22 July 2013 may not benefit from this transitional period and may therefore need to apply for appropriate authorisation before commencing such activities.

The authorisation requirements under the AIFMD have a number of practical implications for firms. From a UK perspective, the FSA's and the Treasury's formal consultation papers have provided some assistance in this area. For example, a UK AIFM will need to be authorised under Part IV of the Financial Services and Markets Act 2000 by the FCA to carry on the new regulated activity of managing an AIF. Therefore, those firms with an existing permission to carry on a regulated activity may seek a variation of permission to allow them to act as an AIFM.

Furthermore, the FSA indicated that a grandfathering process may be allowed for those firms currently holding

permissions to operate a collective investment scheme ("CIS") or to act as a sole director of an open-ended investment company ("OEIC"). A firm that currently acts as a management company of a UCITS will already hold a Part IV permission to establish, operate and wind up a CIS or to act as sole director of an OEIC. The Treasury has indicated that all UCITS management companies may be automatically transferred to the new activity of managing a UCITS. Where the firm manages AIFs as well, it will be subject to the same authorisation or variation of permission processes as any other AIFM. The Treasury has stated that a person who has the "managing UCITS permission" would not need permission to operate a CIS to manage a UCITS and that the activity of being a sole director of an OEIC will be abolished, as the activities of managing an AIF or a UCITS will replace it entirely.

The details above confirm that the same firm can manage both UCITS and AIFs if it holds the necessary authorisations, so it will be possible for the Part IV permissions of managing an AIF and managing a UCITS to be held together.

Under the AIFMD, an AIFM and a UCITS management company may also be permitted to carry out certain other activities that would otherwise be regulated under The Markets in Financial Instruments Directive 2004/39/EC ("MiFID"). More specifically, firms can perform some or all of the services allowed by Article 6(4) of the AIFMD and Article 6(3) of the UCITS Directive (essentially activities ancillary to operating funds and dealing with fund assets). A firm cannot be a manager of AIFs or UCITS and simultaneously perform the full range of activities possible under a MiFID authorisation because AIFMD and MiFID authorisations are mutually exclusive. In this context, the FCA's implementation of the AIFMD distinguishes between Collective Portfolio Management firms and Collective Portfolio Management Investment firms; the former being firms that manage AIFs but do not carry out permitted MiFID services and the latter being firms that also carry out permitted MiFID services. This distinction has an impact, in particular, in relation to capital requirements under the AIFMD.

Firms, especially those which manage real estate funds, may currently be authorised under the Insurance Mediation Directive 2002/92/EC ("IMD") and have permissions to carry out insurance mediation activities. Unfortunately, no attention appears to have been given to whether IMD and AIFMD authorisations are mutually exclusive (as with MiFID and AIFMD) or potentially complementary (as with UCITS and

AIFMD). This is a matter which we hope will be addressed in what remains of the consultation process, but a logical solution would be for the FCA to apply limitations to the relevant permissions to make it clear that any IMD activities should be carried out within the context of acting as an AIFM rather than providing a full range of insurance related services.

On a cautionary note in respect of timing, the FCA's current position is to recommend that firms seeking a new authorisation or variation of permission should apply to the FCA no later than 22 January 2014, in case 6 months is required to determine the application. Technically, the delegated Regulation gives the FCA 3 months to determine an application with the possibility of an extension to 6 months where the application is materially incomplete. On this basis, an application will need to be submitted by 22 April 2014. This appears to contradict the grace period in the delegated Regulation but reflects the fact that the authorities have repeatedly commented that firms should be in a position to comply with the AIFMD by 22 July 2014.

**Action Points:** *AIFMs should have confirmed whether they can benefit from the transitional provisions and identify appropriate timings for applications (including new AIFMs potentially applying under the current regime so as to benefit from any grandfathering provisions). Furthermore, firms should consider whether it would be appropriate to apply for the Part IV permissions necessary to enable them to perform some or all of the services allowed by Article 6(4) of the AIFMD and Article 6(3) of the UCITS Directive. Finally, firms which may be intending to manage AIFs and also engage in a broad range of MiFID activities should be aware that structural changes will be required to facilitate such arrangements, given that AIFMD and broader MiFID authorisations are mutually exclusive.*

## EXEMPTIONS

These exemptions may be helpful for managers of small real estate, venture capital, hedge and private equity funds, and closed ended funds which are fully invested or coming towards the end of their lifespan.

There is a partial exemption for:

- AIFMs managing AIFs that have total assets of less than €100 million; or

- AIFMs managing AIFs that have total assets of less than €500 million, provided (i) the AIFs are not “leveraged” and (ii) no redemption rights exist during a period of five years following the date of initial investment in each AIF.

For the purposes of the AIFMD, “leverage” is broadly defined to include any method by which an AIFM increases the exposure of an AIF it manages, whether through borrowing of cash or securities, or leverage embedded in derivative positions, or by any other means. There is some uncertainty as to whether borrowing by a special purpose vehicle owned by an AIF will constitute “leverage” of the AIF for these purposes.

The AIFMD permits Member States to establish a *de minimis* registration regime for these exempt sub-threshold AIFMs, requiring them to register with, and report annually to, regulators but without requiring full AIFMD authorisation. Sub-threshold AIFMs also have the right to opt-in to full authorisation under the AIFMD in order to benefit from the AIFMD marketing passport regime. Where the applicable thresholds are exceeded, the AIFM must decide whether such situation is temporary (i.e. unlikely to exceed the threshold for more than three months). If the situation is temporary, the AIFM is able to maintain its registration-only status. However, if the situation is not temporary, the AIFM must seek full AIFMD authorisation within 30 calendar days. It should be noted that Member States have the option of imposing additional requirements on sub-threshold AIFMs.

