

# **Alternative Investment Funds (Jersey) Regulations 2012**

## **Financial Services (Jersey) Law 1998 In Relation to AIF Services Business**

### **Code of Practice for Alternative Investment Funds and AIF Services Business**

Issued: 22 July 2013

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## Glossary of terms

Unless otherwise defined, the following terms when used in this Code of Practice (**Code**) shall have the meanings set out below. To aid with the readability of the *Code* the JFSC has utilised *italic* text to highlight terms which are defined in the *Code* Glossary. Guidance in the form of Notes is provided in the form of “boxed italicised” text.

If not defined below or elsewhere in the Code, terms, where relevant, have the same meanings as are ascribed to them in the Alternative Investment Funds (Jersey) Regulations 2012 (the **Regulations**) and any Order made thereunder or, in relation to AIF services business, the Financial Services (Jersey) Law 1998 (the **FS(J)L**), and any Order made thereunder.

Where not defined in the *Regulations* or the *FS(J)L*, terms used in the Code shall have the same meanings as are ascribed to them in the Directive 2011/61/EU of the European Parliament and of the Council of 8 June, 2011 on Alternative Investment Fund Managers (**Level 1 AIFM Directive**) and/or the European Commission Delegated Regulation of 19 December 2012 supplementing Level 1 AIFM Directive with regard to exemptions, general operating conditions, depositaries, leverage, transparency, and supervision (**Level 2 AIFMD Regulation**).

References to laws are to such laws as amended, consolidated, or re-created from time to time.

Alternative Investment Funds:	
AIF (as defined in Regulation 3 of the <i>Regulations</i> )	<p>a scheme or arrangement is an AIF if:</p> <ul style="list-style-type: none"> <li>(a) it is an AIF, within the meaning given in <i>Level 1 AIFM Directive</i>; and</li> <li>(b) it is marketed in a Member State of the <i>European Union</i> or other <i>EEA State</i> to which <i>Level 1 AIFM Directive</i> applies; and</li> <li>(c) it is registered in Jersey or is a Jersey trust (has the same meaning as in the <i>Trusts (Jersey) Law 1984</i>) that is a unit trust; and</li> <li>(d) it is a scheme or arrangement – <ul style="list-style-type: none"> <li>(i) in respect of which the <i>JFSC</i> has given consent under the <i>Control of Borrowing (Jersey) Order 1958</i>, or</li> <li>(ii) that is a <i>Recognized Fund</i>, an unclassified fund or an unregulated fund for the purposes of the <i>CIF Law</i> or any Order made under the <i>CIF Law</i>.</li> </ul> </li> </ul> <p>For the purposes of paragraph (c) an AIF is registered in Jersey if –</p> <ul style="list-style-type: none"> <li>(a) it is a company within the meaning of Article 1 of the <i>Companies (Jersey) Law 1991</i>;</li> <li>(b) it is a limited partnership in respect of which a certificate has been issued under Article 4 of the <i>Limited Partnerships (Jersey) Law 1994</i>;</li> <li>(c) it is a limited liability partnership registered under Article 16 of the <i>Limited Liability Partnerships (Jersey) Law 1997</i>;</li> </ul>

	<p>(d) it is an incorporated limited partnership in respect of which a certificate has been issued under Article 4 of the Incorporated Limited Partnerships (Jersey) Law 2011; or</p> <p>(e) it is a separate limited partnership in respect of which a certificate has been issued under Article 4 of the Separate Limited Partnerships (Jersey) Law 2011.</p>
<p>EU AIF</p> <p>(as defined under Article 4 of the <i>Level 1 AIFM Directive</i>)</p>	<p>means:</p> <p>(a) a <i>Directive AIF</i> which is authorised or registered in a <i>Member State</i> under the applicable national law; or</p> <p>(b) a <i>Directive AIF</i> which is not authorised or registered in a <i>Member State</i>, but has its registered office and/or head office in a <i>Member State</i>.</p>
<p>Non-EU AIF</p> <p>(as defined under Article 4 of the <i>Level 1 AIFM Directive</i>)</p>	<p>means a <i>Directive AIF</i> which is not an <i>EU AIF</i>.</p>
<p>Directive AIF</p>	<p>means a scheme or arrangement that is an alternative investment fund for the purposes of the <i>Level 1 AIFM Directive</i> which for the avoidance of doubt includes an <i>AIF</i>, an <i>EU AIF</i> and a <i>Non-EU AIF</i>.</p>
<p><b>Alternative Investment Fund Managers:</b></p>	
<p>AIFM</p>	<p>means a legal person operating in or from within Jersey whose regular business is <i>managing</i> one or more <i>Directive AIFs</i> to which the provisions of the <i>Level 1 AIFM Directive</i> apply.</p>
<p>EU AIFM</p>	<p>means a legal person whose regular business is <i>managing</i> one or more <i>Directive AIFs</i> which has its registered office in a <i>Member State</i>.</p>
<p>Non-EU AIFM</p>	<p>means a legal person whose regular business is <i>managing</i> one or more <i>Directive AIFs</i> which is not an <i>EU AIFM</i> which for the avoidance of doubt includes an <i>AIFM</i>.</p>
<p>Directive AIFM</p>	<p>means a legal person whose regular business is managing one or more <i>Directive AIFs</i> for the purpose of the <i>Level 1 AIFM Directive</i> which for the avoidance of doubt includes an <i>AIFM</i>, an <i>EU AIFM</i> and a <i>Non-EU AIFM</i>.</p>
<p><b>Other terms:</b></p>	
<p>AIF entity</p> <p>(as defined in Regulation 2 of the <i>Regulations</i>)</p>	<p>means, in relation to an <i>AIF</i>, any one of the following:</p> <p>(a) a company that is the <i>AIF</i>;</p> <p>(b) a trustee of a unit trust that is the <i>AIF</i>;</p> <p>(c) a general partner of an incorporated limited partnership, of a limited partnership, or of a separate limited partnership, that is the <i>AIF</i>;</p>

	<p>(d) a partner of a limited liability partnership that is the <i>AIF</i>; or</p> <p>(e) in the case of an <i>AIF</i> that is not a company, unit trust or any partnership referred to in paragraph (c) or (d), the person who manages the <i>AIF</i>.</p>
AIF Order	means the Alternative Investment Funds (Jersey) Order 2013.
AIF prescribed service provider (within the meaning of Regulation 2 of the <i>Regulations</i> )	<p>means,</p> <p>(a) a depositary appointed under Article 21 of the Level 1 <i>AIFM Directive</i> (whether or not the <i>EU AIFM</i> is an <i>EU AIFM</i> to which Article 36 of the Level 1 <i>AIFM Directive</i> applies) that is not carrying on <i>fund services business</i> within the meaning of Article 2(10) of the <i>FS(J)L</i>;</p> <p>and</p> <p>(b) an <i>AIFM</i></p> <p>(i) in respect of which Article 3(2) of the Level 1 <i>AIFM Directive</i> applies, and</p> <p>(ii) which, under Article 3 of, and Part 5 of Schedule 2 to, the <i>FS(J)L</i>, is not treated as an <i>AIF services business</i>.</p> <p>Both of which are approved under the <i>AIF Order</i>.</p>
AIF services business (as defined under Article 2(11) of the <i>FS(J)L</i> )	a person carries on AIF services business if the person is a legal person whose regular business is <i>managing</i> one or more <i>Directive AIFs</i> and to which the provisions of the <i>Level 1 AIFM Directive</i> apply.
Certified Fund	means all unclassified collective investment funds, within the meaning of Article 3 of the <i>CIF Law</i> , issued with a certificate by the JFSC under Article 8B of the <i>CIF Law</i> .
CIF Code	means the Code of Practice for Certified Funds.
CIF Law	means the Collective Investment Funds (Jersey) Law 1988, as amended.
Code	means the Code of Practice for <i>AIFs</i> and <i>AIF services business</i> .
▼	▼
EC	means the European Commission.
EEA State	means a State which is a <i>Member State</i> or any other State which is a contracting party to the agreement on the European Economic Area signed at Oporto on 2 May, 1992 as adjusted by the Protocol signed at Brussels on 17 March 1993 (currently Iceland, Liechtenstein and Norway) or a State which becomes a contracting party to these arrangements in the future.
ESMA	means the European Securities and Markets Authority.

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ESRB	means the European Systemic Risk Board.
European Union/EU	means 28 sovereign <i>Member States</i> (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and United Kingdom).
fund services business	a person who carries on fund services business within the meaning of paragraph (10) of Article 2 of the <i>FS(J)L</i> , granted a registration certificate by the Commission under Article 9 of the <i>FS(J)L</i> in relation to fund services business.
Explanatory Memorandum	means the Explanatory Memorandum of the <i>Level 2 AIFMD Regulation</i> .
FS(J)L	means the Financial Services (Jersey) Law 1998, as amended.
<u>JFSC</u>	<u>means the Jersey Financial Services Commission.</u>
Implementation Date	means in relation to an <i>AIF</i> or an <i>AIFM</i> the later of: (a) 22 July 2013, which is the date on which <i>Level 1 AIFM Directive</i> should be implemented by all <i>Member States</i> ; and (b) the earliest date adopted by a relevant <i>Member State</i> under its national transitional arrangements for the implementation of the <i>Level 1 AIFM Directive</i> where “relevant <i>Member State</i> ” means a <i>Member State</i> into which the <i>Directive AIF</i> is marketed or, where the <i>EU AIF</i> which the <i>AIFM</i> manages is established.
Jersey Depositary	means a Jersey depositary within the meaning of paragraph 15.1 of the <i>Code</i> .
Level 1 AIFM Directive	means 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.
Level 2 AIFMD Regulation	means the European Commission Delegated Regulation of 19 December 2012 supplementing <i>Level 1 AIFM Directive</i> with regard to exemptions, general operating conditions, depositaries, <i>leverage</i> , transparency and supervision.
Leverage (as defined under Article 4 of the <i>Level 1 AIFM Directive</i> )	means any method by which the <i>Directive AIFM</i> increases the exposure of a <i>Directive AIF</i> it <i>manages</i> whether through borrowing of cash or securities, or leverage embedded in derivative positions or by any other means.
managing AIFs	means performing at least investment management functions referred to in point 1(a) or (b) of the Notes attaching to paragraph 1 of the <i>Code</i> for one or more <i>Directive AIFs</i> .

marketing AIFs	means a direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares of a <i>Directive AIF</i> it <i>manages</i> to or with investors domiciled or with a registered office in the <i>Union</i> .
Member State	means a Member State of the <i>European Union</i> or other <i>EEA State</i> to which <i>Level 1 AIFM Directive</i> applies.
Recognized Fund	means a fund in respect of which a certificate has been granted by the JFSC under the Collective Investment Funds (Recognized Funds) (Rules) (Jersey) Order 2003.
Regulations	means the Alternative Investment Funds (Jersey) Regulations 2012.
special arrangement (as defined under Article 1 of the <i>Level 2 AIFMD Regulation</i> )	means an arrangement that arises as a direct consequence of the illiquid nature of the assets of a <i>Directive AIF</i> which impacts the specific redemption rights of investors in a type of units or shares of the <i>Directive AIF</i> and which is a bespoke or separate arrangement from the general redemption rights of investors.
Transitional Period	means 22 July 2013 to 21 July 2015.
UCITS	means an undertaking for collective investment in transferable securities authorised in accordance with Article 5 of Directive 2009/65/EC.
Union	means the <i>European Union</i> including any <i>EEA State</i> to which <i>Level 1 AIFM Directive</i> applies.

## Contents

<b>Introduction .....</b>	<b>9</b>
<b>Part I: Application of the Code.....</b>	<b>14</b>
<b>Part II .....</b>	<b>15</b>
<b>Section 1: General Provisions .....</b>	<b>15</b>
1 Scope (Article 2 of the Level 1 AIFM Directive) .....	15
2 Sub-threshold AIFMs (Article 3 of the Level 1 AIFM Directive) and calculation of total value of assets under management (AUM) and leverage (Articles 2 and 6 to 11 of Level 2 AIFMD Regulation) .....	16
3 Determination of the AIFM (Article 5 of the Level 1 AIFM Directive).....	23
4 Conditions for conducting AIF business .....	23
5 Initial capital and own funds (Article 9 of the Level 1 AIFM Directive).....	23
<b>Section 2: Operating conditions for AIFMs .....</b>	<b>28</b>
6 General principles (Article 12 of the Level 1 AIFM Directive) .....	28
7 Remuneration (Article 13 of the Level 1 AIFM Directive) .....	34
8 Conflicts of interest (Article 14 of the Level 1 AIFM Directive).....	35
9 Risk management (Article 15 of the Level 1 AIFM Directive) .....	39
10 Liquidity management (Article 16 of the Level 1 AIFM Directive) .....	44
11 Investment in securitisation positions (Article 17 of the Level 1 AIFM Directive).....	47
12 General organisational requirements (Article 18 of the Level 1 AIFM Directive).....	51
13 Valuation (Article 19 of the Level 1 AIFM Directive) .....	59
14 Delegation of AIFM functions (Article 20 of the Level 1 AIFM Directive) .....	64
15 Depositary (Article 21 of the Level 1 AIFM Directive) .....	70
<b>Section 3: Transparency requirements.....</b>	<b>90</b>
16 Annual Report (Article 22 of the Level 1 AIFM Directive) .....	90
17 Disclosure to investors (Article 23 of the Level 1 AIFM Directive).....	95
18 Reporting obligations to the JFSC (Article 24 of the Level 1 AIFM Directive) .....	98
<b>Section 4: AIFMs managing specific types of Directive AIF .....</b>	<b>102</b>
19 AIFMs managing leveraged <i>Directive AIFs</i> – Use of information by the JFSC and limits to leverage (Article 25 of the Level 1 AIFM Directive) .....	102
20 AIFMs managing Directive AIFs which acquire control of non-listed companies and issuers – Scope (Article 26 of the Level 1 AIFM Directive) .....	103

- 21 Notification of the acquisition of major holdings and control of non-listed companies (Article 27 of the Level 1 AIFM Directive) ..... 104
- 22 Disclosure in case of acquisition of control (Article 28 of the Level 1 AIFM Directive) ..... 105
- 23 Specific provisions regarding the annual report of Directive AIFs exercising control of non-listed companies (Article 29 of the Level 1 AIFM Directive) ..... 106
- 24 Asset stripping (Article 30 of the Level 1 AIFM Directive) ..... 107

**Section 5: Specific rules in relation to Jersey .....109**

- 25 Conditions for the marketing in Member States without a passport of Directive AIFs managed by a non-EU AIFM (Article 42 of the Level 1 AIFM Directive) (Private Placement Rules) ..... 109
- 26 Conditions for the marketing in Member States without a passport of *Non-EU* AIFs managed by an EU AIFM (Article 36 of the Level 1 AIFM Directive) (Depositary Lite) ..... 109
- 27 Authorisation of Non-EU AIFMs intending to manage EU AIFs and/or market Directive AIFs managed by them in the Union with a passport in accordance with Article 39 or 40 of the Level 1 AIFM Directive (Article 37 of the Level 1 AIFM Directive) (Guidance for reference purposes only from Level 1 AIFM Directive) ..... 110
- 28 Marketing of AIFs by AIFMs to retail investors (Article 43 of the Level 1 AIFM Directive) (Guidance for reference purposes only from Level 1 AIFM Directive) ..... 111

## Introduction

### Power exercised and scope

The Code is issued by the JFSC under powers given to it by Regulation 22 of the Alternative Investment Funds (Jersey) Regulations 2012 (the **Regulations**) and Article 19 of the Financial Services (Jersey) Law 1998 (the **FS(J)L**).

The Code has been prepared and issued for the purpose of setting out the principles and detailed requirements that must be complied with in respect of any AIF, by AIFMs who are managing an EU AIF, or who are marketing a Directive AIF in the European Union or EEA, irrespective of whether such Directive AIF is an AIF, an EU AIF or a Non-EU AIF, and by Jersey Depositaries from the Implementation Date.

Specifically, the Code applies directly to the following:

- 1) a person that has been granted a certificate under Regulation 9 of the Regulations;
- 2) a person that has been granted a certificate under the FS(J)L to carry on AIF services business;
- 3) a person that the JFSC has approved as an AIF prescribed service provider under Article 4(1) of the Alternative Investment Funds (Jersey) Order 2013 (the **AIF Order**), namely a sub-threshold manager and an AIF depositary (paragraph 15.1.3).

Where the Code requires provision of information to the JFSC, such requirement is established in accordance with the powers provided by either Article 8 of the Financial Services Commission (Jersey) Law 1998 or Regulation 14 of the Regulations.

Persons are reminded of the provisions of Regulation 7 of the Regulations and Article 7 of the FS(J)L in respect of the prohibition on carrying out any unauthorised business.

The JFSC's Code of Practice for Certified Funds (the **CIF Code**) and Code of Practice for Fund Services Business were updated, effective from 22 July 2013, to include an additional principle which provides that the relevant Certified Fund/fund services business must comply with the applicable sections of the Code. The CIF Code was also amended to include reference to the (then) new certified fund AIF product, devised to take account of the Level 1 AIFM Directive, known as the 'Jersey Eligible Investor Fund' and its accompanying JFSC guide known as the 'Jersey Eligible Investor Fund Guide' which forms Schedule 5 to the CIF Code.

Consequently, the Code applies through the application of Principle 9 to the Code of Practice for Certified Funds and Principle 8 of the Code of Practice for Fund Services Business to:

- 1) a person that holds a certificate in respect of any Certified Fund that is also an AIF;
- 2) a person that is registered under the FS(J)L to carry on fund services business that:
  - a) is also carrying on AIF services business; or
  - b) has been appointed depositary to an alternative investment fund in accordance with Article 21 and/or Article 36 of the Level 1 AIFM Directive (paragraph 15.1.1 of the Code).

Finally, the Code applies to the following persons through the condition attached to their permit:

- 1) a person that holds a permit as a company issuing units in respect of any Recognized Fund that is also an AIF;
- 2) a person that has been granted a permit under the Collective Investment Funds (Jersey) Law 1988 to act as a functionary to a Recognized Fund:

- a) that is also carrying on AIF services business; or
- b) has been appointed depositary to an alternative investment fund in accordance with Article 21 and/or Article 36 of the Level 1 AIFM Directive (paragraph 15.1.2 of the Code).

### Application of the Code

The Code transposes the parts of the Level 1 AIFM Directive and the Level 2 AIFMD Regulation (which supplements the Level 1 AIFM Directive with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision) as far as such parts can be said to apply to any person.

From the Implementation Date and pursuant to Article 36 of the Level 1 AIFM Directive, with the exception of marketing in Member States without a passport of Non-EU AIFs managed by an EU AIFM, EU AIFMs are subject to the full impact of the Level 1 AIFM Directive, in return for which they are permitted to market Directive AIFs in the Union with the benefit of a Union-wide marketing “passport”.

With effect from the Implementation Date, AIFMs who are managing an EU AIF, or who are marketing a Directive AIF in the Union, are subject to the provisions of the Level 1 AIFM Directive and the Level 2 AIFMD Regulation applying to Non-EU AIFMs **but will not benefit from a passport**. Union-wide marketing passports will not be available to Non-EU AIFMs, or Non-EU AIFs which are managed by an EU AIFM, until the end of the Transitional Period at the earliest. Following the Transitional Period ESMA is due to conduct a review of the passporting regime with a view to recommending that it be extended to introduce two new types of passport; one passport for Non-EU AIFMs and another passport for Non-EU AIFs managed by an EU AIFM.

During the Transitional Period, Non-EU AIFMs are permitted to market AIFs under Member States’ national private placement rules (the rules applicable during this period, referred to as the **Private Placement Rules**). The Level 1 AIFM Directive provides that even if Non-EU AIFMs are able to benefit from a Union-wide passport from 2015, they will continue to be able to market Directive AIFs under the Private Placement Rules until at least 2018, when marketing under Member States’ national Private Placement Rules is likely to come to an end. Non-EU AIFMs will then be subject to the full impact of the Level 1 AIFM Directive.

Jersey has implemented the necessary regulatory infrastructure to comply fully with the Level 1 AIFM Directive from the Implementation Date and operates a dual regime split between:

- 1) a regulatory regime for those AIFMs who choose to be subject only to the Private Placement Rules until at least 2018; and
- 2) a fully compliant regime for passporting purposes (in anticipation of when Union-wide marketing passports may become available to Non-EU AIFMs) for those AIFMs who wish to be fully compliant earlier than 2018.

The Code is arranged under two separate parts. Part I illustrates how the Code applies to AIFs, AIFMs and Jersey Depositaries in practice and Part II sets out the Code under five separate sections, (as based on the relevant parts of the Level 1 AIFM Directive and Level 2 AIFMD Regulation). By consulting Part I, a person will readily be able to establish which provisions of the Code applies to it and which do not.

Different sections of the Code apply depending on whether the AIFM wishes to be subject to the Private Placement Rules or opt into the fully compliant regime. Where the AIFM wishes to be subject to the Private Placement Rules, Article 42 of the Level 1 AIFM Directive provides that only the transparency requirements relating to: Annual report; Disclosure to investors; and Reporting obligations to competent authorities (Articles 22 to 24 of the Level 1 AIFM Directive) will apply and, if within scope, Articles 26 to 30 of the Level 1 AIFM Directive setting out the obligations for Directive

AIFMs managing Directive AIFs which acquire control of non-listed companies and issuers will also apply. The Code naturally applies in full where the AIFM opts in to the fully compliant regime, and in this regard, there shall be no variations from any of the requirements. In addition, the degree to which the Code applies in practice will vary depending on the Jersey regulatory status of the relevant AIF entity and/or AIFM or Jersey Depositary.

**The requirements of any Member State in relation to the Level 1 AIFM Directive and the Level 2 AIFMD Regulation will need to be considered separately and, to the extent applicable, complied with in addition to the requirements set out in the Code.**

### Compliance with the Code

The certificate granted by the JFSC to:

- 1) an AIF entity under Regulation 9 of the Regulations;
- 2) a person under the FS(J)L to carry on AIF services business;

and, where appropriate:

- 3) the permit or certificate granted by the JFSC to a Recognized Fund or a Certified Fund respectively under the CIF Law; or
- 4) a registration certificate granted to a Fund Services Business under the FS(J)L,

will, in each case where the relevant Directive AIF is being marketed in a Member State include the condition that the relevant person “**MUST** comply with the applicable sections of the Code”.

Each section of the Code is designed to be understood by reference to its full text, including the notes. The Code should be read in conjunction with the Regulations and the FS(J)L and any subordinate legislation, together with any certificate/permit conditions, and the Handbook for the Prevention and Detection of Money Laundering and the Financing of Terrorism for Financial Services Business regulated under the Regulatory Laws, issued by the JFSC.

In interpreting the Code, in circumstances where there is any ambiguity, the JFSC may consider, and where appropriate may apply, the interpretation of the equivalent Level 1 AIFM Directive or Level 2 AIFMD Regulation provision applied by the relevant Member State of reference (where that concept is applicable), or of the Member State(s) in which the business of the AIFM and/or Directive AIF is undertaken or regulated under the Level 1 AIFM Directive.

It is the responsibility of each relevant person to comply with the Code, as far as the Code applies to it, and to implement such additional practices as it considers necessary for the proper management and control of its business. Where a relevant person considers that it may not be able to achieve full compliance with the Code for a temporary period (for example, for a short period after first being licensed) it should, in advance, agree a plan of action (to include timescales) with the JFSC to bring itself into full compliance with the Code. In exceptional circumstances, where strict adherence to the Code would produce an anomalous result, a relevant person may apply to the JFSC for a variation from the Code; this is in addition to those areas of the Code which specifically provide for a relevant person to apply for a variance from the Code.

In determining whether a person has complied with a particular requirement of the Code, the JFSC may take account of any relevant guidance issued from time to time by the JFSC, the EC, ESMA or any supervisory body of any Member State.

Methods of compliance with the provisions of the Code will vary depending on whether Jersey is the home or host jurisdiction of the relevant person and the extent of physical presence in the Island or elsewhere:

- 1) A relevant person whose home jurisdiction is Jersey shall be subject to the Jersey regulatory framework<sup>1</sup>, including the requirements of the Code. Where such a person has subsidiaries or branches outside Jersey, or makes services or products available outside Jersey through brokers or other intermediaries, it must ensure, as far as possible, that the Jersey regulatory framework is applied to those subsidiaries or branches or observed by the brokers and other intermediaries. Where significant differences exist between the host jurisdiction and that of Jersey which would result in non-compliance with the Code; they must be brought to the attention of the JFSC for discussion and resolution.
- 2) Where a person appoints its own agents or sub-agents, that person is responsible for ensuring that the legal agreements between them and its own agents or sub agents make provision for compliance with the Code.

Failure to follow the Code represents grounds for the JFSC to take regulatory action. Where the JFSC has reason to believe that at any time there has been a failure to comply with the Code, it may consider making use of its regulatory powers which, in serious cases, could include the revocation of a registration certificate/permit.

In addition, failure to comply with the Code may support a decision by the JFSC that, for example, continued non-compliance or other failure to remedy the circumstances giving rise to the breach may be addressed by the issue of a written direction under Regulation 20 of the Regulations or Article 23 of the FS(J)L. Such a direction might impose requirements on a person to do or not to do specified things, including the removal of specified individuals or the cessation of business. In appropriate circumstances that direction can be made public by virtue of Regulation 24(1)(e) of the Regulations and/or Article 25(a) of the FS(J)L.

The JFSC also has the power under Article 21A of the Financial Services Commission (Jersey) Law 1998 to impose financial penalties for significant and material contraventions of the Code.

When considering a person's failure to comply with the Code the JFSC places emphasis on whether or not a person conducts its business with integrity and deals with the JFSC in an open and co-operative manner.

Whilst Regulation 22(3) of the Regulations and Article 19(3) of the FS(J)L provides that the contravention of the Code shall not of itself render any person liable to proceedings of any kind (excluding regulatory action that may be taken by the JFSC in response to a contravention) or invalidate any transaction, Regulation 22(4) of the Regulations and Article 19(4) of the FS(J)L provide that, subject to a condition of registration indicating that any part or parts of the Code are to be wholly or partly disregarded by a person, the Code shall be admissible in evidence if it appears to the court conducting proceedings to be relevant to any questions arising in the proceedings, and shall be taken into account in determining any such questions.

Where it appears to the JFSC that a person has failed to comply with the Code, it may issue a public statement under Regulation 24(2)(b) of the Regulations or under Article 25(b) of the FS(J)L.

In a number of places the Code requires the JFSC to be advised of a matter "in writing". For the avoidance of doubt, a notification given by email, or by means of the JFSC's ~~online~~ portal, will be considered by the JFSC to meet that requirement (unless the particular Code requirement specifies otherwise how a notification "in writing" must be given).

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<sup>1</sup> "Regulatory framework" is utilised to refer to the legislative and regulatory requirements established in a jurisdiction.

Deleted: 1 September 2016

## Revision of the Code

In accordance with Regulation 22(1) of the Regulations and Article 19(1)(b) of the FS(J)L, the JFSC may, after consultation with such persons or bodies as appear to be representative of the interests concerned, revise the Code by revoking, varying, amending or adding to its provisions.

In July 2017 the JFSC published Consultation Paper No. 6, proposing a number of amendments to the Code and, in December 2017, published a feedback paper summarising respondents' comments and the JFSC's responses.

Rather than detail the amendments here, the JFSC has published a version of the Code that highlights the amendments applied.

## Effective Date

This revised Code is effective from 21 March 2018.

Any person that has made an application to the JFSC which is currently under consideration, should review the Code and contact the JFSC to discuss any areas where compliance on grant of registration may be an issue.

**John Harris**

**Director General**

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## Part I: Application of the Code

Application of the Code	
AIF*	
CIF <i>Certified Funds</i> (OCIF, Jersey Expert Fund, Jersey Listed Fund and Jersey Eligible Investor Fund)	In accordance with paragraph 25, Section 3 and Section 4 (with the exception of paragraph 19) of the <i>Code</i> apply, except in relation to a <i>Directive AIF</i> which has appointed a sub-threshold manager within the scope of paragraph 2.1 of Section 1.
CIF <i>Recognized Funds</i>	
Private COBO Funds (Very Private, COBO – Only and Jersey Private Placement Fund)	
AIFM*	
Article 2(10) <i>FS(J)L Fund Services Business Recognized Fund Functionary performing AIFM</i> (Full Passport)	Full application of the <i>Code</i> applies. No derogation from the <i>Code</i> is permitted.
Article 2(10) <i>FS(J)L Fund Services Business Recognized Fund Functionary performing AIFM</i> (Private Placement)	In accordance with paragraph 25, paragraphs 1, 2.3, 3 and 4 of Section 1 and Section 3 and Section 4 (with the exception of paragraph 19) of the <i>Code</i> apply.
Article 2(11) <i>FS(J)L AIF Services Business performing AIFM</i> (Private Placement)	
<i>Regulations performing AIFM</i> (Sub-threshold)	Paragraphs 1, 0, 3 and 4 of Section 1 of the <i>Code</i> apply.
DEPOSITARY	
Article 2(10) <i>FS(J)L Fund Services Business Recognized Fund Functionary performing Jersey Depositary</i> (Full)	Paragraph 15 of Section 2 of the <i>Code</i> applies.
Article 2(10) <i>FS(J)L Fund Services Business Recognized Fund Functionary performing Jersey Depositary</i> (Lite)	In accordance with paragraph 26, paragraphs 15.1, 15.4 (which for the avoidance of doubt, does not include 15.4.1 in this case) and paragraphs 15.7 to 15.22 of Section 2 of the <i>Code</i> apply.
Article 2(10) <i>FS(J)L Fund Services Business Recognized Fund Functionary Regulations</i> (Non-Fund Services Business) Jersey Depositary performing Depositary (Closed-ended private equity/real estate)	Paragraphs 15.1 and 15.4 (which for the avoidance of doubt, includes 15.4.1 in this case) of Section 2 of the <i>Code</i> apply.

\* Paragraph 28 provides guidance to *AIFs* and *AIFMs* on *marketing* to retail investors as compared with professional investors.

## Part II

### Section 1: General Provisions

#### 1 Scope (Article 2 of the Level 1 AIFM Directive)<sup>2</sup>

- 1.1 The Code applies to:
- 1.1.1 AIFMs which manage one or more EU AIFs; and
  - 1.1.2 AIFMs which market one or more Directive AIFs in the Union irrespective of whether such Directive AIFs are AIFs, EU AIFs or Non-EU AIFs.
- 1.2 Whilst the Code is aimed at AIFMs, they also impact on AIFs and Jersey Depositaries (as defined in paragraph 15), where the Code expressly provides.

##### Notes:

*AIFM Functions (Paragraph (w) of Article 4 of the Level 1 AIFM Directive (definition of 'managing AIFs') and Annex I of the Level 1 AIFM Directive (AIFM functions))*

*For the purpose of paragraph 1.1.1, investment management functions which an AIFM (a Directive AIFM in the Glossary) shall at least perform when managing an AIF (a Directive AIF in the Glossary) shall include:*

- (a) portfolio management; and/or
- (b) risk management.

*Other functions that an AIFM (a Directive AIFM in the Glossary) may additionally perform in the course of the collective management of an AIF (a Directive AIF in the Glossary) include:*

- (a) administration:
  - i. legal and fund management accounting services;
  - ii. customer inquiries;
  - iii. valuation and pricing, including tax returns;
  - iv. regulatory compliance monitoring;
  - v. maintenance of unit-/shareholder register;
  - vi. distribution of income;
  - vii. unit/shares issues and redemptions;
  - viii. contract settlements, including certificate dispatch;
  - ix. record keeping;
- (b) marketing;
- (c) activities related to the assets of AIFs (a Directive AIF in the Glossary), namely services necessary to meet the fiduciary duties of the AIFM (a Directive AIFM in the Glossary), facilities management, real estate administration activities, advice to undertakings on capital structure, industrial strategy and related matters, advice and services relating to

<sup>2</sup> Recitals 6, 7, 8, 13, 14 and 16 of the Level 1 AIFM Directive.

*mergers and the purchase of undertakings and other services connected to the management of the AIF (a Directive AIF in the Glossary) and the companies and other assets in which it has invested.*

## 2 Sub-threshold AIFMs (Article 3 of the Level 1 AIFM Directive) and calculation of total value of assets under management (AUM) and leverage (Articles 2 and 6 to 11 of Level 2 AIFMD Regulation)<sup>3</sup>

2.1 AIFMs having AUM below certain thresholds specified in paragraphs 2.1.1 and 2.1.2 shall be treated as ‘sub-threshold’ managers for the purpose of the *Code* and a modified regime shall apply to such AIFMs as more particularly described under paragraph 2.5.

2.1.1 AIFMs which either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of *Directive AIFs* whose assets under management, including any assets acquired through use of *leverage*, in total do not exceed a threshold of EUR 100 million; or

2.1.2 AIFMs which either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of *Directive AIFs* whose assets under management in total do not exceed a threshold of EUR 500 million when the portfolios of *Directive AIFs* consist of *Directive AIFs* that are unleveraged and have no redemption rights exercisable during a period of 5 years following the date of initial investment in each *Directive AIF*.

2.2 Calculation of the total value of assets under management (Article 2 of *Level 2 AIFMD Regulation*)

2.2.1 In order to qualify as a “sub-threshold” manager, an AIFM shall:

2.2.1.1 identify all *Directive AIFs* for which it is appointed as the external AIFM or the *Directive AIF* for which it is the AIFM, where the legal form of the *Directive AIF* permits internal management, in accordance with the *Code*;

2.2.1.2 identify for each managed *Directive AIF* the portfolio of assets and determine in accordance with the valuation rules laid down in the law of the country where the *Directive AIF* is established and, as the case may be or in the *Directive AIF* rules or instruments constituting the *Directive AIF* the corresponding value of assets under management, including all assets acquired through use of *leverage*;

2.2.1.3 aggregate the determined values of assets under management for all *Directive AIFs* managed and compare the resulting total value of assets under management to the relevant threshold laid down in paragraph 2.1.

<sup>3</sup> Recital 17 of the *Level 1 AIFM Directive*  
Section 3.2.1 of the *Explanatory Memorandum* and Recitals 4 to 10 of *Level 2 AIFMD Regulation*

- 2.2.2 For the purposes of paragraph 2.2.1, undertakings for collective investment in transferable securities (*UCITS*) for which the *AIFM* acts as the designated management company under Directive 2009/65/EC shall not be included in the calculation.
- For the purposes of paragraph 2.2.1, *Directive AIFs* managed by the *AIFM* for which the *AIFM* has delegated functions in accordance with the *Code* shall be included in the calculation. However, portfolios of *Directive AIFs* that the *AIFM* is *managing* under delegation shall be excluded from the calculation.
- 2.2.3 For the purpose of calculating the total value of assets under management, each derivative instrument position, including any derivative embedded in transferable securities shall be converted into its equivalent position in the underlying assets of that derivative using the conversion methodologies set out in paragraph 2.12. The absolute value of that equivalent position shall then be used for the calculation of the total value of assets under management.
- 2.2.4 Where a *Directive AIF* invests in other *Directive AIFs* managed by the same externally appointed *AIFM*, that investment may be excluded from the calculation of the *AIFM's* assets under management.
- 2.2.5 Where one compartment within an internally or externally managed *Directive AIF* invests in another compartment of that *Directive AIF*, that investment may be excluded from the calculation of the *AIFM's* assets under management.
- 2.2.6 The total value of assets under management shall be calculated in accordance with paragraphs 2.2.1 to 2.2.4 at least annually and using the latest available asset values. The latest available asset value for each *Directive AIF* shall be produced during the twelve months preceding the date of the calculation of the threshold in accordance with the first sentence of this paragraph. The *AIFM* shall determine a threshold calculation date and apply it in a consistent manner. Any subsequent change to the date chosen must be justified to the *JFSC*. In selecting the threshold calculation date, the *AIFM* shall take into account the time and frequency of the valuation of the assets under management.
- 2.3 For the purpose of all *AIFMs*, including sub-threshold *AIFMs*, on-going monitoring of assets under management (Article 3 of *Level 2 of AIFMD Regulation*)
- 2.3.1 *AIFMs* shall establish, implement and apply procedures to monitor on an on-going basis the total value of assets under management. Monitoring shall reflect an up-to-date overview of the assets under management and shall include the observation of subscription and redemption activity or, where applicable, capital draw downs, capital distributions and the value of the assets invested in for each *Directive AIF*.
- 2.3.2 The proximity of the total value of assets under management to the threshold set in paragraph 2.1 and the anticipated subscription and redemption activity shall be taken into account in order to assess the need for more frequent calculations of the total value of assets under management.
- 2.4 Occasional breach of the threshold (Article 4 of *Level 2 of AIFMD Regulation*)
- 2.4.1 The *AIFM* shall assess situations where the total value of assets under management exceeds the relevant threshold in order to determine whether or not they are of a temporary nature.

- 2.4.2 Where the total value of assets under management exceeds the relevant threshold and the *AIFM* considers that the situation is not of a temporary nature, the *AIFM* shall notify the *JFSC* in writing without delay stating that the situation is considered not to be of a temporary nature and shall advise the *JFSC* that it should no longer be treated as a sub-threshold *AIFM* and seek, where required, further authorisation under the *FS(J)L* within 30 calendar days.
  - 2.4.3 Where the total value of assets under management exceeds the relevant threshold and the *AIFM* considers that the situation is of a temporary nature, the *AIFM* shall notify the *JFSC* in writing without delay, stating that the situation is considered to be of a temporary nature. The notification shall include supporting information to justify the *AIFM*'s assessment of the temporary nature of the situation, including a description of the situation and an explanation of the reasons for considering it temporary.
  - 2.4.4 A situation shall not be considered of a temporary nature if it is likely to continue for a period in excess of three months.
  - 2.4.5 Three months after the date on which the total value of assets under management exceeds the relevant threshold the *AIFM* shall recalculate the total value of assets under management in order to demonstrate that it is below the relevant threshold or demonstrate to the *JFSC* that the situation which resulted in the assets under management exceeding the threshold has been resolved and an application for authorisation of the *AIFM* is not required.
- 2.5 An *AIFM* which qualifies as a "sub-threshold" manager under paragraph 2.1 shall:
- 2.5.1 be subject to approval by the *JFSC* under the *AIF Order* if not already subject to registration under the *FS(J)L* for *AIF services business* or fund services business;
  - 2.5.2 identify itself and the *Directive AIFs* that it *manages* to the *JFSC* in writing at the time of seeking approval;
  - 2.5.3 provide information on the investment strategies of the *Directive AIFs* that it manages to the *JFSC* in writing at the time of seeking approval;
  - 2.5.4 provide the *JFSC* with information in writing on the main instruments in which it is trading and on the principal exposures and most important concentrations of the *Directive AIFs* that it *manages*; and
  - 2.5.5 notify the *JFSC* in writing promptly in the event that it no longer meets the conditions referred to in paragraphs 2.1.1 and 2.1.2.
- 2.6 Reporting to the *JFSC* (Article 110 of *Level 2 AIFMD Regulation*)
- 2.6.1 In order to comply with the requirements for the reporting obligations to the *JFSC* generally and the specific requirements of paragraph 2.5.4 and the second subparagraph of paragraph 18.1, an *AIFM* shall provide the following information in writing when reporting to the *JFSC*:
    - 2.6.1.1 the main instruments in which it is trading, including a break-down of financial instruments and other assets, including the *Directive AIF*'s investment strategies and their geographical and sectoral investment focus;
    - 2.6.1.2 the markets of which it is a member or where it actively trades;
    - 2.6.1.3 the diversification of the *Directive AIF*'s portfolio, including, but not limited to, its principal exposures and most important concentrations.