In addition to the partial exemption for AIFMs managing small AIFs, the AIFMD's transitional provisions carve out of its scope AIFMs that solely manage closed-ended AIFs which either:

- Do not make further investments after 22 July 2013; or
- Have a lifespan which will expire by 22 July 2016 and which closed their subscription period before the AIFMD came into force (21 July 2011).

An AIFM seeking to make use of the second option will need to produce annual reports for its AIFs and comply with AIFMD requirements for AIFMs managing AIFs that acquire substantial stakes in EU companies.

In addition to the exemptions above, the scope of the AIFMD indicates that investment undertakings which invest the private wealth of investors without raising external capital do not fall within the auspices of the AIFMD. This should be

of assistance to family offices and others. Furthermore, the AIFMD will not apply to holding companies (as defined in the AIFMD) on the understanding that the purpose of this definition is not to exclude managers of private equity funds, nor managers of alternative investment funds whose shares are admitted to trading on a regulated market, from the scope of the AIFMD. The AIFMD also states that it will not apply to the management of pension funds, employee participation or savings schemes, supranational institutions, national central banks or national, regional or local governments, or bodies or institutions which manage funds supporting social security or pension systems, nor to securitisation special purpose vehicles. The AIFMD recites that it shall also not apply to insurance contracts and joint ventures (see further below).

The broad definition of an AIF causes some concern regarding those circumstances where it is not possible to state with absolute certainty whether a particular structure constitutes an AIF. As noted above, the AIFMD explicitly excludes joint ventures from its scope. However, this concept has not been defined in the AIFMD or by ESMA. For its part, the FCA has provided guidance on how an AIF can be differentiated from a joint venture, but it has also cautioned participants to joint ventures that they will need to review their structural arrangements against the AIFMD secondary measures given that joint ventures can have AIF-like aspects (capital raising, investment policies, external management etc.). Furthermore, the FCA considers that certain property investment firms (in particular, real estate investment trusts) may or may not be covered by the AIFMD, depending on their exact structure. It seems likely that a case-by-case review will also be required for such vehicles.

The ESMA opinion on the key concepts of the AIFMD provides further clarification by setting out the criteria for what is considered to be a “collective investment undertaking”, “capital raising”, “defined investment policy” and the “number of necessary investors”.

For instance, the ESMA guidance indicates that an undertaking will be a collective investment undertaking under the AIFMD where it pools together capital raised from investors and has the purpose of generating a pooled return for its investors from the pooled risk generated by acquiring, holding or selling investment assets as opposed to an entity whose purpose is to manage the underlying assets as part of a commercial or entrepreneurial activity.

**Action Points:** *Fund managers falling within the scope of the AIFMD should have reviewed their fund structures to identify AIFs and the entity which should be properly regarded as the AIFM.*

*If, prima facie, the AIFMD does apply, AIFMs should consider whether an exemption or carve-out could be helpful.*

*The FCA and the Treasury have indicated that, as well as adding AIFMD concepts into UK legislation, the UK will maintain the existing collective investment scheme regime. This means that it will continue to be necessary to check whether fund arrangements constitute a CIS under UK law, not least because of the potential impact on UK marketing activities.*

## CAPITAL REQUIREMENTS

The capital requirements under the AIFMD are different depending on whether the AIFM is internally or externally managing the AIF.

An AIF is internally managed when its governing body elects not to appoint an external AIFM (such as a corporate fund which is managed by its governing body). An AIF that is internally managed will itself be authorised as the AIFM. Where an AIF is not internally managed, the AIFM is the legal person appointed by or on behalf of the AIF to be responsible for managing it (i.e. for providing portfolio management or risk management services).

**Initial Capital Requirement and Own Funds.** An internally managed AIF will be required to maintain initial capital of €300,000.

An external AIFM will be required to maintain initial capital of €125,000 and will have to maintain own funds equal to the higher of:

- One quarter of fixed annual overheads; and
- 0.02 percent of the amount by which the total value of assets under management exceeds €250 million, subject to a cap of €10 million (however, up to 50% of this amount is not required if the AIFM benefits from a guarantee from a bank or insurer).

**Additional Requirements.** In addition, external AIFMs and internally managed AIFs must also hold either:

- Appropriate professional indemnity insurance; or
- An amount of own funds to cover potential liability for professional negligence (being 0.01 percent of the value of assets under management).

Furthermore, Collective Portfolio Management Investment firms (being firms that manage AIFs and also carry out permitted MiFID services), will continue to be subject to ongoing GENPRU / BIPRU regulatory capital rules and will need to ensure that their own funds satisfy the higher of the requirements under the GENPRU / BIPRU regime and the AIFMD regime.

Items included as initial capital (for example, share capital and audited profits) may also be included within own funds for the purposes of meeting capital requirements. For example, if a firm has fully paid up ordinary share capital of £250,000, this amount can count both towards meeting the initial capital and towards meeting the own funds test. The requirements are not cumulative.

“Initial capital” and “own funds” are defined by reference to the Capital Requirements Directive (“CRD”). Therefore, any amendment to the CRD definitions is likely to affect which items an AIFM will be entitled to include within its initial capital or own funds. As a general rule, own funds must be invested in liquid assets or near-liquid / readily convertible assets and not in speculative positions. This will apply to all regulatory capital, except the initial capital requirement.