- 2.6.2 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 18.3.3. Where the *Directive AIF* is a fund of funds this period may be extended by the *AIFM* by 15 days.
- 2.7 Information to be provided as part of registration (Article 5 of *Level 2 AIFMD Regulation*)
- 2.7.1 As part of the requirement in paragraph 2.5.2, *AIFMs* shall communicate to the *JFSC* in writing the total value of assets under management calculated in accordance with the procedure set out in paragraph 2.2.
- 2.7.2 As part of the requirement in paragraph 2.5.3, *AIFMs* shall provide for each *Directive AIF* the offering document or a relevant extract from the offering document or, where there is no offering document, a general description of the investment strategy. The relevant extract from the offering document and the description of the investment strategy shall include at least the following information:
- 2.7.2.1 the main categories of assets in which the *Directive AIF* may invest;
- 2.7.2.2 any industrial, geographic or other market sectors or specific classes of assets which are the focus of the investment strategy;
- 2.7.2.3 a description of the *Directive AIF's* borrowing or *leverage* policy.
- 2.7.3 Information to be provided by the *AIFM* under paragraph 2.5.4 is listed in paragraph 18.3.1. It shall be provided in accordance with the pro-forma reporting template as set out in the Annex IV of *Level 2 AIFMD Regulation* which covers the reporting templates.
- 2.7.4 Information collected in accordance with paragraph 2.5.4 shall be shared between the *JFSC* and the competent authorities in the *Union*, with *ESMA* and *ESRB* where necessary for the fulfilment of their duties.
- 2.8 General provisions on the calculation of *leverage* (Article 6 of *Level 2 AIFMD Regulation*)
- 2.8.1 *Leverage* of a *Directive AIF* shall be expressed as the ratio between the exposure of a *Directive AIF* and its net asset value.
- 2.8.2 *AIFMs* shall calculate the exposure of the *Directive AIFs* managed in accordance with the gross method as set out in paragraph 2.9 and the commitment method as set out in paragraph 2.10.
- 2.8.3 Exposure contained in any financial or legal structures involving third parties controlled by the relevant *Directive AIF* shall be included in the calculation of the exposure where the structures referred to are specifically set up to directly or indirectly increase the exposure at the level of the *Directive AIF*. For *Directive AIFs* whose core investment policy is to acquire control of non-listed companies or issuers, the *AIFM* shall not include in the calculation of the *leverage* any exposure that exists at the level of those non-listed companies and issuers provided that the *Directive AIF* or the *AIFM* acting on behalf of the *Directive AIF* does not have to bear potential losses beyond its investment in the respective company or issuer.
- 2.8.4 *AIFMs* shall exclude borrowing arrangements entered into if these are temporary in nature and are fully covered by contractual capital commitments from investors in the *Directive AIF*.

- 2.8.5 An *AIFM* shall have appropriately documented procedures to calculate the exposure of each *Directive AIF* under its management in accordance with the gross method and the commitment method. The calculation shall be applied consistently over time.
- 2.9 Gross method for calculating the exposure of the *Directive AIF* (Article 7 of *Level 2 AIFMD Regulation*)
- 2.9.1 The exposure of a *Directive AIF* calculated in accordance with the gross method shall be the sum of the absolute values of all positions valued in accordance with paragraph 13.
- 2.9.2 For the calculation of the exposure of a *Directive AIF* in accordance with the gross method an *AIFM* shall:
- 2.9.2.1 exclude the value of any cash and cash equivalents which are highly liquid investments held in the base currency of the *Directive AIF*, that are readily convertible to a known amount of cash, are subject to an insignificant risk of change in value and provide a return no greater than the rate of a three-month high quality government bond;
  - 2.9.2.2 convert derivative instruments into the equivalent position in their underlying assets using the conversion methodologies set out in paragraph 2.12 and the methods set out in paragraphs (4) to (9) and (14) of Annex I of *Level 2 AIFMD Regulation*;
  - 2.9.2.3 exclude cash borrowings that remain in cash or cash equivalent as referred to in paragraph 2.9.2.1 and where the amounts of that payable are known;
  - 2.9.2.4 include exposure resulting from the reinvestment of cash borrowings, expressed as the higher of the market value of the investment realised or the total amount of the cash borrowed as referred to in paragraphs (1) and (2) of Annex I of *Level 2 AIFMD Regulation*;
  - 2.9.2.5 include positions within repurchase or reverse repurchase agreements and securities lending or borrowing or other arrangements in accordance with paragraphs (3) and (10) to (13) of Annex I of *Level 2 AIFMD Regulation*.
- 2.10 Commitment method for calculating the exposure of a *Directive AIF* (Article 8 of *Level 2 AIFMD Regulation*)
- 2.10.1 The exposure of a *Directive AIF* calculated in accordance with the commitment method shall be the sum of the absolute values of all positions valued in accordance with paragraph 13, subject to the criteria provided for in paragraphs 2.10.2 to 2.10.9.
- 2.10.2 For the calculation of the exposure of a *Directive AIF* in accordance with the commitment method an *AIFM* shall:
- 2.10.2.1 convert each derivative instrument position into an equivalent position in the underlying asset of that derivative using the conversion methodologies set out in paragraph 2.12 and paragraphs (4) to (9) and (14) of Annex II of *Level 2 AIFMD Regulation*;
  - 2.10.2.2 apply netting and hedging arrangements;

- 2.10.2.3 calculate the exposure created through the reinvestment of borrowings where such reinvestment increases the exposure of the *Directive AIF* as defined in paragraphs (1) and (2) of Annex I of *Level 2 AIFMD Regulation*;
- 2.10.2.4 include other arrangements in the calculation in accordance with paragraphs (3) and (10) to (13) of Annex I of *Level 2 AIFMD Regulation*.
- 2.10.3 For the purposes of calculating the exposure of a *Directive AIF* according to the commitment method:
  - 2.10.3.1 netting arrangements shall include combinations of trades on derivative instruments or security positions which refer to the same underlying asset, irrespective - in the case of derivative instruments - of the maturity date of the derivative instruments and where those trades on derivative instruments or security positions are concluded with the sole aim of eliminating the risks linked to positions taken through the other derivative instruments or security positions;
  - 2.10.3.2 hedging arrangements shall include combinations of trades on derivative instruments or security positions which do not necessarily refer to the same underlying asset and where those trades on derivative instruments or security positions are concluded with the sole aim of offsetting risks linked to positions taken through the other derivative instruments or security positions.
- 2.10.4 By way of derogation from paragraph 2.10.2, a derivative instrument shall not be converted into an equivalent position in the underlying asset if it has all of the following characteristics:
  - 2.10.4.1 it swaps the performance of financial assets held in the *Directive AIF's* portfolio for the performance of other reference financial assets;
  - 2.10.4.2 it totally offsets the risks of the swapped assets held in the *Directive AIF's* portfolio so that the *Directive AIF's* performance does not depend on the performance of the swapped assets;
  - 2.10.4.3 it includes neither additional optional features, nor *leverage* clauses nor other additional risks as compared to a direct holding of the reference financial assets.
- 2.10.5 By way of derogation from paragraph 2.10.2 a derivative instrument shall not be converted into an equivalent position in the underlying asset when calculating the exposure according to the commitment method if it meets both of the following conditions:
  - 2.10.5.1 the combined holding by the *Directive AIF* of a derivative instrument relating to a financial asset and cash which is invested in cash equivalent as defined in paragraph 2.9.2.1 is equivalent to holding a long position in the given financial asset;
  - 2.10.5.2 the derivative instrument shall not generate any incremental exposure and *leverage* or risk.
- 2.10.6 Hedging arrangements shall be taken into account when calculating the exposure of a *Directive AIF* only if they comply with all the following conditions:
  - 2.10.6.1 the positions involved within the hedging relationship do not aim to generate a return and general and specific risks are offset;

- 2.10.6.2 there is a verifiable reduction of market risk at the level of the *Directive AIF*;
  - 2.10.6.3 the risks linked to derivative instruments, general and specific, if any, are offset;
  - 2.10.6.4 the hedging arrangements relate to the same asset class;
  - 2.10.6.5 they are efficient in stressed market conditions.
- 2.10.7 Subject to paragraph 2.10.6, derivative instruments used for currency hedging purposes and that do not add any incremental exposure, *leverage* or other risks shall not be included in the calculation.
- 2.10.8 An *AIFM* shall net positions in any of the following cases:
  - 2.10.8.1 between derivative instruments, provided they refer to the same underlying asset, even if the maturity date of the derivative instruments is different;
  - 2.10.8.2 between a derivative instrument whose underlying asset is a transferable security, money market instrument or units in a collective investment undertaking as referred to in points 1 to 3 of Section C of Annex I to Directive 2004/39/EC, and that same corresponding underlying asset.
- 2.10.9 *AIFMs managing Directive AIFs* that, in accordance with their core investment policy, primarily invest in interest rate derivatives shall make use of specific duration netting rules in order to take into account the correlation between the maturity segments of the interest rate curve as set out in paragraph 2.13.
- 2.11 Methods of increasing the exposure of a *Directive AIF* (Article 9 of *Level 2 AIFMD Regulation*)
  - 2.11.1 When calculating exposure *AIFMs* shall use the methods set out in Annex I of *Level 2 AIFMD Regulation* for the situations referred to therein.
- 2.12 Conversion methodologies for derivative instruments (Article 10 of *Level 2 AIFMD Regulation*)
  - 2.12.1 *AIFMs* shall use the conversion methodologies set out in Annex II of *Level 2 AIFMD Regulation* for the derivative instruments referred to therein.
- 2.13 Duration netting rules (Article 11 of *Level 2 AIFMD Regulation*)
  - 2.13.1 Duration netting rules shall be applied by *AIFMs* when calculating the exposure of *Directive AIFs* according to paragraph 2.10.9.
  - 2.13.2 The duration-netting rules shall not be used where they would lead to a misrepresentation of the risk profile of the *Directive AIF*. *AIFMs* availing themselves of those netting rules shall not include other sources of risk such as volatility in their interest rate strategy. Consequently, interest rate arbitrage strategies shall not apply those netting rules.
  - 2.13.3 The use of those duration-netting rules shall not generate any unjustified level of *leverage* through investment in short-term positions. Short-dated interest rate derivatives shall not be the main source of performance for an *Directive AIF* with medium duration which uses the duration netting rules.
  - 2.13.4 Interest rate derivatives shall be converted into their equivalent underlying asset position and netted in accordance with Annex III of *Level 2 AIFMD Regulation*.

- 2.13.5 A *Directive AIF* making use of the duration-netting rules may still make use of the hedging framework. Duration netting rules may be applied only to the interest rate derivatives which are not included in hedging arrangements.

### 3 Determination of the AIFM (Article 5 of the Level 1 AIFM Directive)<sup>4</sup>

- 3.1 Each *Directive AIF* shall have a single *EU AIFM* (however paragraph 25 (Article 42 of the Level 1 *AIFM Directive*) makes no requirement for a single *Non-EU AIFM*), which shall be responsible for ensuring compliance with the *Code*. The *AIFM* shall be either:
- 3.1.1 an external manager, which is the legal person appointed by the *Directive AIF* or on behalf of the *Directive AIF* and which through this appointment is responsible for *managing* the *Directive AIF* (external *AIFM*); or
  - 3.1.2 where the legal form of the *Directive AIF* permits an internal management and where the *Directive AIF*'s governing body chooses not to appoint an external *AIFM*, the *Directive AIF* itself, which shall then be authorised as the *AIFM*.
- 3.2 In cases where an external *AIFM* is unable to ensure compliance with the requirements of the *Code* for which a *Directive AIF* or another entity on its behalf is responsible, it shall immediately inform the *JFSC* in writing and where required, the competent authorities of the *Member State* of reference (where that concept is applicable), and, the competent authorities of the *EU AIF* concerned (if applicable). The *JFSC* may require the *AIFM* to take the necessary steps to remedy the situation.

### 4 Conditions for conducting AIF business

- 4.1 An *AIF entity* in relation to an *AIF* or an *AIF prescribed service provider* in relation to a *Directive AIF* shall not carry on any business until such time as a certificate has been granted by the *JFSC* under the *AIF Regulations* and is in force or it has been approved by the *JFSC*.
- 4.2 A person shall not carry on *AIF services business* within the meaning of Article 2(11) of the *FS(J)L* until such time as a *Certificate* has been granted by the *JFSC* and is in force in relation to that person.

### 5 Initial capital and own funds (Article 9 of the Level 1 AIFM Directive)<sup>5</sup>

- 5.1 An *AIFM* which is an internally managed *AIF* (as contemplated under paragraph 3.1.2) shall have an initial capital of at least EUR 300,000.

<sup>4</sup> Recital 20 of the Level 1 *AIFM Directive*.

<sup>5</sup> Recital 23 of the Level 1 *AIFM Directive*.  
Section 3.2.3 of the *Explanatory Memorandum* and Recitals 32 to 38 of *Level 2 AIFMD Regulation*.

- 5.2 Where an *AIFM* is appointed as an external manager of *Directive AIFs*, the *AIFM* shall have an initial capital of at least EUR 125,000.
- 5.3 Where the value of the portfolios of *Directive AIFs* managed by the *AIFM* exceeds EUR 250 million, the *AIFM* shall provide an additional amount of own funds. That additional amount of own funds shall be equal to 0.02 % of the amount by which the value of the portfolios of the *AIFM* exceeds EUR 250 million but the required total of the initial capital and the additional amount shall not, however, exceed EUR 10 million. For the purpose of paragraph 5.3, *Directive AIFs* managed by the *AIFM*, including *Directive AIFs* for which the *AIFM* has delegated functions in accordance with the delegation provisions of the *Code* but excluding *Directive AIF* portfolios that the *AIFM* is *managing* under delegation, shall be deemed to be the portfolios of the *AIFM*.
- 5.4 For the purpose of paragraph 5.3, *Directive AIFs* managed by the *AIFM*, including *Directive AIFs* for which the *AIFM* has delegated functions in accordance with the delegation provisions of the *Code* but excluding *Directive AIF* portfolios that the *AIFM* is *managing* under delegation, shall be deemed to be the portfolios of the *AIFM*.
- 5.5 The *JFSC* may authorise *AIFMs* not to provide up to 50% of the additional amount of own funds referred to in paragraph 5.3 if they benefit from a guarantee of the same amount given by an entity with a minimum paid up share capital of at least £5 million.
- 5.6 To cover potential professional liability risks resulting from activities *AIFMs* may carry out pursuant to the *Code*, both internally managed *AIFs* and external *AIFMs* shall either:
- 5.6.1 have additional own funds which are appropriate to cover potential liability risks arising from professional negligence; or
- 5.6.2 hold a professional indemnity insurance against liability arising from professional negligence which is appropriate to the risks covered.
- 5.7 Professional liability risks (Article 12 *Level 2 AIFMD Regulation*)
- 5.7.1 The professional liability risks to be covered pursuant to paragraph 5.6 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.
- 5.7.2 Professional liability risks as defined in paragraph 5.7.1 shall include, without being limited to, risks of
- 5.7.2.1 loss of documents evidencing title of assets of the *Directive AIF*;
- 5.7.2.2 misrepresentations or misleading statements made to the *Directive AIF* or its investors;
- 5.7.2.3 acts, errors or omissions resulting in a breach of
- › legal and regulatory obligations;
  - › duty of skill and care towards the *Directive AIF* and its investors;
  - › fiduciary duties;
  - › obligations of confidentiality;
  - › AIF rules or instruments constituting the *Directive AIF*;
  - › terms of appointment of the *AIFM* by the *Directive AIF*;
- 5.7.2.4 failure to establish, implement and maintain appropriate procedures to prevent dishonest, fraudulent or malicious acts;

- 5.7.2.5 improperly carried out valuation of assets or calculation of unit/share prices;
  - 5.7.2.6 losses arising from business disruption, system failures, failure of transaction processing or process management.
- 5.7.3 Professional liability risks shall be covered at all times either through appropriate additional own funds determined in accordance with paragraph 5.9 or through appropriate coverage of professional indemnity insurance determined in accordance with paragraph 5.10.
- 5.8 Qualitative requirements addressing professional liability risks (Article 13 of *Level 2 AIFMD Regulation*)
  - 5.8.1 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.
  - 5.8.2 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 paragraph 5.7.2 that have materialized.
  - 5.8.3 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.
  - 5.8.4 Operational risk exposures and loss experience shall be monitored on an on-going basis and shall be subject to regular internal reporting.
  - 5.8.5 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.
  - 5.8.6 The operational risk management policies and procedures and measurement systems shall be subject to regular review, at least on an annual basis.
  - 5.8.7 An *AIFM* shall maintain financial resources adequate to its assessed risk profile.
- 5.9 Additional own funds (Article 14 of *Level 2 AIFMD Regulation*)
  - 5.9.1 This paragraph shall apply to *AIFMs* that choose to cover professional liability risks through additional own funds.
  - 5.9.2 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 *Directive AIFs* managed.  
 The value of the portfolios of *Directive AIFs* managed shall be the sum of the absolute value of all assets of all *Directive AIFs* managed by the *AIFM*, including assets acquired through use of *leverage*, whereby derivative instruments shall be valued at their market value.
  - 5.9.3 The additional own funds requirement referred to in the first sub-paragraph of paragraph 5.9.2 shall be recalculated at the end of each financial year and the amount of additional own funds shall be adjusted accordingly.

The *AIFM* shall establish, implement and apply procedures to monitor on an on-going basis the value of the portfolios of *Directive AIFs* managed, calculated in accordance with the second sub-paragraph of paragraph 5.9.2. Where, before the annual recalculation referred to in the first sub-paragraph, the value of the portfolios of *Directive AIFs* managed increases significantly, the *AIFM* shall without undue delay recalculate the additional own funds requirement and shall adjust the additional own funds accordingly.

- 5.9.4 The *JFSC* may authorise the *AIFM* to provide additional own funds lower than the amount referred to in paragraph 5.9.2 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 *Directive AIFs* managed by the *AIFM*.
- 5.9.5 The *JFSC* may request the *AIFM* to provide additional own funds higher than the amount referred to in paragraph 5.9.2 if it is not satisfied that the *AIFM* has sufficient additional own funds to appropriately cover professional liability risks. The *JFSC* shall give reasons why it considers that the *AIFM's* additional own funds are insufficient.

5.10 Professional indemnity insurance (Article 15 of *Level 2 AIFMD Regulation*)

- 5.10.1 This paragraph shall apply to *AIFMs* that choose to cover professional liability risks through professional indemnity insurance.
- 5.10.2 The *AIFM* shall take out and maintain at all times professional indemnity insurance that:
- 5.10.2.1 shall have an initial term of no less than one year;
  - 5.10.2.2 shall have a notice period for cancellation of at least 90 days;
  - 5.10.2.3 shall cover professional liability risks as defined in paragraphs 5.7.1 and 5.7.2;
  - 5.10.2.4 is taken out from an *EU* or non-*EU* undertaking authorised to provide professional indemnity insurance, in accordance with *Union* law, the law of any *Member State* or Jersey law;
  - 5.10.2.5 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 paragraphs 5.1 and 5.3.
- 5.10.3 The coverage of the insurance for an individual claim shall be equal to at least 0.7 % of the value of the portfolios of *Directive AIFs* managed by the *AIFM* calculated as set out in paragraph 5.9.2.
- 5.10.4 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 *Directive AIFs* managed by the *AIFM* calculated as set out in paragraph 5.9.2.
- 5.10.5 The *AIFM* shall review the professional indemnity insurance policy and its compliance with the requirements laid down in this paragraph at least once a year and in the event of any change which affects the policy's compliance with the requirements in this paragraph.

- 5.11 Own funds, including any additional own funds as referred to in paragraph 5.6.1, shall be invested in liquid assets or assets readily convertible to cash in the short term and shall not include speculative positions.

## Section 2: Operating conditions for AIFMs

### 6 General principles (Article 12 of the Level 1 AIFM Directive)<sup>6</sup>

- 6.1 *AIFMs* shall at all times:
- 6.1.1 act honestly, with due skill, care and diligence and fairly in conducting their activities;
  - 6.1.2 act in the best interests of the *Directive AIFs* or the investors of the *Directive AIFs* they *manage* and the integrity of the market;
  - 6.1.3 have and employ effectively the resources and procedures that are necessary for the proper performance of their business activities;
  - 6.1.4 take all reasonable steps to avoid conflicts of interest and, when they cannot be avoided, to identify, manage and monitor and, where applicable, disclose, those conflicts of interest in order to prevent them from adversely affecting the interests of the *Directive AIFs* and their investors and to ensure that the *Directive AIFs* they *manage* are fairly treated;
  - 6.1.5 comply with all regulatory requirements applicable to the conduct of their business activities so as to promote the best interests of the *Directive AIFs* or the investors of the *Directive AIFs* they *manage* and the integrity of the market;
  - 6.1.6 treat all *Directive AIF* investors fairly.
- 6.2 No investor in a *Directive AIF* shall obtain preferential treatment, unless such preferential treatment is disclosed in the relevant *Directive AIF's* rules or instruments constituting the *Directive AIF*.
- 6.3 Duty to act in the best interests of the *Directive AIF* or the investors in the *Directive AIF* and the integrity of the market (Article 17 of *Level 2 AIFMD Regulation*)
- 6.3.1 *AIFMs* shall apply policies and procedures for preventing malpractices, including those that might reasonably be expected to affect adversely the stability and integrity of the market.
  - 6.3.2 *AIFMs* shall ensure that the *Directive AIFs* they *manage* or the investors in these *Directive AIFs* are not charged undue costs.
- 6.4 Due diligence (Article 18 of *Level 2 AIFMD Regulation*)
- 6.4.1 *AIFMs* shall apply a high standard of diligence in the selection and ongoing monitoring of investments.
  - 6.4.2 *AIFMs* shall ensure that they have adequate knowledge and understanding of the assets in which the *Directive AIF* is invested.
  - 6.4.3 *AIFMs* shall establish, implement and apply written policies and procedures on due diligence and implement effective arrangements for ensuring that investment decisions on behalf of the *Directive AIFs* are carried out in compliance with the

<sup>6</sup> Section 3.2.4 of the *Explanatory Memorandum* and Recitals 39 to 43 of the *Level 2 AIFMD Regulation*.

objectives, the investment strategy and, where applicable, the risk limits of the *Directive AIF*.

- 6.4.4 The policies and procedures on due diligence referred to in paragraph 6.4.3 shall be regularly reviewed and updated.

6.5 Due diligence when investing in assets of limited liquidity (Article 19 of the *Level 2 AIFMD Regulation*)

- 6.5.1 Where *AIFMs* invest in assets of limited liquidity and where such investment is preceded by a negotiation phase, they shall, in relation to the negotiation phase, in addition to the requirements laid down in paragraph 6.3.2:

- 6.5.1.1 set out and regularly update a business plan consistent with the duration of the *Directive AIF* and market conditions;
- 6.5.1.2 seek and select possible transactions consistent with the business plan referred to in paragraph 6.5.1.1;
- 6.5.1.3 assess the selected transactions in consideration of opportunities, if any, and overall related risks, all relevant legal, tax-related, financial or other value affecting factors, human and material resources, and strategies, including exit strategies;
- 6.5.1.4 perform due diligence activities related to the transactions prior to arranging execution;
- 6.5.1.5 monitor the performance of the *Directive AIF* with respect to the business plan referred to in paragraph 6.5.1.1.

- 6.5.2 *AIFMs* shall retain records of the activities carried out pursuant to paragraph 6.5.1 for at least five years.

6.6 Due diligence in the selection and appointment of counterparties and prime brokers (Article 20 of *Level 2 AIFMD Regulation*)

- 6.6.1 When selecting and appointing counterparties and prime brokers, *AIFMs* shall exercise due skill, care and diligence before entering into an agreement and on an ongoing basis thereafter taking into account the full range and quality of their services.

- 6.6.2 When selecting prime brokers or counterparties of an *AIFM* or a *Directive AIF* in an OTC derivatives transaction, in a securities lending or in a repurchase agreement, *AIFMs* shall ensure that those prime brokers and counterparties fulfil all of the following conditions:

- 6.6.2.1 they are subject to ongoing supervision by a public authority;
- 6.6.2.2 they are financially sound;
- 6.6.2.3 they have the necessary organizational structure and resources for performing the services which are to be provided by them to the *AIFM* or the *Directive AIF*.

- 6.6.3 When appraising the financial soundness referred to in paragraph 6.6.2.2, the *AIFM* shall take into account whether or not the prime broker or counterparty is subject to prudential regulation, including sufficient capital requirements, and effective supervision.

- 6.6.4 The list of selected prime brokers shall be approved by the *AIFM's* senior management. In exceptional cases prime brokers not included in the list may be

appointed provided that they fulfil the requirements laid down in paragraph 6.6.2 and subject to approval by senior management. The *AIFM* shall be able to demonstrate the reasons for such a choice and the due diligence that it exercised in selecting and monitoring the prime brokers which had not been listed.

6.7 Acting honestly, fairly and with due skills (Article 21 of *Level 2 AIFMD Regulation*)

- 6.7.1 In order to establish whether an *AIFM* conducts its activities honestly, fairly and with due skills, the *JFSC* shall assess, at least, whether the following conditions are met:
- 6.7.1.1 the governing body of the *AIFM* possesses adequate collective knowledge, skills and experience to be able to understand the *AIFM*'s activities, in particular the main risks involved in those activities and the assets in which the *Directive AIF* is invested;
  - 6.7.1.2 the members of the governing body commit sufficient time to properly perform their functions in the *AIFM*;
  - 6.7.1.3 each member of the governing body acts with honesty, integrity and independence of mind;
  - 6.7.1.4 the *AIFM* devotes adequate resources to the induction and training of members of the governing body.

6.8 Resources (Article 22 of *Level 2 AIFMD Regulation*)

- 6.8.1 *AIFMs* shall employ sufficient personnel with the skills, knowledge and expertise necessary for discharging the responsibilities allocated to them.
- 6.8.2 For the purposes of paragraph 6.8.1, *AIFMs* shall take into account the nature, scale and complexity of their business and the nature and range of services and activities undertaken in the course of that business.

6.9 Fair treatment of investors in the *Directive AIF* (Article 23 of *Level 2 AIFMD Regulation*)

- 6.9.1 The *AIFM* shall ensure that its decision-making procedures and its organizational structure, referred to in paragraph 12.2, ensure fair treatment of investors.
- 6.9.2 Any preferential treatment accorded by an *AIFM* to one or more investors shall not result in an overall material disadvantage to other investors.

6.10 Inducements (Article 24 of *Level 2 AIFMD Regulation*)

- 6.10.1 *AIFMs* shall not be regarded as acting honestly, fairly and in accordance with the best interests of the *Directive AIFs* they manage or the investors in these *Directive AIFs* if, in relation to the activities performed when carrying out the functions referred to in Annex I of the *Level 1 AIFM Directive*, they pay or are paid any fee or commission, or provide or are provided with any non-monetary benefit, other than the following:
- 6.10.1.1 a fee, commission or non-monetary benefit paid or provided to or by the *Directive AIF* or a person on behalf of the *Directive AIF*;
  - 6.10.1.2 a fee, commission or non-monetary benefit paid or provided to or by a third party or a person acting on behalf of a third party, where the *AIFM* can demonstrate that the following conditions are satisfied:
    - › the existence, nature and amount of the fee, commission or benefit, or, where the amount cannot be ascertained, the method

of calculating that amount, is clearly disclosed to the investors in the *Directive AIF* in a manner that is comprehensive, accurate and understandable, prior to the provision of the relevant service;

- › the payment of the fee or commission, or the provision of the non-monetary benefit are designed to enhance the quality of the relevant service and not impair compliance with the *AIFM's* duty to act in the best interests of the *Directive AIF* it *manages* or the investors in the *Directive AIF*.

6.10.1.3 proper fees which enable or are necessary for the provision of the relevant service, including custody costs, settlement and exchange fees, regulatory levies or legal fees, and which, by their nature, do not give rise to conflicts with the *AIFM's* duties to act honestly, fairly and in accordance with the best interests of the *Directive AIF* it *manages* or the investors of the *Directive AIF*.

6.10.2 The disclosure of the essential terms of the arrangements relating to the fee, commission or non-monetary benefit in summary form shall be considered as satisfactory for the purposes of the first bullet point under paragraph 6.10.1.2, provided that the *AIFM* commits to disclose further details at the request of the investor in the *Directive AIF* it *manages* and provided that it fulfils this commitment.

#### 6.11 Effective employment of resources and procedures - handling of orders (Article 25 of *Level 2 AIFMD Regulation*)

6.11.1 *AIFMs* shall establish, implement and apply procedures and arrangements which provide for the prompt, fair and expeditious execution of orders on behalf of the *Directive AIF*.

6.11.2 The procedures and arrangements referred to in paragraph 6.11.1 shall satisfy the following requirements:

6.11.2.1 they shall ensure that orders executed on behalf of *Directive AIFs* are promptly and accurately recorded and allocated;

6.11.2.2 they shall execute otherwise comparable *Directive AIF* orders sequentially and promptly unless the characteristics of the order or prevailing market conditions make this impracticable, or the interests of the *Directive AIF* or of the investors in the *Directive AIF* require otherwise.

6.11.3 The financial instruments, sums of money or other assets received in settlement of the executed orders shall be promptly and correctly delivered to or registered in the account of the relevant *Directive AIF*.

6.11.4 *AIFMs* shall not misuse information related to pending *Directive AIF* orders, and shall take all reasonable steps to prevent the misuse of such information by any of their relevant persons.

#### 6.12 Reporting obligations in respect of execution of subscription and redemption orders (Article 26 *Level 2 AIFMD Regulation*)

6.12.1 Where *AIFMs* have carried out a subscription or, where relevant, a redemption order from an investor, they shall promptly provide the investor, by means of a durable medium, with the essential information concerning the execution of that order or the acceptance of the subscription offer, as the case may be.

- 6.12.2 Paragraph 6.12.1 shall not apply where a third person is required to provide the investor with a confirmation concerning the execution of the order and where the confirmation contains the essential information.
- AIFMs* shall ensure that the third person complies with its obligations.
- 6.12.3 The essential information referred to in paragraphs 6.12.1 and 6.12.2 shall include the following information:
- 6.12.3.1 the identification of the *AIFM*;
  - 6.12.3.2 the identification of the investor;
  - 6.12.3.3 the date and time of receipt of the order;
  - 6.12.3.4 the date of execution;
  - 6.12.3.5 the identification of the *Directive AIF*;
  - 6.12.3.6 the gross value of the order including charges for subscription or the net amount after charges for redemptions.
- 6.12.4 *AIFMs* shall supply the investor, upon request, with information about the status of the order or the acceptance of the subscription offer, or both as the case may be.
- 6.13 Execution of decisions to deal on behalf of the *managed Directive AIF* (Article 27 of *Level 2 AIFMD Regulation*)
- 6.13.1 *AIFMs* shall act in the best interests of the *Directive AIFs* or the investors in the *Directive AIFs* they *manage* when executing decisions to deal on behalf of the *managed Directive AIF* in the context of the management of their portfolio.
- 6.13.2 Whenever *AIFMs* buy or sell financial instruments or other assets for which best execution is relevant, and for the purposes of paragraph 6.13.1, they shall take all reasonable steps to obtain the best possible result for the *Directive AIFs* they *manage* or the investors in these *Directive AIFs*, taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order. The relative importance of such factors shall be determined by reference to the following criteria:
- 6.13.2.1 the objectives, investment policy and risks specific to the *Directive AIF*, as indicated in the *Directive AIF's* rules or articles of association, prospectus or offering documents of the *Directive AIF*;
  - 6.13.2.2 the characteristics of the order;
  - 6.13.2.3 the characteristics of the financial instruments or other assets that are the subject of that order;
  - 6.13.2.4 characteristics of the execution venues to which that order can be directed.
- 6.13.3 *AIFMs* shall establish and implement effective arrangements for complying with the obligations referred to in paragraphs 6.13.1 and 6.13.2. In particular, the *AIFM* shall establish in writing and implement an execution policy to allow *Directive AIFs* and their investors to obtain, for *Directive AIF* orders, the best possible result in accordance with paragraph 6.13.2.
- 6.13.4 *AIFMs* shall monitor on a regular basis the effectiveness of their arrangements and policy for the execution of orders with a view to identifying and, where appropriate, correcting any deficiencies.

- 6.13.5 *AIFMs* shall review their execution policy on an annual basis. A review shall also be carried out whenever a material change occurs that affects the *AIFM's* ability to continue to obtain the best possible result for the *managed Directive AIFs*.
  - 6.13.6 *AIFMs* shall be able to demonstrate that they have executed orders on behalf of the *Directive AIF* in accordance with their execution policy.
  - 6.13.7 Whenever there is no choice of different execution venues paragraphs 6.13.2 to 6.13.5 shall not apply. However, *AIFMs* shall be able to demonstrate that there is no choice of different execution venues.
- 6.14 Placing orders to deal on behalf of AIFs with other entities for execution (Article 28 *Level 2 AIFMD Regulation*)
- 6.14.1 Whenever the *AIFM* buys or sells financial instruments or other assets for which best execution is relevant, it shall act in the best interest of the *Directive AIFs* it *manages* or the investors in the *Directive AIFs* when placing orders to deal on behalf of the *managed Directive AIFs* with other entities for execution, in the context of the management of their portfolio.
  - 6.14.2 *AIFMs* shall take all reasonable steps to obtain the best possible result for the *Directive AIF* or the investors in the *Directive AIF* taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order. The relative importance of such factors shall be determined by reference to the criteria laid down in paragraph 6.13.2.  
  
*AIFMs* shall establish, implement and apply a policy to enable them to comply with the obligation referred to in paragraph 6.14.2. The policy shall identify, in respect of each class of instruments, the entities with which the orders may be placed. The *AIFM* shall only enter into arrangements for execution where such arrangements are consistent with the obligations laid down in paragraph 6.14. The *AIFM* shall make available to investors in the *Directive AIFs* it *manages* appropriate information on the policy established in accordance with this paragraph and on any material changes to that policy.
  - 6.14.3 *AIFMs* shall monitor on a regular basis the effectiveness of the policy established in accordance with paragraph 6.14.2 and, in particular, monitor the quality of the execution by the entities identified in that policy and, where appropriate, correct any deficiencies.  
  
In addition, *AIFMs* shall review the policy on an annual basis. Such a review shall also be carried out whenever a material change occurs that affects the *AIFM's* ability to continue to obtain the best possible result for the *managed Directive AIFs*.
  - 6.14.4 *AIFMs* shall be able to demonstrate that they have placed orders on behalf of the *Directive AIF* in accordance with the policy established pursuant to paragraph 6.14.2.
  - 6.14.5 Whenever there is no choice of different execution venues paragraphs 6.14.2 to 6.14.4 shall not apply. However, *AIFMs* shall be able to demonstrate that there is no choice of different execution venues.

6.15 Aggregation and allocation of trading orders (Article 29 of *Level 2 AIFMD Regulation*)

- 6.15.1 AIFMs can only carry out a *Directive AIF* order in aggregate with an order of another *Directive AIF*, a *UCITS* or a client or with an order made when investing their own funds where:
- 6.15.1.1 it can be reasonably expected that the aggregation of orders will not work overall to the disadvantage of any *Directive AIF*, *UCITS* or clients whose order is to be aggregated;
- 6.15.1.2 an order allocation policy is established and implemented, providing in sufficiently precise terms for the fair allocation of aggregated orders, including how the volume and price of orders determines allocations and the treatment of partial executions.
- 6.15.2 Where an AIFM aggregates a *Directive AIF* order with one or more orders of other *Directive AIFs*, *UCITS* or clients and the aggregated order is partially executed, it shall allocate the related trades in accordance with its order allocation policy.
- 6.15.3 Where an AIFM aggregates transactions for its own account with one or more orders of *Directive AIFs*, *UCITS* or clients, it shall not allocate the related trades in a way that is detrimental to the *Directive AIF*, *UCITS* or a client.
- 6.15.4 Where an AIFM aggregates an order of a *Directive AIF*, *UCITS* or another client with a transaction for its own account and the aggregated order is partially executed, it shall allocate the related trades to the *Directive AIF*, *UCITS* or to clients in priority over those for own account.

However, if the AIFM is able to demonstrate to the *Directive AIF* or to the client on reasonable grounds that it would not have been able to carry out the order on such advantageous terms without aggregation, or at all, it may allocate the transaction for its own account proportionally, in accordance with the policy referred to in paragraph 6.15.1.2.

## 7 Remuneration (Article 13 of the Level 1 AIFM Directive)<sup>7</sup>

- 7.1 AIFMs shall have remuneration policies and practices for those categories of staff, including 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, whose professional activities have a material impact on the risk profiles of the AIFMs or of the *Directive AIFs* they manage, that are consistent with and promote sound and effective risk management and do not encourage risk-taking which is inconsistent with the risk profiles, rules or instruments constituting the *Directive AIFs* they manage.
- 7.2 The AIFMs shall determine the remuneration policies and practices in accordance with Annex II of the Level 1 AIFM Directive.

<sup>7</sup> Recitals 24 to 25 of the Level 1 AIFM Directive.  
Recital 127 of *Level 2 AIFMD Regulation*.

## 8 Conflicts of interest (Article 14 of the Level 1 AIFM Directive)<sup>8</sup>

8.1 *AIFMs* shall take all reasonable steps to identify conflicts of interest that arise in the course of *managing Directive AIFs* between:

- 8.1.1 the *AIFM*, including its managers, employees or any person directly or indirectly linked to the *AIFM* by control, and the *Directive AIF managed* by the *AIFM* or the investors in that *Directive AIF*;
- 8.1.2 the *Directive AIF* or the investors in that *Directive AIF*, and another *Directive AIF* or the investors in that *Directive AIF*;
- 8.1.3 the *Directive AIF* or the investors in that *Directive AIF*, and another client of the *AIFM*;
- 8.1.4 the *Directive AIF* or the investors in that *Directive AIF*, and a *UCITS* managed by the *AIFM* or the investors in that *UCITS*; or

two clients of the *AIFM*. *AIFMs* shall 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 *Directive AIFs* and their investors.

*AIFMs* shall segregate, within their own operating environment, tasks and responsibilities which may be regarded as incompatible with each other or which may potentially generate systematic conflicts of interest. *AIFMs* shall assess whether their operating conditions may involve any other material conflicts of interest and disclose them to the investors of the *Directive AIFs*.

8.2 Where 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* shall clearly disclose the general nature or sources of conflicts of interest to the investors before undertaking business on their behalf, and develop appropriate policies and procedures.

8.3 Where the *AIFM* on behalf of a *Directive AIF* uses the services of a prime broker, the terms shall be set out in a written contract. In particular any possibility of transfer and re-use of *Directive AIF* assets shall be provided for in that contract and shall comply with the AIF rules or instruments constituting the *Directive AIF*. The contract shall provide that the depositary be informed of the contract.

*AIFMs* shall exercise due skill, care, diligence in the selection and appointment of prime brokers with whom a contract is to be concluded.

8.4 Types of conflicts of interest (Article 30 of *Level 2 AIFMD Regulation*)

- 8.4.1 For the purpose of identifying the types of conflicts of interest that arise in the course of *managing a Directive AIF*, *AIFMs* shall take into account, in particular,

<sup>8</sup> Recital 22 of the Level 1 *AIFM Directive*.  
Section 3.2.4 of the *Explanatory Memorandum* and Recitals 47 to 50 of *Level 2 AIFMD Regulation*.

whether the *AIFM*, a relevant person or a person directly or indirectly linked by way of control to the *AIFM*:

- 8.4.1.1 is likely to make a financial gain, or avoid a financial loss, at the expense of the *Directive AIF* or its investors;
- 8.4.1.2 has an interest in the outcome of a service or an activity provided to the *Directive AIF* or its investors or to a client or of a transaction carried out on behalf of the *Directive AIF* or a client, which is distinct from the *Directive AIF's* interest in that outcome;
- 8.4.1.3 has a financial or other incentive to favour:
  - › the interest of a *UCITS*, a client or group of clients or another AIF over the interest of the *Directive AIF*;
  - › the interest of one investor over the interest of another investor or group of investors in the same *Directive AIF*;
- 8.4.1.4 carries out the same activities for the *Directive AIF* and for another *Directive AIF*, a *UCITS* or client; or
- 8.4.1.5 receives or will receive from a person other than the *Directive AIF* or its investors an inducement in relation to collective portfolio management activities provided to the *Directive AIF*, in the form of monies, goods or services other than the standard commission or fee for that service.

8.5 Conflicts of interest policy (Article 31 of *Level 2 AIFMD Regulation*)

- 8.5.1 The *AIFM* shall establish, implement and apply an effective conflicts of interest policy. That policy shall be set out in writing and shall be appropriate to the size and organisation of the *AIFM* and the nature, scale and complexity of its business.
- 8.5.2 Where the *AIFM* is a member of a group, the policy shall also take into account any circumstances of which the *AIFM* is or should be aware which may give rise to a conflict of interest resulting from the structure and business activities of other members of the group.
- 8.5.3 The conflicts of interest policy established in accordance with paragraph 8.5.1 shall include the following:
  - 8.5.3.1 with reference to the activities carried out by or on behalf of the *AIFM*, including activities carried out by a delegate, sub-delegate, external valuer or counterparty, identification of the circumstances which constitute or may give rise to a conflict of interest entailing a material risk of damage to the interests of the *Directive AIF* or its investors;
  - 8.5.3.2 procedures to be followed and measures to be adopted in order to prevent, manage and monitor such conflicts.

8.6 Conflicts of interest related to the redemption of investments (Article 32 of *Level 2 AIFMD Regulation*)

- 8.6.1 An *AIFM* that *manages* an open-ended *Directive AIF* shall identify, manage and monitor conflicts of interest arising between investors wishing to redeem their investments and investors wishing to maintain their investments in the *Directive AIF*, and any conflicts between the *AIFM's* incentive to invest in illiquid assets and

the *Directive AIF's* redemption policy in accordance with its obligations under paragraph 8.1.