***Action Points.** AIFMs should assess whether they are internally or externally managing AIFs and what capital requirements apply. AIFMs should ensure whether they have sufficient assets to meet the AIFMD requirements and decide whether they will use professional indemnity insurance or additional capital buffers.*

## GOVERNANCE AND OPERATING CONDITIONS

The AIFMD requires AIFMs to abide by certain general principles which include, for example: acting in the best interests of the AIF, the investors and the integrity of the market; acting honestly and with due skill, care and diligence; treating investors fairly; and complying with regulatory requirements.

The delegated Regulation clarifies the general duty of AIFMs to act in the best interests of the AIF, the investors and the integrity of the market. For example, it stipulates that AIFMs should apply appropriate policies and procedures to prevent malpractices such as market timing (taking advantage of out of date or stale prices for portfolio securities that impact the calculation of an AIF’s net asset value or buying and redeeming units of an AIF within a few days, thereby exploiting the way the AIF calculates its net asset value) or late trading and establish procedures to ensure the AIF is managed efficiently to prevent undue cost being charged to the AIF and its investors.

As a further example, AIFMs need to be aware of their obligation to act with due skill, care and diligence when appointing a prime broker or selecting a counterparty. The AIFM should appoint only entities that are subject to ongoing supervision, are financially sound (that is, the entity abides by adequate capital requirements) and have an organisational structure appropriate to the services to be provided.

AIFMs are also required to manage conflicts of interest and operate satisfactory risk management and liquidity management systems.

The delegated Regulation stipulates that it is important to establish a conflicts of interest policy for the AIFM which identifies situations in which activities carried out by the AIFM could constitute conflicts of interest that may lead to potential risks of damage to the AIF’s interests or the interests of its investors. In so doing, the AIFM should consider all relevant activities, including portfolio management and the activities of its delegates, external valuer or counterparties. For any conflicts of interest which are identified, there must be a framework according to which such conflicts can be managed and disclosed.

One of the central components of a risk management system, according to the delegated Regulation, is a permanent management function which has a primary role in shaping the risk management policy and risk monitoring/measuring to ensure that risk levels are appropriate. Given the importance of this function, it is vital that it has the necessary authority and access to all relevant information and to senior management.

As with risk management, AIFMs should be able to demonstrate that appropriate and effective liquidity management

policies and procedures are in place to prevent difficulties associated with illiquid assets, valuation issues and redemption requests. By way of example, such procedures could include annual stress tests to simulate liquidity shortages or atypical redemption requests.

Generally, AIFMs should establish a well-documented organisational structure that clearly assigns responsibilities, defines control mechanisms and ensures appropriate information flow between all relevant parties. The delegated Regulation highlights the importance of adopting a proportionate approach when calibrating the requisite policies and procedures to the size and complexity of the AIFM's business.

**Action Points.** *AIFMs should ensure that policies and procedures are compliant with the AIFMD requirements and consider carrying out systems audits and simulations to identify any areas requiring further attention. AIFMs should review the capacity and independence of the compliance, audit and risk management functions, and consider any necessary improvements. Proportionate policy documentation should be in place for AIFMD compliance.*

## REMUNERATION

The remuneration requirements in the AIFMD apply to all AIFMs authorised under the AIFMD and stipulate remuneration policies and practices which promote effective risk management for categories of staff whose professional activities have a material impact on the risk profiles of the AIFs they manage. These categories include senior management, risk takers and control functions (as well as any employee receiving total remuneration that takes him or her into the same remuneration bracket as senior management and risk takers).

ESMA published its final report setting out guidelines for the remuneration of AIFMs under the AIFMD on 11 February 2013. ESMA's report clarifies which staff will be regarded as falling within the categories described above (and will therefore be "Identified Staff" for the purposes of the AIFMD). ESMA also confirmed that the general remuneration requirements need only be applied to Identified Staff but, in any case, strongly recommended voluntary application to all AIFM staff.

The remuneration requirements apply to:

- All forms of payments or benefits paid by the AIFM;
- Any amount paid by the AIF itself, including carried interest; and
- Any transfer of units or shares of the AIF,

in exchange for professional services rendered by the AIFM Identified Staff.

The cornerstone of the remuneration requirements is that an AIFM establishes a consistent remuneration policy which promotes sound and effective risk management. The AIFMD also sets out a number of principles which should be adopted by AIFMs in a proportionate way. These principles include the following requirements:

- The remuneration policy should be in line with the business strategy, objectives, values and interests of the AIFM, and the AIF it manages or the investors of such AIF (including measures to avoid conflicts of interest) and does not encourage risk-taking which is inconsistent with the risk profiles, fund rules or instruments of incorporation of the AIF it manages;
- The general principles of the remuneration policy should be reviewed periodically and be subject to central and independent internal review;
- Staff members engaged in control functions should be compensated in accordance with achievement objectives linked to their functions;
- The remuneration of the senior officers in the risk management and compliance functions should be directly overseen by a remuneration committee (in line with the proportionality principle, ESMA has confirmed that not all AIFMs will require a remuneration committee; for example, AIFMs managing AIFs of €1.25 billion (in aggregate) or less and with 50 employees or less);
- Fixed and variable components (for example, bonuses) of total remuneration should be appropriately balanced and the fixed element must represent a sufficiently high proportion of total remuneration to allow a fully flexible bonus policy (including not paying bonuses at all);
- At least 50 percent of variable remuneration must be paid in shares or units in the relevant AIF (subject to the legal structure of the AIF and adjustment for multiple AIFs);

- A substantial portion, which is at least 40 percent to 60 percent (where the variable remuneration is a particularly high amount) of the variable remuneration component should be deferred over a period appropriate to the life cycle, redemption policy and risks of the AIF (which, per the AIFMD, will usually be at least three to five years);
  - The AIFM's pension policy should be in line with the business strategy, objectives, values and long-term interests of the AIFM and the AIF it manages (for example, if the employee leaves the AIFM before retirement, discretionary pension benefits should be held by the AIFM for a period of five years); and
  - Staff members should be required to undertake not to use personal hedging strategies or insurance to undermine the risk alignment effects embedded in their remuneration arrangements and variable remuneration should not be paid through vehicles or methods that facilitate the avoidance of the requirements of the AIFMD.
- Appropriate and consistent policies and procedures are established for the proper and independent valuation of the assets of those AIFs; and
  - The net asset value per share/unit in the AIF is calculated and disclosed to investors (it is not clear how this second requirement will be applied to AIFs which issue neither shares nor units, such as private equity or real estate AIFs structured as limited partnerships).

The delegated Regulation lays down the main features of the valuation policies and procedures. Such policies and procedures should cover all material aspects of the valuation process and controls in respect of the relevant AIF, including (by way of example):

- The competence and independence of the personnel valuing the assets;
- The specific investment strategies of the AIF;
- The controls in place over the selection of valuation inputs, sources and methodologies; and
- The escalation channels for resolving valuation differences.

These requirements are derived from the Financial Stability Board/G20 standards which are also similar (but not identical) to the remuneration provisions being implemented in accordance with the CRD (which will depend on the nature of the organisation and its business).

Credit institutions and investment firms subject to the CRD and the AIFMD will therefore have to be aware of where the AIFMD requirements impose additional or different requirements to those in the CRD. This reflects that fact that although ESMA's recent final report does clarify that public disclosure of detailed information regarding remuneration policies and practices will not necessarily have to be made under the AIFMD, such public disclosure may still be required under other EU and national rules.

**Action Points.** *AIFMs should assess the suitability of current remuneration arrangements and implement the necessary changes. In particular, a comprehensive remuneration policy should be put in place which includes those elements stipulated by the AIFMD.*

## ASSET VALUATION

Under the AIFMD, for each of the AIFs it manages, an AIFM is required to ensure that:

The valuation policies should set out the responsibilities of all parties involved in the valuation process, including the AIFM's senior management. Where an external valuer is appointed, the policies should set out a process for the exchange of information between the AIFM and the external valuer to ensure all necessary valuation information is provided.

All AIF assets must be valued at least once a year and, additionally, when units of the AIF are issued or redeemed (if the AIF is close-ended) or with "appropriate frequency" (in the case of open-ended AIFs). An AIFM may calculate the valuations itself or appoint an independent external valuer to perform this function.

## DELEGATION

Subject to certain requirements and limitations, the AIFMD permits AIFMs to delegate the performance of some of their functions.

The delegated Regulation sets out the conditions under which an AIFM is permitted to delegate certain of its functions. The conditions are intended to ensure that delegation

does not prevent an AIFM from acting in the best interests of investors and that the AIFM retains responsibility for delegated functions. In particular, an AIFM cannot delegate its functions where delegation would render it a mere “letter-box” entity.

An AIFM shall be deemed to be a letter-box entity and shall no longer be considered to be the manager of the AIF in, at least, any of the following circumstances:

- The AIFM no longer retains the necessary expertise and resources to supervise the delegated tasks effectively and manage the associated risks;
- The AIFM no longer has the power to take decisions in key areas which fall under the responsibility of senior management (particularly in relation to investment policies and strategies);
- The AIFM loses its contractual rights to instruct and inspect its delegates or the exercise of such rights becomes impossible; or
- 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 (this restriction being a late clarification from ESMA that will have material practical implications for a number of fund managers).

In addition, an AIFM seeking to delegate certain of its functions must be able to demonstrate that the delegate is capable of performing, qualified to perform and has sufficient resources to perform the relevant functions delegated, was selected with all due care and can be effectively monitored and instructed by the AIFM. The delegate's staff must also be sufficiently experienced and of good repute.

Further restrictions apply when an AIFM delegates portfolio management or risk management. Such functions may not be delegated to:

- The depositary or any delegate of the depositary;
- A non-EU undertaking, unless there is appropriate cooperation between the regulatory authorities supervising the AIFM and the delegate;
- Any entity that is not both authorised or registered and supervised for asset management, unless the AIFM's regulator has given its prior consent; or
- Any other entity whose interests may conflict with the AIFM or the AIF investors unless that entity segregates

its delegated tasks from any other potentially conflicting tasks and potential conflicts are properly identified, managed, monitored and disclosed to investors.

Sub-delegation by a delegate is allowed, provided that the following conditions are satisfied:

- The AIFM has consented in advance;
- The AIFM has given prior notice of the sub-delegation to its regulator;
- The requirements applicable to a delegation of the function are also met in relation to the sub-delegation; and
- The delegate reviews the services provided by its sub-delegates on an ongoing basis.

An AIFM applying for authorisation under the AIFMD will need to disclose its delegation arrangements (including the identity of the delegate and a description of any potential conflicts of interest) to its regulator. An AIFM must then give its regulator advance notice of any new delegation arrangement. The same details must also be made available to AIF investors before they invest. This information must be updated to reflect any material changes.