8.7 Procedures and measures preventing or managing conflicts of interest (Article 33 of *Level 2 AIFMD Regulation*)

8.7.1 The procedures and measures established for the prevention or management of conflicts of interest shall be designed to ensure that the relevant persons engaged in different business activities involving a risk of conflict of interest carry out these activities having a degree of independence which is appropriate to the size and activities of the *AIFM* and of the group to which it belongs, and to the materiality of the risk of damage to the interests of the *Directive AIF* or its investors.

8.7.2 Where necessary and appropriate for the *AIFM* to ensure the requisite degree of independence, the procedures to be followed and measures to be adopted in accordance with paragraph 8.5.3.2 shall include the following:

8.7.2.1 effective procedures to prevent or control the exchange of information between relevant persons engaged in collective portfolio management activities or other activities involving a risk of conflict of interest where the exchange of information may harm the interest of one or more *Directive AIFs* or their investors;

8.7.2.2 the separate supervision of relevant persons, whose principal functions involve carrying out collective portfolio management activities on behalf of or providing services to, clients or investors, whose interests may conflict, or who otherwise represent different interests that may conflict, including those of the *AIFM*;

8.7.2.3 the removal of any direct link between the remuneration of relevant persons principally engaged in one activity and the remuneration of or revenues generated by, different relevant persons principally engaged in another activity, where a conflict of interest may arise in relation to those activities;

8.7.2.4 measures to prevent or restrain any person from exercising inappropriate influence over the way in which a relevant person carries out collective portfolio management activities;

8.7.2.5 measures to prevent or control the simultaneous or sequential involvement of a relevant person in separate collective portfolio management activities or other activities where such involvement may impair the proper management of conflicts of interest.

8.7.3 Where the adoption or the application of one or more of those measures and procedures does not ensure the requisite degree of independence, the *AIFM* shall adopt such alternative or additional measures and procedures as are necessary and appropriate for those purposes.

8.8 Managing conflicts of interest (Article 34 of *Level 2 AIFMD Regulation*)

8.8.1 Where the organisational or administrative arrangements made by the *AIFM* are not sufficient to ensure, with reasonable confidence, that risks of damage to the interests of the *Directive AIF* or investors in the *Directive AIF* are prevented, the senior management or other competent internal body of the *AIFM* shall be promptly informed in order to take any necessary decision or action to ensure

that the *AIFM* acts in the best interests of the *Directive AIF* or the investors in that *Directive AIF*.

8.9 Monitoring conflicts of interest (Article 35 of *Level 2 AIFMD Regulation*)

8.9.1 The *AIFM* shall keep and regularly update a record of the types of activities undertaken by or on behalf of the *AIFM* in which a conflict of interest entailing a material risk of damage to the interests of one or more *Directive AIFs* or its investors has arisen or, in the case of an ongoing activity, may arise.

8.9.2 Senior management shall receive on a frequent basis, and at least annually, written reports on activities referred to in paragraph 8.9.1.

8.10 Disclosure of conflicts of interest (Article 36 of *Level 2 AIFMD Regulation*)

8.10.1 The information to be disclosed to investors in accordance with paragraphs 8.1 and 8.2 shall be provided to investors in a durable medium or by means of a website.

8.10.2 Where information referred to in paragraph 8.10.1 is provided by means of a website and is not addressed personally to the investor, the following conditions shall be satisfied:

8.10.2.1 the investor has been notified of the address of the website, and the place on the website where the information may be accessed, and has consented to the provision of the information by such means;

8.10.2.2 the information must be up to date;

8.10.2.3 the information must be accessible continuously by means of that website for such period of time as the investor may reasonably need to inspect it.

8.11 Strategies for the exercise of voting rights (Article 37 of *Level 2 AIFMD Regulation*)

8.11.1 An *AIFM* shall develop adequate and effective strategies for determining when and how any voting rights held in the *Directive AIF* portfolios it *manages* are to be exercised, to the exclusive benefit of the *Directive AIF* concerned and its investors.

8.11.2 The strategy referred to in paragraph 8.11.1 shall determine measures and procedures for:

8.11.2.1 monitoring relevant corporate actions;

8.11.2.2 ensuring that the exercise of voting rights is in accordance with the investment objectives and policy of the relevant *Directive AIF*;

8.11.2.3 preventing or managing any conflicts of interest arising from the exercise of voting rights.

8.11.3 A summary description of the strategies and details of the actions taken on the basis of those strategies shall be made available to the investors on their request.

## 9 Risk management (Article 15 of the Level 1 AIFM Directive)<sup>9</sup>

- 9.1 *AIFMs* shall functionally and hierarchically separate the functions of risk management from the operating units, including from the functions of portfolio management.
- 9.2 *AIFMs* shall implement adequate risk management systems in order to identify, measure, manage and monitor appropriately all risks relevant to each *Directive AIF* investment strategy and to which each *Directive AIF* is or may be exposed.
- AIFMs* shall review the risk management systems with appropriate frequency at least once a year and adapt them whenever necessary.
- 9.3 Risk management systems (Article 38 of *Level 2 AIFMD Regulation*)
- 9.3.1 Risk management systems shall be understood as systems comprised of relevant elements of the organisational structure of the *AIFM*, with a central role for a permanent risk management function, policies and procedures related to the management of risk relevant to each *Directive AIF*'s investment strategy, and arrangements, processes and techniques related to risk measurement and management employed by the *AIFM* in relation to each *Directive AIF* it manages.
- 9.4 Permanent risk management function (Article 39 of *Level 2 AIFMD Regulation*)
- 9.4.1 An *AIFM* shall establish and maintain a permanent risk management function that shall:
- 9.4.1.1 implement effective risk management policies and procedures in order to identify, measure, manage and monitor on an ongoing basis all risks relevant to each *Directive AIF*'s investment strategy to which each *Directive AIF* is or may be exposed; ensure that the risk profile of the *Directive AIF* disclosed to investors in accordance with the disclosure provisions of the *Code* is consistent with the risk limits that have been set in accordance with paragraph 9.9;
- 9.4.1.2 monitor compliance with the risk limits set in accordance with paragraph 9.9 and notify the *AIFM*'s governing body and, where it exists, the *AIFM*'s supervisory function in a timely manner when it considers the *Directive AIF*'s risk profile inconsistent with these limits or sees a material risk that the risk profile will become inconsistent with these limits;
- 9.4.1.3 provide the following regular updates to the governing body of the *AIFM* and where it exists the *AIFM*'s supervisory function at a frequency which is in accordance with the nature, scale and complexity of the *Directive AIF* or the *AIFM*'s activities:
- › the consistency between and compliance with the risk limits set in accordance with paragraph 9.9 and the risk profile of the *Directive AIF* as disclosed to investors in accordance with paragraph 17.4.3;
  - › the adequacy and effectiveness of the risk management process, indicating in particular whether appropriate remedial measures

<sup>9</sup> Section 3.2.5 of the *Explanatory Memorandum* and Recitals 51 to 56 and 89 of *Level 2 AIFMD Regulation*.

9.4.1.4 provide regular updates to the senior management outlining the current level of risk incurred by each *managed Directive AIF* and any actual or foreseeable breaches of any risk limits set in accordance with paragraph 9.9, so as to ensure that prompt and appropriate action can be taken.

9.5 Risk management policy (Article 40 of *Level 2 AIFMD Regulation*)

9.5.2 The risk management policy shall comprise such procedures as are necessary to enable the AIFM to assess for each *Directive AIF it manages* the exposure of that *Directive AIF* to market, liquidity and counterparty risks, and the exposure of the *Directive AIF* to all other relevant risks, including operational risks, which may be material for each *Directive AIF it manages*.

9.5.3.2 the techniques, tools and arrangements that enable liquidity risk of the *Directive AIF* to be assessed and monitored under normal and exceptional liquidity conditions including through the use of regularly conducted stress tests in accordance with paragraph 10.4;

9.5.3.4 the limits set in accordance with paragraph 9.9 and a justification of how these are aligned with the risk profile of the *Directive AIF* disclosed to investors in accordance with paragraph 17.4.3:

9.5.4.1 the nature of the potential conflicts of interest;

9.5.4.2 the remedial measures put in place;

9.5.4.3 the reasons why these measures should be reasonably expected to result in independent performance of the risk management function;

9.5.4.4 how the *AIFM* expects to ensure that the safeguards are consistently effective.

**Deleted:** 1 September 2016

## 9.6 Assessment, monitoring and review of the risk management systems (Article 41 of *Level 2 AIFMD Regulation*)

### 9.6.1 AIFMs shall assess, monitor and periodically, at least once a year, review:

- 9.6.1.1 the adequacy and effectiveness of the risk management policy and of the arrangements, processes and techniques referred to in paragraph 9.10;
- 9.6.1.2 the degree of compliance by the *AIFM* with the risk management policy and with the arrangements, processes and techniques referred to in paragraph 9.10;
- 9.6.1.3 the adequacy and effectiveness of measures taken to address any deficiencies in the performance of the risk management process;
- 9.6.1.4 the performance of the risk management function;
- 9.6.1.5 the adequacy and effectiveness of measures aiming to ensure the functional and hierarchical separation of the risk management function in accordance with paragraph 9.7.

The frequency of the periodic review referred to in 9.6.1.1 shall be decided by the senior management in accordance with the principle of proportionality given the nature, scale and complexity of the *AIFM's* business and the *Directive AIF* it manages.

### 9.6.2 In addition to the periodic review referred to in paragraph 9.6.1, the risk management systems shall be reviewed where:

- 9.6.2.1 material changes are made to the risk management policies and procedures and to the arrangements, processes and techniques referred to in paragraph 9.10;
- 9.6.2.2 internal or external events indicate that an additional review is required;
- 9.6.2.3 material changes are made to the investment strategy and objectives of a *Directive AIF* that the *AIFM* manages.

### 9.6.3 The *AIFM* shall update the risk management systems on the basis of the outcome of the review referred to in paragraphs 9.6.1 and 9.6.2.

### 9.6.4 The *AIFM* shall notify the *JFSC* in writing of any material changes to the risk management policy and of the arrangements, processes and techniques referred to in paragraph 9.10.

## 9.7 Functional and hierarchical separation of the risk management function (Article 42 of *Level 2 AIFMD Regulation*)

### 9.7.1 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:

- 9.7.1.1 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*;
- 9.7.1.2 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;

- 9.7.1.3 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;
    - 9.7.1.4 the remuneration of senior officers in the risk management function is directly overseen by the remuneration committee, where such a committee has been established.
  - 9.7.2 The functional and hierarchical separation of the risk management function in accordance with paragraph 9.7.1 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*.
- 9.8 Safeguards against conflicts of interest (Article 43 of *Level 2 AIFMD Regulation*)
  - 9.8.1 The safeguards against conflicts of interest referred to in paragraph 9.1 shall ensure, at least, that:
    - 9.8.1.1 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;
    - 9.8.1.2 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;
    - 9.8.1.3 the risk management function is subject to an appropriate independent review to ensure that decisions are being arrived at independently;
    - 9.8.1.4 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;
    - 9.8.1.5 any conflicting duties are properly segregated.
  - 9.8.2 Where proportionate, taking into account the nature, scale and complexity of the *AIFM*, the safeguards referred to in paragraph 9.8.1 shall also ensure that:
    - 9.8.2.1 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;
    - 9.8.2.2 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.
  - 9.8.3 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 9.8.1 and 9.8.2, regularly review their effectiveness and take timely remedial action to address any deficiencies.
- 9.9 Risk limits (Article 44 of *Level 2 AIFMD Regulation*)
  - 9.9.1 An *AIFM* shall establish and implement quantitative or qualitative risk limits, or both, for each *Directive AIF* it *manages*, taking into account all relevant risks. Where only qualitative limits are set, the *AIFM* shall be able to justify this approach to the *JFSC*.

- 9.9.2 The qualitative and quantitative risk limits for each *Directive AIF* shall, at least, cover the following risks:
  - 9.9.2.1 market risks;
  - 9.9.2.2 credit risks;
  - 9.9.2.3 liquidity risks;
  - 9.9.2.4 counterparty risks;
  - 9.9.2.5 operational risks.
- 9.9.3 When setting risk limits, the *AIFM* shall take into account the strategies and assets employed in respect of each *Directive AIF* it *manages* as well as the rules applicable to each of those *Directive AIFs*. Those risk limits shall be aligned with the risk profile of the *Directive AIF* as disclosed to investors in accordance with paragraph 17.4.3 and approved by the governing body.
- 9.10 Risk measurement and management (Article 45 of *Level 2 AIFMD Regulation*)
  - 9.10.1 *AIFMs* shall adopt adequate and effective arrangements, processes and techniques in order to:
    - 9.10.1.1 identify, measure, manage and monitor at any time the risks to which the *Directive AIFs* under their management are or might be exposed;
    - 9.10.1.2 ensure compliance with the limits set in accordance with paragraph 9.9.
  - 9.10.2 The arrangements, processes and techniques referred to in paragraph 9.10.1 shall be proportionate to the nature, scale and complexity of the business of the *AIFM* and of each *Directive AIF* it *manages* and shall be consistent with the *Directive AIF's* risk profile as disclosed to investors in accordance with paragraph 17.4.3.
  - 9.10.3 For the purposes of paragraph 9.10.1, the *AIFM* shall take the following actions for each *Directive AIF* it *manages*:
    - 9.10.3.1 put in place such risk measurement arrangements, processes and techniques as are necessary to ensure that the risks of positions taken and their contribution to the overall risk profile are accurately measured on the basis of sound and reliable data and that the risk measurement arrangements, processes and techniques are adequately documented;
    - 9.10.3.2 conduct periodic back-tests in order to review the validity of risk measurement arrangements which include model-based forecasts and estimates;
    - 9.10.3.3 conduct periodic appropriate stress tests and scenario analyses to address risks arising from potential changes in market conditions that might adversely impact the *Directive AIF*;
    - 9.10.3.4 ensure that the current level of risk complies with the risk limits set in accordance with paragraph 9.9;
    - 9.10.3.5 establish, implement and maintain adequate procedures that, in the event of actual or anticipated breaches of the risk limits of the *Directive AIF*, result in timely remedial actions in the best interest of investors;

- 9.10.3.6 ensure that there are appropriate liquidity management systems and procedures for each *Directive AIF* in line with the requirements laid down in paragraph 10.2.

9.11 *AIFMs* shall at least:

- 9.11.1 implement an appropriate, documented and regularly updated due diligence process when investing on behalf of the *Directive AIF*, according to the investment strategy, the objectives and risk profile of the *Directive AIF*;
- 9.11.2 ensure that the risks associated with each investment position of the *Directive AIF* and their overall effect on the *Directive AIF*'s portfolio can be properly identified, measured, managed and monitored on an ongoing basis, including through the use of appropriate stress testing procedures;
- 9.11.3 ensure that the risk profile of the *Directive AIF* shall correspond to the size, portfolio structure and investment strategies and objectives of the *Directive AIF* as laid down in the AIF rules or instruments constituting the *Directive AIF*, prospectus and offering documents.

9.12 *AIFMs* shall set a maximum level of *leverage* which they may employ on behalf of each *Directive AIF* they *manage* as well as the extent of the right to reuse collateral or guarantee that could be granted under the leveraging arrangement, taking into account, inter alia:

- 9.12.1 the type of the *Directive AIF*;
- 9.12.2 the investment strategy of the *Directive AIF*;
- 9.12.3 the sources of *leverage* of the *Directive AIF*;
- 9.12.4 any other inter-linkage or relevant relationships with other financial services institutions, which could pose systemic risk;
- 9.12.5 the need to limit the exposure to any single counterparty;
- 9.12.6 the extent to which the *leverage* is collateralised;
- 9.12.7 the asset-liability ratio;
- 9.12.8 the scale, nature and extent of the activity of the *AIFM* on the markets concerned.

## 10 Liquidity management (Article 16 of the Level 1 AIFM Directive)<sup>10</sup>

- 10.1 *AIFMs* shall, for each *Directive AIF* that they *manage* which is not an unleveraged closed-ended *Directive AIF*, employ an appropriate liquidity management system and adopt procedures which enable them to monitor the liquidity risk of the *Directive AIF* and to ensure that the liquidity profile of the investments of the *Directive AIF* complies with its underlying obligations.

*AIFMs* shall regularly conduct stress tests, under normal and exceptional liquidity conditions, which enable them to assess the liquidity risk of the *Directive AIFs* and monitor the liquidity risk of the *Directive AIFs* accordingly.

<sup>10</sup> Section 3.2.6 of the *Explanatory Memorandum* and Recitals 57 to 64 and 129 of *Level 2 AIFMD Regulation*.

- 10.2 Liquidity management system and procedures (Article 46 of *Level 2 AIFMD Regulation*)
- 10.2.1 *AIFMs* shall be able to demonstrate to the *JFSC* that an appropriate liquidity management system and effective procedures set out under the liquidity management provisions of the *Code* are in place taking into account the investment strategy, the liquidity profile and the redemption policy of each *Directive AIF*.
- 10.3 Monitoring and managing liquidity risk (Article 47 of *Level 2 AIFMD Regulation*)
- 10.3.1 The liquidity management system and procedures referred to in paragraph 10.2 shall at least, ensure that:
- 10.3.1.1 the *AIFM* maintains a level of liquidity in the *Directive AIF* appropriate to its underlying obligations, based on an assessment of the relative liquidity of the *Directive AIF's* assets in the market, taking account of the time required for liquidation and the price or value at which those assets can be liquidated, and their sensitivity to other market risks or factors;
- 10.3.1.2 the *AIFM* monitors the liquidity profile of the *Directive AIF's* portfolio of assets, having regard to the marginal contribution of individual assets which may have a material impact on liquidity, and the material liabilities and commitments, contingent or otherwise, which the *Directive AIF* may have in relation to its underlying obligations. For these purposes the *AIFM* shall take into account the profile of the investor base of the *Directive AIF*, including the type of investors, the relative size of investments and the redemption terms to which these investments are subject;
- 10.3.1.3 where the *Directive AIF* invests in other collective investment undertakings, the *AIFM* monitors the approach adopted by the managers of those other collective investment undertakings to the management of liquidity, including through conducting periodic reviews to monitor changes to the redemption provisions of the underlying collective investment undertakings in which the *Directive AIF* invests. Subject to paragraph 10.1, this obligation shall not apply where the other collective investment undertakings in which the *Directive AIF* invests are actively traded on a regulated market within the meaning of point (14) of Article 4(1) of Directive 2004/39/EC or an equivalent third country market;
- 10.3.1.4 the *AIFM* implements and maintains appropriate liquidity measurement arrangements and procedures to assess the quantitative and qualitative risks of positions and of intended investments which have a material impact on the liquidity profile of the portfolio of the *Directive AIF's* assets to enable their effects on the overall liquidity profile to be appropriately measured. The procedures employed shall ensure that the *AIFM* has the appropriate knowledge and understanding of the liquidity of the assets in which the *Directive AIF* has invested or intends to invest including, where applicable, the trading volume and sensitivity of prices and, as the case may be, or spreads of individual assets in normal and exceptional liquidity conditions;

- 10.3.1.5 the *AIFM* considers and puts into effect the tools and arrangements, including *special arrangements*, necessary to manage the liquidity risk of each *Directive AIF* under its management. The *AIFM* shall identify the types of circumstances where these tools and arrangements may be used in both normal and exceptional circumstances, taking into account the fair treatment of all *Directive AIF* investors in relation to each *Directive AIF* under management. The *AIFM* may use such tools and arrangements only in these circumstances and if appropriate disclosures have been made in accordance with paragraph 17.5.
  - 10.3.2 *AIFMs* shall document their liquidity management policies and procedures, as referred to in paragraph 10.3.1, review them on at least an annual basis and update them for any changes or new arrangements.
  - 10.3.3 *AIFMs* shall include appropriate escalation measures in their liquidity management system and procedures, as referred to in paragraph 10.3.1, to address anticipated or actual liquidity shortages or other distressed situations of the *Directive AIF*.
  - 10.3.4 Where the *AIFM manages* a *Directive AIF* which is a leveraged closed-ended AIF, paragraph 10.3.1.5 shall not apply.
- 10.4 Liquidity management limits and stress tests (Article 48 of *Level 2 AIFMD Regulation*)
- 10.4.1 *AIFMs* shall, where appropriate, considering the nature, scale and complexity of each *Directive AIF* they *manage*, implement and maintain adequate limits for the liquidity or illiquidity of the *Directive AIF* consistent with its underlying obligations and redemption policy and in accordance with the requirements laid down in paragraph 9.9 relating to quantitative and qualitative risk limits.  
*AIFMs* shall monitor compliance with those limits and where limits are exceeded or likely to be exceeded, they shall determine the required (or necessary) course of action. In determining appropriate action, *AIFMs* shall consider the adequacy of the liquidity management policies and procedures, the appropriateness of the liquidity profile of the *Directive AIF's* assets and the effect of atypical levels of redemption requests.
  - 10.4.2 *AIFMs* shall regularly conduct stress tests, under normal and exceptional liquidity conditions, which enable them to assess the liquidity risk of each *Directive AIF* under their management. The stress tests shall:
    - 10.4.2.1 be conducted on the basis of reliable and up-to-date information in quantitative terms or, where this is not appropriate, in qualitative terms;
    - 10.4.2.2 where appropriate, simulate a shortage of liquidity of the assets in the *Directive AIF* and atypical redemption requests;
    - 10.4.2.3 cover market risks and any resulting impact, including on margin calls, collateral requirements or credit lines;
    - 10.4.2.4 account for valuation sensitivities under stressed conditions;
    - 10.4.2.5 be conducted at a frequency which is appropriate to the nature of the *Directive AIF*, taking in to account the investment strategy, liquidity profile, type of investor and redemption policy of the *Directive AIF*, and at least once a year.

- 10.4.3 *AIFMs* shall act in the best interest of investors in relation to the outcome of any stress tests.
- 10.5 *AIFMs* shall ensure that, for each *Directive AIF* that they *manage*, the investment strategy, the liquidity profile and the redemption policy are consistent.
- 10.6 Alignment of investment strategy, liquidity profile and redemption policy (Article 49 *Level 2 AIFMD Regulation*)
  - 10.6.1 For the purposes of paragraph 10.5, the investment strategy, liquidity profile and redemption policy of each *Directive AIF* managed by an *AIFM* shall be considered to be aligned when investors have the ability to redeem their investments in a manner consistent with the fair treatment of all *Directive AIF* investors and in accordance with the *Directive AIF's* redemption policy and its obligations.
  - 10.6.2 In assessing the alignment of the investment strategy, liquidity profile and redemption policy the *AIFM* shall also have regard to the impact that redemptions may have on the underlying prices or spreads of the individual assets of the *Directive AIF*.

## 11 Investment in securitisation positions (Article 17 of the Level 1 AIFM Directive)<sup>11</sup>

- 11.1 In order to ensure cross-sectoral consistency and to remove misalignment between the interests of:
  - 11.1.1 firms that repackage loans into tradable securities and originators within the meaning of point (41) of Article 4 of Directive 2006/48/EC; and  
*AIFMs* that invest in those securities or other financial instruments on behalf of *Directive AIFs*, the following requirements shall apply in the following areas:
    - 11.1.1.1 the requirements that need to be met by the originator, the sponsor or the original lender, in order for an *AIFM* to be allowed to invest in securities or other financial instruments of this type issued after 1 January 2011 on behalf of *Directive AIFs*, including requirements that ensure that the originator, the sponsor or the original lender retains a net economic interest of not less than 5 %;
    - 11.1.1.2 qualitative requirements that must be met by *AIFMs* which invest in these securities or other financial instruments on behalf of one or more *Directive AIFs*.
- as more particularly described in the remainder of this paragraph.
- 11.2 Definitions (Article 50 of *Level 2 AIFMD Regulation*)
  - 11.2.1 For the purposes of this paragraph
    - 11.2.1.1 'securitisation' means a securitisation within the meaning of Article 4(36) of Directive 2006/48/EC;

<sup>11</sup> Section 3.2.7 of the *Explanatory Memorandum* and Recitals 65 to 69 of *Level 2 AIFMD Regulation*.

- 11.2.1.2 'securitisation position' means a securitisation position within the meaning of Article 4(40) of Directive 2006/48/EC;
- 11.2.1.3 'sponsor' means a sponsor within the meaning of Article 4(42) of Directive 2006/48/EC;
- 11.2.1.4 'tranche' means a tranche within the meaning of Article 4(39) of Directive 2006/48/EC.

### 11.3 Requirements for retained interest (Article 51 of *Level 2 AIFMD Regulation*)

- 11.3.1 *AIFMs* shall assume exposure to the credit risk of a securitisation on behalf of one or more *Directive AIFs* it *manages* only if the originator, sponsor or original lender has explicitly disclosed to the *AIFM* that it retains, on an ongoing basis, a material net economic interest, which in any event shall not be less than 5%.

Only any of the following shall qualify as retention of a material net economic interest of not less than 5%;

- 11.3.1.1 retention of no less than 5% of the nominal value of each of the tranches sold or transferred to the investors;
- 11.3.1.2 in the case of securitisations of revolving exposures, retention of the originator's interest of no less than 5% of the nominal value of the securitised exposures;
- 11.3.1.3 retention of randomly selected exposures, equivalent to not less than 5% of the nominal value of the securitised exposures, where such exposures would otherwise have been securitised in the securitisation, provided that the number of potentially securitised exposures is not less than 100 at origination;
- 11.3.1.4 retention of the first loss tranche and, if necessary, other tranches having the same or a more severe risk profile than those transferred or sold to investors and not maturing any earlier than those transferred or sold to investors, so that the retention equals in total not less than 5% of the nominal value of the securitised exposures;
- 11.3.1.5 retention of a first loss exposure of not less than 5% of every securitised exposure in the securitisation.

Net economic interest shall be measured at the origination and shall be maintained on an ongoing basis. The net economic interest, including retained positions, interest or exposures, shall not be subject to any credit risk mitigation or any short positions or any other hedge and shall not be sold. The net economic interest shall be determined by the notional value for off-balance sheet items.

There shall be no multiple applications of the retention requirements for any given securitisation.

- 11.3.2 Paragraph 11.3.1 shall not apply where the securitised exposures are claims or contingent claims on or fully, unconditionally and irrevocably guaranteed by the institutions listed in the first subparagraph of Article 122a (3) of Directive 2006/48/EC, and shall not apply to those transactions listed in the second subparagraph of Article 122a (3) of Directive 2006/48/EC.

- 11.4 Qualitative requirements concerning sponsors and originators (Article 52 of *Level 2 AIFMD Regulation*)
- 11.4.1 Prior to an *AIFM* assuming exposure to the credit risk of a securitisation on behalf of one or more *Directive AIFs*, it shall ensure that the sponsor and originator:
- 11.4.1.1 grant credit based on sound and well-defined criteria and clearly establish the process for approving, amending, renewing and re-financing loans to exposures to be securitised as they apply to exposures they hold;
  - 11.4.1.2 have in place and operate effective systems to manage the ongoing administration and monitoring of their credit risk-bearing portfolios and exposures, including for identifying and managing problem loans and for making adequate value adjustments and provisions;
  - 11.4.1.3 adequately diversify each credit portfolio based on the target market and overall credit strategy;
  - 11.4.1.4 have a written policy on credit risk that includes their risk tolerance limits and provisioning policy and describes how it measures, monitors and controls that risk;
  - 11.4.1.5 grant readily available access to all materially relevant data on the credit quality and performance of the individual underlying exposures, cash flows and collateral supporting a securitisation exposure and such information that is necessary to conduct comprehensive and well informed stress tests on the cash flows and collateral values supporting the underlying exposures. For that purpose, materially relevant data shall be determined as at the date of the securitisation and where appropriate due to the nature of the securitisation thereafter;
  - 11.4.1.6 grant readily available access to all other relevant data necessary for the *AIFM* to comply with the requirements laid down in paragraph 11.5
  - 11.4.1.7 disclose the level of their retained net economic interest as referred to in paragraph 11.3, as well as any matters that could undermine the maintenance of the minimum required net economic interest as referred to in that Article.
- 11.5 Qualitative requirements concerning *AIFMs* exposed to securitisations (Article 53 of *Level 2 AIFMD Regulation*)
- 11.5.1 Before becoming exposed to the credit risk of a securitisation on behalf of one or more *Directive AIFs*, and as appropriate thereafter, *AIFMs* shall be able to demonstrate to the *JFSC* for each of their individual securitisation positions that they have a comprehensive and thorough understanding of those positions and have implemented formal policies and procedures appropriate to the risk profile of the relevant *Directive AIF's* investments in securitised positions for analysing and recording:
- 11.5.1.1 information disclosed under paragraph 11.3 by originators or sponsors to speak the net economic interest that they maintain, on an ongoing basis, in the securitisation;
  - 11.5.1.2 the risk characteristics of the individual securitisation position;

- 11.5.1.3 the risk characteristics of the exposures underlying the securitisation position;
  - 11.5.1.4 the reputation and loss experience in earlier securitisations of the originators or sponsors in the relevant exposure classes underlying the securitisation position;
  - 11.5.1.5 the statements and disclosures made by the originators or sponsors, or their agents or advisors, about their due diligence on the securitised exposures and, where applicable, on the quality of the collateral supporting the securitised exposures;
  - 11.5.1.6 where applicable, the methodologies and concepts on which the valuation of collateral supporting the securitised exposures is based and the policies adopted by the originator or sponsor to ensure the independence of the valuer;
  - 11.5.1.7 all the structural features of the securitisation that can materially impact the performance of the institution's securitisation position, such as the contractual waterfall and waterfall related triggers, credit enhancements, liquidity enhancements, market value triggers, and deal-specific definitions of default.
- 11.5.2 Where an *AIFM* has assumed exposure to a material value of the credit risk of a securitisation on behalf of one or more *Directive AIFs*, it shall regularly perform stress tests appropriate to such securitisation positions in accordance with paragraph 9.11.2. The stress test shall be commensurate with the nature, scale and complexity of the risk inherent in the securitisation positions.
- AIFMs* shall establish formal monitoring procedures in line with the principles laid down in paragraph 9 commensurate with the risk profile of the relevant *Directive AIF* in relation to the credit risk of a securitisation position in order to monitor on an ongoing basis and in a timely manner performance information on the exposures underlying such securitisation positions. Such information shall include (if relevant to the specific type of securitisation and not limited to such types of information further described herein), the exposure type, the percentage of loans more than 30, 60 and 90 days past due, default rates, prepayment rates, loans in foreclosure, collateral type and occupancy, frequency distribution of credit scores or other measures of credit worthiness across underlying exposures, industry and geographical diversification and frequency distribution of loan to value ratios with bandwidths that facilitate adequate sensitivity analysis. Where the underlying exposures are themselves securitisation positions, *AIFMs* shall have the information set out in this sub-paragraph not only on the underlying securitisation tranches, such as the issuer name and credit quality, but also on the characteristics and performance of the pools underlying those securitisation tranches.
- AIFMs* shall apply the same standards of analysis to participations or underwritings in securitisation issues purchased from third parties.
- 11.5.3 For the purposes of appropriate risk and liquidity management, *AIFMs* assuming exposure to the credit risk of a securitisation on behalf of one or more *Directive AIFs* shall properly identify, measure, monitor, manage, control and report the risks that arise because of mismatches between the assets and liabilities of the relevant *Directive AIF*, concentration risk or investment risk arising from these instruments. The *AIFM* shall ensure that the risk profile of such securitisation positions corresponds to the size, overall portfolio structure, investment

Deleted: 1 September 2016

strategies and objectives of the relevant *Directive AIF* as laid down in the AIF rules or instruments constituting the *Directive AIF*, prospectus and offering documents.

11.5.4 *AIFMs* shall ensure, in line with the requirements laid down in paragraph 12 that there is an adequate degree of internal reporting to the senior management so that senior management is fully aware of any material assumption of exposure to securitisations and that the risks arising from those exposures are adequately managed.

11.5.5 *AIFMs* shall include appropriate information on their exposures to the credit risk of securitisation and their risk management procedures in this area in the reports and disclosures to be submitted in accordance with the transparency requirements set out under paragraphs 16, 17 and 18.

#### 11.6 Corrective action (Article 54 of *Level 2 AIFMD Regulation*)

11.6.1 *AIFMs* shall take such corrective action as is in the best interest of the investors in the relevant *Directive AIF* where they discover, after the assumption of an exposure to a securitisation, that the determination and disclosure of the retained interest did not meet the requirements laid down in this Regulation.

11.6.2 *AIFMs* shall take such corrective action as is in the best interest of the investors in the relevant *Directive AIF*, where the retained interest becomes less than 5% at a given moment after the assumption of the exposure and this is not due to the natural payment mechanism of the transaction.

#### 11.7 Grandfathering clause (Article 55 of *Level 2 AIFMD Regulation*)

11.7.1 Paragraphs 11.3 to 11.6 shall apply in relation to new securitisations issued on or after 1 January 2011. Paragraphs 11.3 to 11.6 shall, after 31 December 2014, apply in relation to existing securitisations where new underlying exposures are added or substituted after that date.

#### 11.8 Interpretation (Article 56 of *Level 2 AIFMD Regulation*)

11.8.1 In the absence of specific interpretation given by *ESMA* or by the Joint Committee of the European Supervisory Authorities, the provisions of paragraph 11 shall be interpreted in a consistent manner with the corresponding provisions of Directive 2006/48/EC and with the Guidelines to Article 122a of the Capital Requirements of 31 December 2010 issued by the Committee of European Banking Supervisors and their subsequent amendments.

## 12 General organisational requirements (Article 18 of the Level 1 AIFM Directive)<sup>12</sup>

12.1 *AIFMs* shall use, at all times, adequate and appropriate human and technical resources that are necessary for the proper management of *Directive AIFs*.

In particular, having regard to the nature of the *Directive AIFs* managed by the *AIFM*, the *AIFM* shall have sound administrative and accounting procedures, control and safeguard

<sup>12</sup> Recital 22 of the Level 1 *AIFM Directive*.  
Section 3.2.8 of the *Explanatory Memorandum* and Recitals 70 to 74 and 89 of *Level 2 AIFMD Regulation*.

arrangements for electronic data processing and adequate internal control mechanisms including, in particular, rules for personal transactions by its employees or for the holding or management of investments in order to invest on its own account and ensuring, at least, that each transaction involving the *Directive 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 that the assets of the *Directive AIFs* managed by the *AIFM* are invested in accordance with the AIF rules or instruments constituting the *Directive AIF* and the legal provisions in force.

## 12.2 General requirements (Article 57 of *Level 2 AIFMD Regulation*)

### 12.2.1 *AIFMs* shall:

- 12.2.1.1 establish, implement and maintain decision-making procedures and an organisational structure which specifies reporting lines and allocates functions and responsibilities clearly and in a documented manner;
- 12.2.1.2 ensure that their relevant persons are aware of the procedures to be followed for the proper discharge of their responsibilities;
- 12.2.1.3 establish, implement and maintain adequate internal control mechanisms designed to secure compliance with decisions and procedures at all levels of the *AIFM*;
- 12.2.1.4 establish, implement and maintain effective internal reporting and communication of information at all relevant levels of the *AIFM* and effective information flows with any third party involved;
- 12.2.1.5 maintain adequate and orderly records of their business and internal organisation.

*AIFMs* shall take into account the nature, scale and complexity of their business and the nature and range of services and activities undertaken in the course of that business.

- 12.2.2 *AIFMs* shall establish, implement and maintain systems and procedures that are adequate to safeguard the security, integrity and confidentiality of information, taking into account the nature of the information in question.
- 12.2.3 *AIFMs* shall establish, implement and maintain an adequate business continuity policy aimed at ensuring, in the event of an interruption to their systems and procedures, the preservation of essential data and functions, and the maintenance of services and activities, or, where that is not possible, the timely recovery of such data and functions and the timely resumption of their services and activities.
- 12.2.4 *AIFMs* shall establish, implement and maintain accounting policies and procedures and valuation rules that enable them, at the request of the *JFSC*, to deliver in a timely manner to the *JFSC* financial reports which reflect a true and fair view of their financial position and which comply with all applicable accounting standards and rules.
- 12.2.5 *AIFMs* shall implement appropriate policies and procedures to ensure that the redemption policies of the *Directive AIF* are disclosed to investors, in sufficient detail, before they invest in the *Directive AIF* and in the event of material changes.
- 12.2.6 *AIFMs* shall monitor and, on a regular basis, evaluate the adequacy and effectiveness of their systems, internal control mechanisms and arrangements

established in accordance with paragraphs 12.2.1 to 12.2.5, and take appropriate measures to address any deficiencies.

- 12.3 Electronic data processing (Article 58 of *Level 2 AIFMD Regulation*)
- 12.3.1 *AIFMs* shall make appropriate and sufficient arrangements for suitable electronic systems so as to permit the timely and proper recording of each portfolio transaction or subscription or, where relevant, redemption order.
- 12.3.2 *AIFMs* shall ensure a high standard of security during the electronic data processing and integrity and confidentiality of the recorded information, as appropriate.
- 12.4 Accounting procedures (Article 59 of *Level 2 AIFMD Regulation*)
- 12.4.1 *AIFMs* shall employ accounting policies and procedures as referred to in paragraph 12.2.4 so as to ensure the protection of investors. The accounting records shall be kept in such a way that all assets and liabilities of the *Directive AIF* can be directly identified at all times. If a *Directive AIF* has different investment compartments, separate accounts shall be maintained for those compartments.
- 12.4.2 *AIFMs* shall establish, implement and maintain accounting and valuation policies and procedures so as to ensure that the net asset value of each *Directive AIF* is accurately calculated on the basis of the applicable accounting rules and standards.
- 12.5 Control by the governing body, senior management and supervisory function (Article 60 of *Level 2 AIFMD Regulation*)
- 12.5.1 When allocating functions internally, *AIFMs* shall ensure that the governing body, the senior management and, where it exists, the supervisory function is responsible for the *AIFM's* compliance with its obligations under the *Code*.
- 12.5.2 An *AIFM* shall ensure that its senior management:
- 12.5.2.1 is responsible for the implementation of the general investment policy for each managed *Directive AIF*, as defined, where relevant, in the fund rules, the instruments constituting the *Directive AIF*, the prospectus or the offering documents;
  - 12.5.2.2 oversees the approval of the investment strategies for each managed *Directive AIF*;
  - 12.5.2.3 is responsible for ensuring that valuation policies and procedures, in accordance with paragraph 13, are established and implemented;
  - 12.5.2.4 is responsible for ensuring that the *AIFM* has a permanent and effective compliance function, even if this function is performed by a third party;
  - 12.5.2.5 ensures and verifies on a periodic basis that the general investment policy, the investment strategies and the risk limits of each managed *Directive AIF* are properly and effectively implemented and complied with, even if the risk management function is performed by third parties;
  - 12.5.2.6 approves and reviews on a periodic basis the adequacy of the internal procedures for undertaking investment decisions for each managed

*Directive AIF*, so as to ensure that such decisions are consistent with the approved investment strategies;

12.5.2.7 approves and reviews on a periodic basis the risk management policy and the arrangements, processes and techniques for implementing that policy, including the risk limit system for each *Directive AIF* it manages;

12.5.2.8 is responsible for establishing and applying a remuneration policy in line with Annex II of the Level 1 *AIFM Directive*.

12.5.3 An *AIFM* shall also ensure that its senior management and, where appropriate, its governing body or supervisory function:

12.5.3.1 assess and periodically review the effectiveness of the policies, arrangements and procedures put in place to comply with the obligations laid down in the *Code*;

12.5.3.2 take appropriate measures to address any deficiencies.

12.5.4 An *AIFM* shall ensure that its senior management receives on a frequent basis, and at least annually, written reports on matters of compliance, internal audit and risk management indicating in particular whether appropriate remedial measures have been taken in the event of any deficiencies.

12.5.5 An *AIFM* shall ensure that its senior management receives on a regular basis reports on the implementation of investment strategies and of the internal procedures for taking investment decisions referred to in paragraphs 12.5.2.2 to 12.5.2.5.

12.5.6 An *AIFM* shall ensure that the governing body or the supervisory function, if any, receives on a regular basis written reports on the matters referred to in paragraph 12.5.4.

## 12.6 Permanent compliance function (Article 61 of *Level 2 AIFMD Regulation*)

12.6.1 *AIFMs* shall establish, implement and maintain adequate policies and procedures designed to detect any risk of failure by the *AIFM* to comply with its obligations under the *Code*, and the associated risks, and put in place adequate measures and procedures designed to minimise such risk and to enable the *JFSC* to exercise their powers effectively under the *Code*.

The *AIFM* shall take into account the nature, scale and complexity of its business, and the nature and range of services and activities undertaken in the course of that business.

12.6.2 An *AIFM* shall establish and maintain a permanent and effective compliance function which operates independently and has the following responsibilities:

12.6.2.1 monitoring and, on a regular basis, evaluating the adequacy and effectiveness of the measures, policies and procedures put in place in accordance with paragraph 12.6.1 and the actions taken to address any deficiencies in the *AIFM's* compliance with its obligations;

12.6.2.2 advising the relevant persons responsible for carrying out services and activities and assisting them in complying with the *AIFM's* obligations under the *Code*.