## DEPOSITARIES

Generally, AIFMs will need to ensure that a single depositary is appointed for each AIF it manages. However, a depositary is not required in relation to a non-EU AIF that is either (i) managed by a non-EU AIFM and marketed in the EU via national private placement regimes or (ii) managed by an EU AIFM but not marketed in the EU.

The AIFMD specifies which entities can act as a depositary. Originally, it was intended that the AIFMD would allow only an EU credit institution to be a depositary, but this requirement has been relaxed. Investment firms and other appropriately authorised persons (such as institutions eligible to be a UCITS depositary) can also carry out the function.

AIFMs of AIFs whose investors have no redemption rights for five years after their initial investment may have further flexibility in choosing a depositary. The depositary to such AIFs can be any entity which (i) carries out depositary functions as part of its professional or business activities, (ii) is subject to mandatory professional registration recognised by law and/or professional conduct rules and (iii) can furnish

sufficient financial and professional guarantees that it can meet its commitments and effectively perform its functions as depositary.

Generally speaking, the depositary of an EU AIF must either have its registered office or a branch in the AIF's home Member State.

The depositary of a non-EU AIF must either have its registered office or a branch in the AIFM's home Member State. The depositary may be established in the non-EU country in which the AIF is established if a number of conditions are met.

The AIFMD sets out numerous functions and duties for depositaries and restricts their ability to delegate. The functions and duties include:

- Acting independently, honestly, fairly, professionally and in the interests of the AIF and the investors;
- Holding in custody the financial instruments belonging to the AIF;
- Verifying ownership of other assets and maintaining a record evidencing ownership;
- Cash flow monitoring;
- Checking that all investor subscription payments and funds are received and booked in segregated accounts with appropriate institutions;
- Ensuring transactions in AIF units/shares are carried out in accordance with applicable law and the AIF's internal rules;
- Confirming that AIF shares or units are valued in accordance with applicable national law, the AIF's internal rules and AIFMD valuation requirements (see above);
- Executing the AIFM's instructions, unless they conflict with applicable national law or the AIF's internal rules; and
- Remitting consideration for transactions in AIF assets and applying income appropriately.

The delegated Regulation sets out detailed provisions about the obligations and rights of depositaries and emphasises that a depositary's key function is the protection of the AIF's investors. The delegated Regulation also requires information flow to enable the depositary to have a clear overview and effectively monitor the AIF's assets and cash flow. Criteria are established for the scope for financial instruments to be held in custody, general oversight duties,

delegation of custody and liability for the loss of instruments held in custody.

The AIFMD imposes liability on depositaries in relation to loss of financial instruments owned by an AIF and held by the depositary. The depositary will avoid such liability only if the loss is caused by an external event beyond its control. These requirements mean that the cost of depositary services is likely to increase to reflect the depositary's additional risk above that currently borne by administrators and operators.

***Action Points.** Given that AIFMs will need to appoint depositaries (and may also appoint delegates and external valuers), it will be important to liaise with the intended service provider/delegate to ensure the counterparty is suitable. AIFMs should consider related budgeting issues and the manner in which such arrangements will be documented.*

## DISCLOSURE AND TRANSPARENCY

One of the main aims of the AIFMD is to improve transparency for investors and supervisors in respect of AIFMs and AIFs. The hope is that increased information flows will allow investors and supervisors to properly understand the nature and risks of an AIF and the related management infrastructure.

From a supervisory perspective, ESMA will maintain a central public register identifying each AIFM authorised under the AIFMD and a list of AIFs managed and/or marketed in the EU. There is no requirement in the AIFMD for any information about investors in AIFs to be disclosed.

As referred to in the background and implementation section of this Commentary, ESMA has recently published final guidelines on reporting requirements under the AIFMD to supplement the delegated Regulation. The final guidelines are primarily for the use of national competent authorities (such as the FCA) and one of ESMA's main aims is to standardise the information received by competent authorities and exchanged between them pursuant to Articles 25 and 53 of the AIFMD.

In short, the guidelines provide clarifications on the information that AIFMs must report to national competent authorities, the timing of such reporting together with the

procedures to be followed when AIFMs move from one reporting obligation to another.

AIFMs are required regularly to report to the relevant competent authority on the principal markets and instruments in which it trades on behalf of the AIF. AIFMs are also required to provide information relating to assets held (including asset liquidity), valuations, risk profiles and the results of specified stress tests together with principal exposures and important concentrations (and similar information must also be provided to investors on a periodic basis).

AIFMs are to produce an annual report with respect to each of the AIFs it manages for each financial year. The report is to be provided to investors on request and made available to the relevant competent authority and should include: a balance sheet; an income and expenditure account; a report on activities; any material changes in certain information provided to investors; and remuneration figures. Such reports should not be made public by the relevant authority.

The guidelines will be translated into the official EU languages and published on the ESMA website. The publication of the translations will trigger a two-month period during which national competent authorities must notify ESMA as to whether they comply or intend to comply with the guidelines.

The guidelines are accompanied by two helpful flow-charts (Annex I to the guidelines) which show the reporting requirements in respect of an authorised AIFM and a non-EU AIFM using the national private placement regime.

ESMA has also published an opinion that proposes introducing additional periodic reporting including such information as value-at-risk of AIFs or the number of transactions carried out using high frequency algorithmic trading techniques.