12.6.3 In order to enable the compliance function referred to in paragraph 12.6.2 to perform its responsibilities properly and independently, the *AIFM* shall ensure that:

- 12.6.3.1 the compliance function has the necessary authority, resources, expertise and access to all relevant information;
- 12.6.3.2 a compliance officer is appointed and is responsible for the compliance function and for reporting on a frequent basis, and at least annually, to the senior management on matters of compliance, indicating in particular whether appropriate remedial measures have been taken in the event of any deficiencies;
- 12.6.3.3 persons in the compliance function are not involved in the performance of services or activities they monitor;
- 12.6.3.4 the method of determining the remuneration of a compliance officer and other persons in the compliance function do not affect their objectivity and are not likely to do so.

However, the *AIFM* shall not be required to comply with paragraphs 12.6.3.3 or 12.6.3.4 where it is able to demonstrate that in view of the nature, scale and complexity of its business, and the nature and range of its services and activities, that the requirement is not proportionate and that its compliance function continues to be effective.

## 12.7 Permanent internal audit function (Article 62 of *Level 2 AIFMD Regulation*)

- 12.7.1 *AIFMs* shall, where appropriate and proportionate in view of the nature, scale and complexity of their business and the nature and range of collective portfolio management activities undertaken in the course of that business, establish and maintain an internal audit function which is separate and independent from the other functions and activities of the *AIFM*.
- 12.7.2 The internal audit function referred to in paragraph 12.7.1 shall:
  - 12.7.2.1 establish, implement and maintain an audit plan to examine and evaluate the adequacy and effectiveness of the *AIFM's* systems, internal control mechanisms and arrangements;
  - 12.7.2.2 issue recommendations based on the results of work carried out in accordance with paragraph 12.7.2.1;
  - 12.7.2.3 verify compliance with the recommendations referred to in paragraph 12.7.2.2;
  - 12.7.2.4 report internal audit matters.

## 12.8 Personal transactions (Article 63 of *Level 2 AIFMD Regulation*)

- 12.8.1 For any relevant person who is involved in activities that may give rise to a conflict of interest, or who has access to inside information within the meaning given to such term under Part 3A of the *FS(J)L* on market manipulation, misleading information and insider dealing, or to other confidential information relating to a *Directive AIF* or transactions with or for a *Directive AIF* market abuse and insider dealing an *AIFM* shall establish, implement and maintain adequate arrangements aimed at preventing such relevant persons from:
  - 12.8.1.1 entering into a personal transaction in financial instruments or other assets which fulfils one of the following criteria:
    - › the transaction is subject to Part 3A of the *FS(J)L*;
    - › the transaction involves the misuse or improper disclosure of confidential information;

- › the transaction conflicts or is likely to conflict with an obligation of the *AIFM* under the *Code*;
- 12.8.1.2 advising or inducing, other than in the proper course of his employment or contract for services, any other person to enter into a personal transaction referred to in the first and second bullet points under paragraph 12.8.1.1, or that would otherwise constitute a misuse of information relating to pending orders;
- 12.8.1.3 disclosing, other than in the normal course of his employment or contract for services, any information or opinion to any other person if the relevant person knows, or reasonably ought to know, that as a result of that disclosure that other person would or would be likely to take either of the following steps:
  - › entering into a personal transaction referred to in the first and second bullet points of paragraph 12.8.1.1 in financial instruments or other assets or that would otherwise constitute a misuse of information relating to pending orders;
  - › advising or inducing another person to enter into such a personal transaction.
- 12.8.2 The arrangements referred to in paragraph 12.8.1 shall in particular be designed to ensure that:
  - 12.8.2.1 each relevant person is aware of the restrictions on personal transactions referred to in paragraph 12.8.1, and of the measures established by the *AIFM* in connection with personal transactions and disclosure, pursuant to paragraph 12.8.1;
  - 12.8.2.2 the *AIFM* is informed promptly of any personal transaction entered into by a relevant person covered by paragraph 12.8.1, either by notification of that transaction or by other procedures enabling the *AIFM* to identify such transactions;
  - 12.8.2.3 a record is kept of the personal transaction notified to the *AIFM* or identified by it, including any authorisation or prohibition in connection with such a transaction.

For the purposes of paragraph 12.8.2.2, where certain activities of the *AIFM* are performed by third parties, the *AIFM* shall ensure that the entity performing the activity maintains a record of personal transactions entered into by any relevant person covered by paragraph 12.8.1 and provides that information to the *AIFM* promptly on request.
- 12.8.3 Paragraphs 12.8.1 and 12.8.2 shall not apply to personal transactions:
  - 12.8.3.1 effected under a discretionary portfolio management service where there is no prior communication in connection with the transaction between the portfolio manager and the relevant person or other person for whose account the transaction is executed;
  - 12.8.3.2 in *Directive AIFs* which require an equivalent level of risk spreading in their assets, where the relevant person and any other person for whose account the transactions are effected are not involved in the management of that undertaking.

- 12.8.4 For the purpose of paragraph 12.8.1, a personal transaction shall also include a transaction in a financial instrument or other asset effected on behalf or for the account of:
- 12.8.4.1 a relevant person;
  - 12.8.4.2 any person with whom the relevant person has a family relationship or with whom the relevant person has close links;
  - 12.8.4.3 a person whose relationship with the relevant person is such that the relevant person has a direct or indirect material interest in the outcome of the trade, other than a fee or commission for the execution of the trade.

12.9 Recording of portfolio transactions (Article 64 of *Level 2 AIFMD Regulation*)

- 12.9.1 *AIFMs* shall maintain without delay for each portfolio transaction relating to *Directive AIFs* it manages a record of information which is sufficient to reconstruct the details of the order and the executed transaction or of the agreement.
- 12.9.2 With regard to portfolio transactions on an execution venue, the record referred to in paragraph 12.9.1 shall include the following information:
- 12.9.2.1 the name or other designation of the *Directive AIF* and of the person acting for the account of the *Directive AIF*;
  - 12.9.2.2 the asset;
  - 12.9.2.3 where relevant, the quantity;
  - 12.9.2.4 the type of the order or transaction;
  - 12.9.2.5 the price;
  - 12.9.2.6 for orders, the date and exact time of the transmission of the order and the name or other designation of the person to whom the order was transmitted, or for transactions, the date and exact time of the decision to deal and the execution of the transaction;
  - 12.9.2.7 where applicable, the name of the person transmitting the order or executing the transaction;
  - 12.9.2.8 where applicable, the reasons for the revocation of an order;
  - 12.9.2.9 for executed transactions the counterparty and execution venue identification.
- 12.9.3 With regard to portfolio transactions by the *Directive AIF* outside an execution venue, the record referred to in paragraph 12.9.1 shall include the following information:
- 12.9.3.1 the name or other designation of the *Directive AIF*;
  - 12.9.3.2 the legal and other documentation that forms the basis of the portfolio transaction, including in particular the agreement as executed;
  - 12.9.3.3 the price.
- 12.9.4 For the purposes of paragraphs 12.9.2 and 12.9.3, an execution venue shall include a systematic internaliser, a regulated market, a multilateral trading facility, a market maker or other liquidity provider or an entity that performs a similar function.

12.10 Recording of subscription and redemption orders (Article 65 of *Level 2 AIFMD Regulation*)

12.10.1 *AIFMs* shall take all reasonable steps to ensure that received *Directive AIF* subscriptions and, where relevant, redemption orders are recorded without undue delay after receipt of any such order.

12.10.2 That record shall include information on the following:

12.10.2.1 the relevant *Directive AIF*;

12.10.2.2 the person giving or transmitting the order;

12.10.2.3 the person receiving the order;

12.10.2.4 the date and time of the order;

12.10.2.5 the terms and means of payment;

12.10.2.6 the type of the order;

12.10.2.7 the date of execution of the order;

12.10.2.8 the number of units or shares or equivalent amounts subscribed or redeemed;

12.10.2.9 the subscription or, where relevant, redemption price for each unit or share or, where relevant, the amount of capital committed and paid;

12.10.2.10 the total subscription or redemption value of the units or shares;

12.10.2.11 the gross value of the order including charges for subscription, or the net amount after charges for redemption.

Information under paragraphs 12.10.2.9, 12.10.2.10 and 12.10.2.11 shall be recorded as soon as available.

12.11 Recordkeeping requirements (Article 66 of *Level 2 AIFMD Regulation*)

12.11.1 *AIFMs* shall ensure that all required records referred to in paragraphs 12.9 and 12.10 are retained for the minimum period required under any relevant legislation.

12.11.2 Following the termination of the authorisation of an *AIFM*, the records are to be retained for the minimum period referred to in paragraph 12.11.1. The *JFSC* may require retention for a longer period.

Where the *AIFM* transfers its responsibilities in relation to the *Directive AIF* to another *AIFM*, it shall ensure that the records referred to in paragraph 12.11.1 are accessible to that *AIFM*.

12.11.3 The records shall be retained on a medium that allows the storage of information in a way accessible for future reference by the *JFSC* and in such a form and manner that:

12.11.3.1 the *JFSC* is able to access them readily and to reconstitute each key stage of the processing of each portfolio transaction;

12.11.3.2 corrections or other amendments, and the contents of the records prior to such corrections or amendments, may be easily ascertained;

12.11.3.3 no other manipulation or alteration is possible.

## 13 Valuation (Article 19 of the Level 1 AIFM Directive)<sup>13</sup>

- 13.1 *AIFMs* shall ensure that, for each *Directive AIF* that they *manage*, appropriate and consistent procedures are established so that a proper and independent valuation of the assets of the *Directive AIF* can be performed in accordance with this paragraph, the applicable national law and the AIF rules or instruments constituting the *Directive AIF*.
- 13.2 The rules applicable to the valuation of assets and the calculation of the net asset value per unit or share of the *Directive AIF* shall be laid down in the law of the country where the *Directive AIF* is established and/or in the AIF rules or instruments constituting the AIF.
- 13.3 *AIFMs* shall also ensure that the net asset value per unit or share of *Directive AIFs* is calculated and disclosed to the investors in accordance with this paragraph, the applicable national law and the AIF rules or instruments constituting the *Directive AIF*.
- The valuation procedures used shall ensure that the assets are valued and the net asset value per unit or share is calculated at least once a year.
- If the *Directive AIF* is of the open-ended type, such valuations and calculations shall also be carried out at a frequency which is both appropriate to the assets held by the *Directive AIF* and its issuance and redemption frequency.
- If the *Directive AIF* is of the closed-ended type, such valuations and calculations shall also be carried out in case of an increase or decrease of the capital by the relevant *Directive AIF*.
- The investors shall be informed of the valuations and calculations as set out in the relevant AIF rules or instruments constituting the *Directive AIF*.
- 13.4 Policies and procedures for the valuation of the assets of the *Directive AIF* (Article 67 of Level 2 AIFMD Regulation)
- 13.4.1 *AIFMs* shall establish, maintain, implement and review, for each *Directive AIF* they *manage*, written policies and procedures that ensure a sound, transparent, comprehensive and appropriately documented valuation process. The valuation policy and procedures shall cover all material aspects of the valuation process and valuation procedures and controls in respect of the relevant *Directive AIF*.
- Without prejudice to requirements under applicable law and the AIF rules and instruments constituting the *Directive AIF*, the *AIFM* shall ensure that fair, appropriate and transparent valuation methodologies are applied for the *Directive AIFs* it *manages*. The valuation policies shall identify and the procedures shall implement the valuation methodologies used for each type of asset in which the *Directive AIF* may invest in accordance with applicable law, the AIF rules and the instruments constituting the *Directive AIF*. The *AIFM* shall not invest in a particular type of asset for the first time unless an appropriate valuation methodology or methodologies have been identified for that specific type of asset.
- The policies and procedures setting out valuation methodologies shall include inputs, models and the selection criteria for pricing and market data sources. They shall provide that prices shall be obtained from independent sources whenever possible and appropriate. The selection process of a particular methodology shall include an assessment of the available relevant methodologies, taking into

<sup>13</sup> Recital 29 of the Level 1 AIFM Directive.  
Section 3.2.9 of the *Explanatory Memorandum* and Recitals 75 to 81 of *Level 2 AIFMD Regulation*.

account their sensitivity to changes in variables and how specific strategies determine the relative value of the assets in the portfolio.

- 13.4.2 The valuation policies shall set out the obligations, roles and responsibilities of all parties involved in the valuation process, including the senior management of the *AIFM*. The procedures shall reflect the organisational structure as set out in the valuation policies.

The valuation policies and procedures shall address at least the following:

- 13.4.2.1 the competence and independence of personnel who are effectively carrying out the valuation of assets;
- 13.4.2.2 the specific investment strategies of the *Directive AIF* and the assets the *Directive AIF* might invest in;
- 13.4.2.3 the controls over the selection of valuation inputs, sources and methodologies;
- 13.4.2.4 the escalation channels for resolving differences in values for assets;
- 13.4.2.5 the valuation of any adjustments related to the size and liquidity of positions, or to changes in the market conditions, as appropriate;
- 13.4.2.6 the appropriate time for closing the books for valuation purposes;
- 13.4.2.7 the appropriate frequency for valuing assets.

- 13.4.3 Where an external valuer is appointed, the valuation policies and procedures shall set out a process for the exchange of information between the *AIFM* and the external valuer to ensure that all necessary information required for the purpose of performing the valuation task is provided.

The valuation policies and procedures shall ensure that the *AIFM* conducts initial and periodic due diligence on third parties that are appointed to perform valuation services.

- 13.4.4 Where the valuation is performed by the *AIFM* itself, the policies shall include a description of the safeguards for the functionally independent performance of the valuation task in accordance with paragraph 13.11.2. Such safeguards shall include measures to prevent or restrain any person from exercising inappropriate influence over the way in which a person carries out valuation activities.

### 13.5 Use of models to value assets (Article 68 *Level 2 AIFMD Regulation*)

- 13.5.1 If a model is used to value the assets of a *Directive AIF*, the model and its main features shall be explained and justified in the valuation policies and procedures. The reason for the choice of the model, the underlying data, the assumptions used in the model and the rationale for using them, and the limitations of the model-based valuation shall be appropriately documented.
- 13.5.2 The valuation policies and procedures shall ensure that before being used a model is validated by a person with sufficient expertise who has not been involved in the process of building that model. The validation process shall be appropriately documented.
- 13.5.3 The model shall be subject to prior approval by the senior management of the *AIFM*. Where the model is used by an *AIFM* that performs the valuation function itself, the approval by the senior management shall be without prejudice to the *JFSC*'s right to require under paragraph 13.17 that the model be verified by an external valuer or an auditor.

- 13.6 Consistent application of valuation policies and procedures (Article 69 of *Level 2 AIFMD Regulation*)
- 13.6.1 An *AIFM* shall ensure that the valuation policies and procedures and the designated valuation methodologies are applied consistently.
  - 13.6.2 The valuation policies and procedures and the designated methodologies shall be applied to all assets within a *Directive AIF* taking into account the investment strategy, the type of asset and, if applicable, the existence of different external valuers.
  - 13.6.3 Where no update is required, the policies and procedures shall be applied consistently over time and valuation sources and rules shall remain consistent over time.
  - 13.6.4 The valuation procedures and the designated valuation methodologies shall be applied consistently across all *Directive AIFs* managed by the same *AIFM*, taking into account the investment strategies and the types of asset held by the *Directive AIFs*, and, if applicable, the existence of different external valuers.
- 13.7 Periodic review of valuation policies and procedures (Article 70 *Level 2 AIFMD Regulation*)
- 13.7.1 Valuation policies shall provide for a periodic review of the policies and procedures, including of the valuation methodologies. The review shall be carried out at least annually and before the *Directive AIF* engages with a new investment strategy or a new type of asset that is not covered by the actual valuation policy.
  - 13.7.2 The valuation policies and procedures shall outline how a change to the valuation policy, including a methodology, may be affected and in what circumstances this would be appropriate. Recommendations for changes to the policies and procedures shall be made to the senior management, which shall review and approve any changes.
  - 13.7.3 The risk management function referred to in paragraph 9.3 shall review and, if needed, provide appropriate support concerning the policies and procedures adopted for the valuation of assets.
- 13.8 Review of individual values of assets (Article 71 *Level 2 AIFMD Regulation*)
- 13.8.1 An *AIFM* shall ensure that all assets held by the *Directive AIF* are fairly and appropriately valued. The *AIFM* shall document by type of asset the way the appropriateness and fairness of the individual values is assessed.
  - 13.8.2 The *AIFM* shall at all times be able to demonstrate that the portfolios of *Directive AIFs* it manages are properly valued.
  - 13.8.3 The valuation policies and procedures shall set out a review process for the individual values of assets, where a material risk of an inappropriate valuation exists, such as in the following cases:
    - 13.8.3.1 the valuation is based on prices only available from a single counterparty or broker source;
    - 13.8.3.2 the valuation is based on illiquid exchange prices;
    - 13.8.3.3 the valuation is influenced by parties related to the *AIFM*;
    - 13.8.3.4 the valuation is influenced by other entities that may have a financial interest in the *Directive AIF's* performance;

- 13.8.3.5 the valuation is based on prices supplied by the counterparty who originated an instrument, in particular where the originator is also financing the *Directive AIF's* position in the instrument;
  - 13.8.3.6 the valuation is influenced by one or more individuals within the *AIFM*.
- 13.8.4 The valuation policies and procedures shall describe the review process including sufficient and appropriate checks and controls on the reasonableness of individual values. Reasonableness shall be assessed in terms of the existence of an appropriate degree of objectivity. Such checks and controls shall include at least:
  - 13.8.4.1 verifying values by a comparison amongst counterparty-sourced pricings and over time;
  - 13.8.4.2 validating values by comparison of realised prices with recent carrying values;
  - 13.8.4.3 considering the reputation, consistency and quality of the valuation source;
  - 13.8.4.4 a comparison with values generated by a third party;
  - 13.8.4.5 an examination and documentation of exemptions;
  - 13.8.4.6 highlighting and researching any differences that appear unusual or vary by valuation benchmark established for the type of asset;
  - 13.8.4.7 testing for stale prices and implied parameters;
  - 13.8.4.8 a comparison with the prices of any related assets or their hedges;
  - 13.8.4.9 a review of the inputs used in model-based pricing, in particular of those to which the model's price exhibits significant sensitivity.
- 13.8.5 The valuation policies and procedures shall include appropriate escalation measures to address differences or other problems in the valuation of assets.
- 13.9 Calculation of the net asset value per unit or share (*Article 72 Level 2 AIFMD Regulation*)
  - 13.9.1 An *AIFM* shall ensure that for each *Directive AIF* it *manages* the net asset value per unit or share is calculated on the occasion of each issue or subscription or redemption or cancellation of units or shares, but at least once a year.
  - 13.9.2 An *AIFM* shall ensure that the procedures and the methodology for calculating the net asset value per unit or share are fully documented. The calculation procedures and methodologies and their application shall be subject to regular verification by the *AIFM*, and the documentation shall be amended accordingly.
  - 13.9.3 An *AIFM* shall ensure that remedial procedures are in place in the event of an incorrect calculation of the net asset value.
  - 13.9.4 An *AIFM* shall ensure that the number of units or shares in issue is subject to regular verification, at least as often as the unit or share price is calculated.
- 13.10 Frequency of valuation of assets held by open-ended *Directive AIFs* (*Article 74 Level 2 AIFMD Regulation*)
  - 13.10.1 The valuation of financial instruments held by open-ended *Directive AIFs* shall take place every time the net asset value per unit or share is calculated pursuant to paragraph 13.9.1.

13.10.2 The valuation of other assets held by open-ended *Directive AIFs* shall take place at least once a year, and every time there is evidence that the last determined value is no longer fair or proper.

13.11 *AIFMs* shall ensure that the valuation function is either performed by:

13.11.1 an external valuer, being a legal or natural person independent from the *Directive AIF*, the *AIFM* and any other persons with close links to the *Directive AIF* or the *AIFM*; or

13.11.2 the *AIFM* itself, provided that the valuation task is functionally independent from the portfolio management and the remuneration policy and other measures ensure that conflicts of interest are mitigated and that undue influence upon the employees is prevented.

The depositary appointed for a *Directive AIF* shall not be appointed as external valuer of that *Directive AIF*, unless it has functionally and hierarchically separated the performance of its depositary functions from its tasks as external valuer and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the *Directive AIF*.