AIFMs will be required to make available to all investors in each of the AIFs they manage (or market in the EU) the following information before they invest, as well as upon any material changes thereto: the investment strategy and objectives; the procedures by which the AIF may change its investment strategy; the main legal implications of the contractual relationship entered into by the investor for the purpose of investment in the AIF; the identities of the AIFM and the AIF's depositary, auditor and any other service providers and a description of their duties and the investor's rights with respect to them; how the AIFM's capital requirements have been complied with; any delegated management

function; the valuation procedure and pricing methodology; the liquidity risk management system; fees, charges and expenses and the maximum amount of these to be borne by the investors; how the fair treatment of investors is to be ensured; the latest annual report; the procedure and conditions of issue and sale of units/shares in the AIF; the latest net asset valuation of the AIF or the latest market price; if available, the historical performance of the AIF; the identity of the prime broker (if any); how additional information will be disclosed; and any arrangement made by the depositary contractually to discharge itself of liability.

There are additional disclosure requirements in relation to substantially leveraged AIFs. Under the delegated Regulation, an AIF would be considered to be employing leverage on a substantial basis when its exposure exceeds three times its net asset value. AIFMs of substantially leveraged AIFs must disclose the extent of the leverage and a breakdown of how the leverage arises.

*Action Point. AIFMs should review the breadth and depth of their current reporting regime and confirm whether additional systems will be required in order to produce the level of disclosure prescribed by the AIFMD.*

## PRIVATE EQUITY PROVISIONS

AIFMs managing one or more AIFs which individually or jointly acquire control (i.e. more than 50 percent of the voting rights) of a non-listed company will be required to notify the non-listed company, the non-listed company's shareholders, and the relevant competent authority of the acquisition. The notification should include details of any change to the voting rights, the conditions under which control has been reached and the date on which control was reached.

Where an AIF buys, sells or holds shares of a non-listed company, the AIFM must notify the competent authority of the proportion of voting rights held by the AIF in the company when that proportion reaches, exceeds or falls below the thresholds of 10, 20, 30, 50 and 75 percent.

The AIFMD also includes asset protection measures which require AIFMs managing one or more AIFs with control of a non-listed company to use its best efforts to prevent asset stripping (i.e. capital reductions, share redemptions, etc.) in the first 24 months of ownership.

**Action Points.** *It should be noted that these requirements do not apply where the non-listed companies concerned are (i) small or medium-sized enterprises or (ii) special purpose vehicles for the purpose of purchasing, holding or administering real estate. The Treasury has proposed that these private equity provisions will also not apply to sub-threshold AIFMs. AIFMs should consider whether their plans would be caught by the private equity provisions under the AIFMD and what alternative structures could be used, if necessary.*

*The provisions place restrictions on the AIFM for two years from acquisition of control. It would seem reasonable to assume that these restrictions would not apply if the AIF disposed of the relevant entity. However, the AIFMD does not explicitly state that this is the case and AIFMs may consider it prudent to seek an undertaking from any buyer regarding the restrictions.*

## EU PASSPORTS AND MARKETING

The AIFMD introduces a framework for AIFMs to market AIFs to investors in the EU provided certain conditions are satisfied.

Marketing is defined in the AIFMD as any direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares in an AIF it manages to investors in the EU. According to the FCA Policy Statement, marketing is understood to cover capital raising and this does not include 'secondary markets' unless such activities include additional capital raising. Furthermore, the AIFMD does not apply to passive marketing or reverse solicitation. The AIFMD marketing restrictions 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. The FCA's guidance states that: "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".

This guidance is helpful in assisting AIFMs and is a departure from the FCA's previous approach to this area. Rather than trying to give exhaustive guidance on how to determine whether marketing is at an investor's initiative based on prior knowledge of the AIF or involvement with the AIFM,

the FCA has simply provided that firms may generally rely on a confirmation from an investor that the approach is at the investor's initiative.

**EU Passports.** An EU Passport is to be introduced to allow AIFMs to market AIFs which have been approved in one Member State to professional investors across the EU. With the exception of EU AIFs managed by EU AIFMs (for which the EU Passport will be the sole means of marketing once the AIFM becomes authorised under the AIFMD), the EU Passport will become available in 2015 and will run in parallel with national private placement regimes until at least 2018 (as more fully described below).

EU AIFMs managing EU AIFs *must* market using the EU Passport from 22 July 2013 provided that the AIFMs are authorised under, and comply in full with, the AIFMD. This means that, to the extent that the AIFM can make use of the transitional provisions, it may not be required to use the EU passport until such time as it is authorised, which should be in good time for 22 July 2014.

EU AIFMs managing non-EU AIFs may market using the EU Passport from, at the earliest, the second half of 2015 provided that they are authorised under, and comply in full with, the AIFMD and the following cooperation requirements are satisfied:

- **Regulatory Cooperation:** A supervisory cooperation agreement must be in place between the competent authority of the EU Member State in which the AIFM is authorised and the competent authority in the jurisdiction where the AIF is established;
- **Financial Action Task Force ("FATF") Blacklist:** The jurisdiction where the AIF is established must not be on the blacklist produced by the FATF on anti-money laundering and terrorist financing; and
- **Taxation:** Taxation agreements must exist between each Member State where the AIF is to be marketed, the jurisdiction where the AIF is established and the Member State in which the AIFM is authorised.

Non-EU AIFMs managing EU AIFs may market using the EU Passport from, at the earliest, the second half of 2015 provided that they are authorised under the AIFMD by the "Member State of Reference" (see below), they comply with the AIFMD in full, and the following cooperation requirements are satisfied:

- **Regulatory Cooperation:** A supervisory cooperation agreement must be in place between the competent authority of the “Member State of Reference” and the competent authority in the jurisdiction where the AIFM is established;
- **FATF Blacklist:** The jurisdiction where the AIFM is established must not be on the FATF blacklist; and
- **Taxation:** A taxation agreement must exist between the “Member State of Reference” and the jurisdiction where the AIFM is established.

Non-EU AIFMs managing non-EU AIFs may market using the EU Passport from the second half of 2015 provided that they are authorised under the AIFMD by the “Member State of Reference”, they comply with the AIFMD in full and the following cooperation requirements are satisfied:

- **Regulatory Cooperation:** A supervisory cooperation agreement must be in place between the competent authority of the “Member State of Reference” and the competent authority in the jurisdiction where the AIFM is established;
- **FATF Blacklist:** The jurisdictions where the AIFM and the AIF are established must not be on the FATF blacklist; and
- **Taxation:** Taxation agreements must exist between the jurisdictions where the AIFM and the AIF are established, each of the Member States where the AIF is to be marketed and the “Member State of Reference”.

The definition of “Member State of Reference” differs depending on the type and number of AIFs that an AIFM is intending to market.

For EU AIFs, the “Member State of Reference” will, broadly speaking, be the Member State where the AIF is established or, where multiple AIFs are to be marketed, the jurisdiction where most of the AIFs are established or where the majority of assets are managed.

For non-EU AIFs, the “Member State of Reference” will, broadly speaking, be the Member State where the AIFM intends to market the AIF or, where the AIF will be marketed in multiple Member States, the Member State in which the AIFM intends to develop effective marketing for most of the AIF.

When using the AIFMD’s Passport regime, the AIFM must notify its regulator of the AIF it wishes to market. This

notification must include the AIF’s internal rules, the identity of the depositary and all information on the AIF which is available to investors (as required by the disclosure and transparency provisions noted above).

Within 20 working days of receipt of the notification, the regulator will inform the AIFM whether it can begin marketing the AIF. Approval for marketing will be withheld where the AIFM cannot demonstrate that its management and marketing will be in line with the AIFMD requirements. The regulator will transmit the notification to the other Member States in which the AIFM wishes to market the AIF. If any of the information provided in the notification changes, the AIFM should give notice of the changes to its regulator.

The approval process outlined above is for EU AIFMs but the process for non-EU AIFMs is expected to be similar with the regulator in the relevant Member State of Reference fulfilling the home regulator role.

**Private Placement Regimes.** The national private placement regime will not be available to EU AIFMs managing EU AIFs from the point at which the AIFM becomes authorised under the AIFMD.

EU AIFMs managing non-EU AIFs may market using national private placement rules until 2018 provided that they are authorised under, and comply in full with, the AIFMD (save for Article 21–Depositary) as well as any additional local requirements in a particular Member State, and the following cooperation requirements are satisfied:

- **Regulatory Cooperation:** A supervisory cooperation agreement must be in place between the competent authority of the EU Member State in which the AIFM is authorised and the jurisdiction where the AIF is established; and
- **FATF Blacklist:** The jurisdiction where the AIF is established must not be on the FATF blacklist.

Non-EU AIFMs managing EU AIFs may market using national private placement rules until 2018 provided that that they are authorised under the AIFMD by the “Member State of Reference”, they comply with the AIFMD in full as well as any additional local requirements in a particular Member State and the following cooperation requirements are satisfied:

- **Regulatory Cooperation:** A supervisory cooperation agreement must be in place between the competent

authority of the “Member State of Reference”, the competent authority in the jurisdiction where the AIFM is established and the competent authority of the Member State to which the AIF will be marketed; and

- **FATF Blacklist:** The jurisdiction where the AIFM is established must not be on the FATF blacklist.

Non-EU AIFMs managing non-EU AIFs may market using national private placement rules until 2018 without being authorised under the AIFMD provided that they comply with the disclosure and transparency and reporting provisions of the AIFMD in full, as well as any additional local requirements in a particular Member State, and the following cooperation requirements are satisfied:

- **Regulatory Cooperation:** A supervisory cooperation agreement must be in place between the competent authority of the “Member State of Reference” in which the AIF will be marketed and the competent authority in the jurisdictions where the AIFM and the AIF are established; and
- **FATF Blacklist:** The jurisdictions where the AIFM and the AIF are established must not be on the FATF blacklist.

After 2018, it is expected that the private placement rules will be phased out following a review by ESMA, at which point the EU Passport regime will come solely and fully into force.

These aspects of the AIFMD are thus not an immediate significant cause for concern as long as at least one of the AIFM and the AIF are situated outside the EU, given that the restrictions on marketing will not be fully implemented until 2018 at the earliest. However, the requirements set at above will still need to be complied with (following the end of the transitional period, if applicable) and AIFMs should be alert to any changes to national private placement regimes and any related notification requirements.

ESMA may establish guidelines on how EU Passports should be awarded by Member States’ competent authorities. ESMA will also be responsible for maintaining important information—for example, a centralised blacklist of AIFs whose passport applications have been rejected.

Member States may allow EU AIFMs and non-EU AIFMs to market an AIF to retail investors and will be required to notify the European Commission and ESMA of the types of AIF which an AIFM may market, together with any additional requirements it seeks to impose on such activities. There is

no EU Passport for marketing to retail investors. It is reasonable to assume that Member States will not allow an AIF to be marketed to retail investors on their territory unless the AIF is managed in accordance with the AIFMD.

***Action Points.** AIFMs should take steps to ensure that their marketing documentation will be sufficient to satisfy the AIFMD marketing disclosure requirements and ensure that they have procedures in place to meet ongoing disclosure requirements. In addition, given the helpful guidance from the FCA in the UK relating to reverse solicitation, AIFMs who wait to make use of this carve-out should ensure that their marketing documentation and subscription agreements confirm that the marketing is at the investor’s initiative. This reflects a broader point that private placement memorandum should now contain wording addressing the application of the AIFMD and how compliance will be approached.*

*In addition, the significant political support for restrictions on the activities of AIFMs might lead to Member States tightening their private placement regimes. AIFMs will have to be vigilant for changes to the respective regimes as they may have to comply with stricter compliance regimes in the short to medium term.*

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# APPENDIX—AIFMD APPLICABILITY AND REQUIREMENTS—SUMMARY TABLE

## AIFMD Applicability and Requirements

	EU manager/ EU fund	EU manager/ Non-EU fund	Non-EU manager/ EU fund	Non-EU manager/ Non-EU fund
<b>Authorisation for AIFM<sup>1</sup></b>	AIFMD provides one-year transitional period for AIFMs managing AIFs before 22 July 2013. AIFMs will have until July 2014 to comply with AIFMD requirements.	AIFMD provides one-year transitional period for AIFMs managing AIFs before 22 July 2013. AIFMs will have until July 2014 to comply with AIFMD requirements.	Required if EU Marketing Passport is extended in 2015 (at the latest), regardless of whether AIF is marketed in the EU (may be required after the transitional period).	Not required unless AIF will be marketed in the EU. Not required if AIF will only be marketed in the EU under Member State private placement rules (this may cease in 2018). Will be required if using EU Marketing Passport.
<b>EU Marketing Passport</b>	From 2013 (may be subject to transitional period) in the following circumstances: <ul style="list-style-type: none"> <li>• AIFM must be authorised and comply in full with AIFMD; and</li> <li>• Consent of AIFM home Member State regulator required.</li> </ul>	May be available from 2015. AIFM must be authorised and the following requirements satisfied: <ul style="list-style-type: none"> <li>• Comply with AIFMD;</li> <li>• Cooperation arrangements;</li> <li>• No FATF blacklisting;</li> <li>• Tax information exchange agreement; and</li> <li>• Consent of AIFM home regulator.</li> </ul>	May be available from 2015. AIFM must be authorised and the following requirements satisfied: <ul style="list-style-type: none"> <li>• Comply with AIFMD;</li> <li>• Cooperation arrangements;</li> <li>• No FATF blacklisting;</li> <li>• Tax information exchange agreement; and</li> <li>• Consent of AIFM home regulator.</li> </ul>	May be available from 2015, but AIFM must be authorised and consent of AIFM reference Member State required. Requirements: <ul style="list-style-type: none"> <li>• Comply with AIFMD;</li> <li>• Cooperation agreements;</li> <li>• No FATF blacklisting; and</li> <li>• Tax information exchange agreement.</li> </ul>
<b>Private Placement Marketing Regimes<sup>2</sup></b>	N/A	Available from 2013 and may become unavailable from 2018. Requirements: <ul style="list-style-type: none"> <li>• AIFM must be authorised;</li> <li>• Comply with AIFMD;</li> <li>• Cooperation arrangements; and</li> <li>• No FATF blacklisting.</li> </ul>	Available from 2013 and may become unavailable from 2018. Requirements: <ul style="list-style-type: none"> <li>• Compliance with annual report, investor disclosure, regulator reporting and unlisted companies provisions of AIFMD;</li> <li>• Cooperation agreements; and</li> <li>• No FATF blacklisting.</li> </ul>	
<b>AIFM Capital Requirements</b>	Applicable	Applicable	Applicable (if authorised)	Applicable (if authorised)
<b>Operating Conditions</b>	Applicable	Applicable	Applicable (if authorised)	Applicable (if authorised)
<b>Conflicts of Interest</b>	Applicable	Applicable	Applicable (if authorised)	Applicable (if authorised)
<b>Risk Management</b>	Applicable	Applicable	Applicable (if authorised)	Applicable (if authorised)
<b>Depository</b>	Applicable (depository must be established in AIF's home Member State)	Not required if there is no marketing in the EU. AIFM is not required to comply in full if marketing in the EU under the Member States' Private Placement Regimes. Must comply in full if marketing under the EU Marketing Passport.	Applicable (if authorised) (depository must be established in AIF's home Member State)	Applicable (if authorised) Depository must be established in AIF country or AIFM's reference Member State. Use of a non-EU depository subject to additional requirements.
<b>Annual Report</b>	Applicable	Applicable if AIF is marketed in the EU	Applicable if AIF is marketed in the EU	Applicable if AIF is marketed in the EU
<b>Disclosure to Investors</b>	Applicable	Applicable	Applicable if AIF is marketed in the EU	Applicable if AIF is marketed in the EU
<b>Reporting to Competent Authorities</b>	Applicable	Applicable	Applicable if AIF is marketed in the EU	Applicable if AIF is marketed in the EU

<sup>1</sup> Please see accompanying *Commentary* in respect of exemptions to the AIFMD (see Exemptions section).

<sup>2</sup> In addition to the rules set out in AIFMD, Member States may impose their own stricter private placement regimes. AIFMs should continue to monitor the regimes in all Member States where they intend to market.

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