13.12 Where an external valuer performs the valuation function, the *AIFM* shall demonstrate that:

13.12.1 the external valuer is subject to mandatory professional registration recognised by law or to legal or regulatory provisions or rules of professional conduct; and

13.12.2 the external valuer can provide sufficient professional guarantees to be able to perform effectively the relevant valuation function in accordance with paragraphs 13.1, 13.2 and 13.3.

13.12.3 the appointment of the external valuer complies with the requirements of paragraphs 14.1 and 14.7.

13.13 Professional guarantees (Article 73 *Level 2 AIFMD Regulation*)

13.13.1 External valuers shall provide upon request professional guarantees to demonstrate their ability to perform the valuation function. Professional guarantees to be furnished by external valuers shall be in written form.

13.13.2 The professional guarantees shall contain evidence of the external valuer's qualification and capability to perform proper and independent valuation, including, at least, evidence of

13.13.2.1 sufficient personnel and technical resources;

13.13.2.2 adequate procedures safeguarding proper and independent valuation;

13.13.2.3 adequate knowledge and understanding of the investment strategy of the *Directive AIF* and of the assets the external valuer is appointed to value;

13.13.2.4 a sufficiently good reputation and sufficient experience with valuation.

13.13.3 Where the external valuer is subject to mandatory professional registration, the professional guarantee shall contain the name of the relevant authority or entity, including the relevant contact information. The professional guarantee shall indicate clearly the legal or regulatory provisions or rules of professional conduct to which the external valuer is subject.

- 13.14 The appointed external valuer shall not delegate the valuation function to a third party.
- 13.15 An *AIFM* shall notify, in writing, the appointment of the external valuer to the *JFSC* which may require that another external valuer be appointed instead, where the conditions laid down in paragraph 13.12 are not met.
- 13.16 The valuation shall be performed impartially and with all due skill, care and diligence.
- 13.17 Where the valuation function is not performed by an independent external valuer, the *JFSC* may require the *AIFM* to have its valuation procedures and/or valuations verified by an external valuer or, where appropriate, by an auditor.
- 13.18 *AIFMs* are responsible for the proper valuation of *Directive AIF* assets, the calculation of the net asset value and the publication of that net asset value. The *AIFM's* liability towards the *Directive AIF* and its investors shall, therefore, not be affected by the fact that the *AIFM* has appointed an external valuer.
- Notwithstanding paragraph 13.18, irrespective of any contractual arrangements providing otherwise, the external valuer shall be liable to the *AIFM* for any losses suffered by the *AIFM* as a result of the external valuer's negligence or intentional failure to perform its tasks.

## 14 Delegation of AIFM functions (Article 20 of the Level 1 AIFM Directive)<sup>14</sup>

- 14.1 *AIFMs* which intend to delegate to third parties the task of carrying out functions on their behalf shall notify the *JFSC* in writing before the delegation arrangements become effective. The following conditions shall be met:
- 14.1.1 the *AIFM* must be able to justify its entire delegation structure on objective grounds;
- 14.1.2 the delegate must have at its disposal sufficient resources to perform the respective tasks and the persons who effectively conduct the business of the delegate must be of sufficiently good repute and sufficiently experienced;
- 14.1.3 where the delegation concerns portfolio management or risk management, it must be conferred only on undertakings which are authorised or registered for the purpose of asset management and subject to supervision by a competent authority;
- 14.1.4 the delegation must not prevent the effectiveness of supervision of the *AIFM*, and, in particular, must not prevent the *AIFM* from acting, or the *Directive AIF* from being managed, in the best interests of its investors;
- 14.1.5 the *AIFM* must be able to demonstrate that the delegate is qualified and capable of undertaking the functions in question, that it was selected with all due care and that the *AIFM* is in a position to monitor effectively at any time the delegated activity, to give at any time further instructions to the delegate and to withdraw the delegation with immediate effect when this is in the interest of investors.

<sup>14</sup> Recitals 30 and 31 of the Level 1 *AIFM Directive*.  
Section 3.2.10 of the *Explanatory Memorandum* and Recitals 82 to 90 of *Level 2 AIFMD Regulation*.

14.1.6 The *AIFM* shall review the services provided by each delegate on an ongoing basis.

14.2 Objective grounds for delegation (Article 76 *Level 2 AIFMD Regulation*)

14.2.1 The *AIFM* shall, in writing, provide the *JFSC* with a detailed description, explanation and evidence of the objective grounds for delegation. When assessing whether the entire delegation structure is based on objective grounds within the meaning of paragraph 14.1.1 the following criteria shall be considered:

- 14.2.1.1 optimising of business functions and processes;
- 14.2.1.2 cost saving;
- 14.2.1.3 expertise of the delegate in administration or in specific markets or investments;
- 14.2.1.4 access of the delegate to global trading capabilities.

14.2.2 Upon request by the *JFSC*, an *AIFM* shall provide further explanations and provide documents proving that the entire delegation structure is based on objective grounds.

14.3 Features of the delegate (Article 77 *Level 2 AIFMD Regulation*)

14.3.1 A delegate shall have sufficient resources and shall employ sufficient personnel with the skills, knowledge and expertise necessary for the proper discharge of the tasks delegated to it and have an appropriate organizational structure supporting the performance of the delegated tasks.

14.3.2 Persons who effectively conduct the activities delegated by the *AIFM* shall have sufficient experience, appropriate theoretical knowledge and appropriate practical experience in the relevant functions. Their professional training and the nature of the functions they have performed in the past shall be appropriate for the conduct of the business.

14.3.3 Persons who effectively conduct the business of the delegate shall not be deemed of sufficiently good repute if they have any negative records relevant both for the assessment of good repute and for the proper performance of the delegated tasks or if there is other relevant information which affects their good reputation. Such negative records shall include but shall not be limited to criminal offences, judicial proceedings or administrative sanctions relevant for the performance of the delegated tasks. Special attention shall be given to any offences related to financial activities, including but not limited to obligations relating to the prevention of money laundering, dishonesty, fraud or financial crime, bankruptcy or insolvency. Other relevant information shall include information such as that indicating that the person is not trustworthy or honest.

14.4 Delegation of portfolio or risk management (Article 78 *Level 2 AIFMD Regulation*)

14.4.1 Where the delegation is conferred on a third-country undertaking, the following condition shall be fulfilled in accordance with paragraph 14.1.2:

- 14.4.1.1 a written arrangement shall exist between the *JFSC* and the supervisory authorities of the undertaking to which delegation is conferred.

14.5 Effective supervision (Article 79 *Level 2 AIFMD Regulation*)

14.5.1 A delegation shall be deemed to prevent the effective supervision of the *AIFM* where:

- 14.5.1.1 the *AIFM*, its auditors and the *JFSC* do not have effective access to data related to the delegated functions and to the business premises of the delegate, or the *JFSC* is not able to exercise those rights of access;
- 14.5.1.2 the delegate does not cooperate with the *JFSC* in connection with the delegated functions;
- 14.5.1.3 the *AIFM* does not make available on request to the *JFSC* all information necessary to enable authorities to supervise the compliance of the performance of the delegated functions with the requirements of the *Code*.

14.6 General principles (Article 75 *Level 2 AIFMD Regulation*)

- 14.6.1 When delegating the task of carrying out one or more functions on their behalf, *AIFMs* shall comply, in particular, with the following general principles:
  - 14.6.1.1 the delegation structure does not allow for the circumvention of the *AIFM's* responsibilities or liability;
  - 14.6.1.2 the obligations of the *AIFM* towards the *Directive AIF* and its investors are not altered as a result of the delegation;
  - 14.6.1.3 the conditions with which the *AIFM* must comply in order to be authorised and registered by the *JFSC* and carry out activities in accordance with the *Code* are not undermined;
  - 14.6.1.4 the delegation arrangement takes the form of a written agreement concluded between the *AIFM* and the delegate;
  - 14.6.1.5 the *AIFM* ensures that the delegate carries out the delegated functions effectively and in compliance with applicable law and regulatory requirements and must establish methods and procedures for reviewing on an on-going basis the services provided by the delegate. The *AIFM* shall take appropriate action if it appears that the delegate cannot carry out the functions effectively or in compliance with applicable laws and regulatory requirements;
  - 14.6.1.6 the *AIFM* supervises effectively the delegated functions and manages the risks associated with the delegation. For this purpose the *AIFM* shall have at all times the necessary expertise and resources to supervise the delegated functions. The *AIFM* shall set out in the agreement its right of information, inspection, admittance and access, and its instruction and monitoring rights against the delegate. The *AIFM* shall also ensure that the delegate properly supervises the performance of the delegated functions, and adequately manages the risks associated with the delegation;
  - 14.6.1.7 the *AIFM* ensures that the continuity and quality of the delegated functions or of the delegated task of carrying out functions are maintained also in the event of termination of the delegation either by transferring the delegated functions or the delegated task of carrying out functions to another third party or by performing them itself;
  - 14.6.1.8 the respective rights and obligations of the *AIFM* and the delegate are clearly allocated and set out in the agreement. In particular, the *AIFM* shall contractually ensure its instruction and termination rights, its

rights of information, and its right to inspections and access to books and premises. The agreement shall make sure that sub-delegation can take place only with the consent of the *AIFM*;

- 14.6.1.9 where it concerns portfolio management, the delegation is in accordance with the investment policy of the *Directive AIF*. The delegate shall be instructed by the *AIFM* how to implement the investment policy and the *AIFM* shall monitor whether the delegate complies with it on an on-going basis;
- 14.6.1.10 the *AIFM* ensures that the delegate discloses to the *AIFM* any development that may have a material impact on the delegate's ability to carry out the delegated functions effectively and in compliance with applicable laws and regulatory requirements;
- 14.6.1.11 the *AIFM* ensures that the delegate protects any confidential information relating to the *AIFM*, the *Directive AIF* affected by the delegation and the investors in that *Directive AIF*;
- 14.6.1.12 the *AIFM* ensures that the delegate establishes, implements and maintains a contingency plan for disaster recovery and periodic testing of backup facilities while taking into account the types of delegated functions.

14.7 No delegation of portfolio management or risk management shall be conferred on:

- 14.7.1 the depositary or a delegate of the depositary; or
- 14.7.2 any other entity whose interests may conflict with those of the *AIFM* or the investors of the *Directive AIF*, unless such entity has functionally and hierarchically separated the performance of its portfolio management or risk management tasks from its other potentially conflicting tasks, and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the *Directive AIF*.

14.8 Conflicts of interest (Article 80 *Level 2 AIFMD Regulation*)

- 14.8.1 In accordance with paragraph 14.7.2, the criteria to assess whether a delegation conflicts with the interests of the *AIFM* or the investor in the *Directive AIF* shall at least include:
  - 14.8.1.1 where the *AIFM* and the delegate are members of the same group or have any other contractual relationship, the extent to which the delegate controls the *AIFM* or has the ability to influence its actions;
  - 14.8.1.2 where the delegate and an investor in the relevant *Directive AIF* are members of the same group or have any other contractual relationship, the extent to which this investor controls the delegate or has the ability to influence its actions;
  - 14.8.1.3 the likelihood that the delegate makes a financial gain, or avoids a financial loss, at the expense of the *Directive AIF* or the investors in the *Directive AIF*;
  - 14.8.1.4 the likelihood that the delegate has an interest in the outcome of a service or an activity provided to the *AIFM* or the *Directive AIF*;

- 14.8.1.5 the likelihood that the delegate has a financial or other incentive to favour the interest of another client over the interests of the *Directive AIF* or the investors in the *Directive AIF*;
- 14.8.1.6 the likelihood that the delegate receives or will receive from a person other than the *AIFM* an inducement in relation to the collective portfolio management activities provided to the *AIFM* and the *Directive AIFs* it manages in the form of monies, goods or services other than the standard commission or fee for that service.
- 14.8.2 The portfolio or risk management function may be considered to be functionally and hierarchically separated from other potentially conflicting tasks only where the following conditions are satisfied:
  - 14.8.2.1 persons engaged in portfolio management tasks are not engaged in the performance of potentially conflicting tasks such as controlling tasks;
  - 14.8.2.2 persons engaged in risk management tasks are not engaged in the performance of potentially conflicting tasks such as operating tasks;
  - 14.8.2.3 persons engaged in risk management functions are not supervised by those responsible for the performance of operating tasks;
  - 14.8.2.4 the separation is ensured throughout the whole hierarchical structure of the delegate up to its governing body and is reviewed by the governing body and, where it exists, the supervisory function of the delegate.
- 14.8.3 Potential conflicts of interest shall be deemed properly identified, managed, monitored and disclosed to the investors of the *Directive AIF* only if
  - 14.8.3.1 the *AIFM* ensures that the delegate takes all reasonable steps to identify, manage and monitor potential conflicts of interest that may arise between itself and the *AIFM*, the *AIF* or the investors in the *Directive AIF*. The *AIFM* shall ensure that the delegate has procedures in place corresponding to those required under paragraphs 8.5 to 8.7.3.
  - 14.8.3.2 the *AIFM* ensures that the delegate discloses potential conflicts of interest as well as the procedures and measures to be adopted by it in order to manage such conflicts of interest to the *AIFM* which shall disclose them to the *Directive AIF* and the investors in the *Directive AIF* in accordance with paragraph 8.10.
- 14.9 The *AIFM's* liability towards the *Directive AIF* and its investors shall not be affected by the fact that the *AIFM* has delegated functions to a third party, or by any further sub-delegation, nor shall the *AIFM* delegate its functions to the extent that, in essence, it can no longer be considered to be the manager of the *Directive AIF* and to the extent that it becomes a letter-box entity.
- 14.10 Letter-box entity and *AIFM* no longer considered to be *managing a Directive AIF* (Article 82 Level 2 AIFMD Regulation)
  - 14.10.1 An *AIFM* shall be deemed a letter-box entity and shall no longer be considered to be the manager of the *Directive AIF* at least in any of the following situations:

Deleted: 1 September 2016

- 14.10.1.1 the *AIFM* no longer retains the necessary expertise and resources to supervise the delegated tasks effectively and manage the risks associated with the delegation;
  - 14.10.1.2 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;
  - 14.10.1.3 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;
  - 14.10.1.4 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, the *JFSC* shall assess the entire delegation structure taking into account not only the assets managed under delegation but also the following qualitative criteria;
    - › the types of assets the *Directive AIF* or the *AIFM* acting on behalf of the *Directive AIF* is invested in, and the importance of the assets managed under delegation for the risk and return profile of the *Directive AIF*;
    - › the importance of the assets under delegation for the achievement of the investment goals of the *Directive AIF*;
    - › the geographical and sectoral spread of the *Directive AIF*'s investments,
    - › the risk profile of the *Directive AIF*;
    - › the type of investment strategies pursued by the *Directive AIF* or the *AIFM* acting on behalf of the *Directive AIF*;
    - › the types of tasks delegated in relation to those retained; and
    - › 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*.
- 14.11 The third party may sub-delegate any of the functions delegated to it provided that the following conditions are met:
- 14.11.1 the *AIFM* consented prior to the sub-delegation;
  - 14.11.2 the *AIFM* notified the *JFSC* in writing before the sub-delegation arrangements become effective;
  - 14.11.3 the conditions set out in paragraph 14.1, on the understanding that all references to the 'delegate' are read as references to the 'sub-delegate'.
- 14.12 Consent and notification of sub-delegation (Article 81 *Level 2 AIFMD Regulation*)
- 14.12.1 A sub delegation shall become effective where the *AIFM* demonstrates its consent to it in writing.

- 14.12.2 A general consent given in advance by the *AIFM* shall not be deemed consent in accordance with paragraph 14.11.1.
- 14.13 Consent and notification of sub-delegation (Article 81 *Level 2 AIFMD Regulation*)
- 14.13.1 Pursuant to paragraph 14.11.2, the notification shall contain details of the delegate, the name of the competent authority where the sub-delegate is authorised or registered, the delegated functions, the *Directive AIFs* affected by the sub-delegation, a copy of the written consent by the *AIFM* and the intended effective date of the sub-delegation.
- 14.14 No sub-delegation of portfolio management or risk management shall be conferred on:
- 14.14.1 the depositary or a delegate of the depositary; or
- 14.14.2 any other entity whose interests may conflict with those of the *AIFM* or the investors of the *Directive AIF*, unless such entity has functionally and hierarchically separated the performance of its portfolio management or risk management tasks from its other potentially conflicting tasks, and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the *Directive AIF*.
- 14.15 The relevant delegate shall review the services provided by each sub-delegate on an ongoing basis.
- 14.16 Where the sub-delegate further delegates any of the functions delegated to it, the conditions set out in paragraph 14.11 shall apply *mutatis mutandis*.

## 15 Depositary (Article 21 of the Level 1 AIFM Directive)<sup>15</sup>

- 15.1 For each *Directive AIF* it manages, an *EU AIFM* has to ensure that a single depositary is appointed in accordance with: (i) Article 21 of the Level 1 *AIFM Directive*; and/or (ii) one or more entities are appointed to carry out the duties referred to in paragraphs 15.7 to 15.22 in accordance with Article 36 of the Level 1 *AIFM Directive*. The additional requirements of a *Member State* may also require a depositary to be appointed in accordance with the requirements of Articles 21 and/or 36 of the Level 1 *AIFM Directive*.

Subject to any guidance provided pursuant to Article 84 of *Level 2 AIFMD Regulation*, in respect of the appointment of a depositary, the depositary may be a:

- 15.1.1 registered person authorised for class ZG (trustee), class ZH (custodian) or class ZI (depositary) *FS(J)L* fund services business;
- 15.1.2 holder of a permit for the functions of trustee, custodian or depositary granted under Article 7 of the *CIF Law*; or
- 15.1.3 depositary approved under the *AIF Order*.  
(paragraphs 15.1.1 to 15.1.3 each a **Jersey Depositary**).

A *Jersey Depositary* appointed in accordance with Articles 21 and/or 36 of the Level 1 *AIFM Directive* shall notify the *JFSC* of such appointment(s).

<sup>15</sup> Recitals 32, 34 to 35 and 37 to 46 of the Level 1 *AIFM Directive*.  
Section 3.2.11 of the *Explanatory Memorandum* and Recitals 84, 94, 97 to 122 and 124 of *Level 2 AIFMD Regulation*.

- 15.2 The appointment of the depositary shall be evidenced by written contract. The contract shall, *inter alia*, regulate the flow of information deemed necessary to allow the depositary to perform its functions for the *Directive AIF* for which it has been appointed as depositary as set out in the *Code*.
- 15.3 Contractual particulars (Article 83 *Level 2 AIFMD Regulation*)
- 15.3.1 A contract by which the depositary is appointed in accordance with paragraph 15.2 shall be drawn up between the depositary on the one hand and the *Directive AIFM* and, as the case may be, or the *Directive AIF* on the other hand and shall include at least the following elements:
- 15.3.1.1 a description of the services to be provided by the depositary and the procedures to be adopted for each type of asset in which the *Directive AIF* may invest and which shall then be entrusted to the depositary;
  - 15.3.1.2 a description of the way in which the safe-keeping and oversight function is to be performed depending on the types of assets and the geographical regions in which the *Directive AIF* plans to invest. With respect to the custody duties this description shall include country lists and procedures for adding and, as the case may be, or withdrawing countries from that list. This shall be consistent with the information provided in the AIF rules, instruments constituting the *Directive AIF* and offering documents regarding the assets in which the *Directive AIF* may invest;
  - 15.3.1.3 a statement that the depositary's liability shall not be affected by any delegation of its custody functions unless it has discharged itself of its liability in accordance with paragraphs 15.30 and 15.31;
  - 15.3.1.4 the period of validity and the conditions for amendment and termination of the contract including the situations which could lead to the termination of the contract and details regarding the termination procedure and, if applicable, the procedures by which the depositary should send all relevant information to its successor;
  - 15.3.1.5 the confidentiality obligations applicable to the parties in accordance with relevant laws and regulations. These obligations shall not impair the ability of the *JFSC* to have access to the relevant documents and information;
  - 15.3.1.6 the means and procedures by which the depositary transmits to the *Directive AIFM* or the *Directive AIF* all relevant information that it needs to perform its duties including the exercise of any rights attached to assets, and in order to allow the *Directive AIFM* and the *Directive AIF* to have a timely and accurate overview of the accounts of the *Directive AIF*;
  - 15.3.1.7 the means and procedures by which the *Directive AIFM* or the *Directive AIF* transmits all relevant information or ensures the depositary has access to all the information it needs to fulfil its duties, including the procedures ensuring that the depositary will receive information from other parties appointed by the *Directive AIF* or the *Directive AIFM*;

- 15.3.1.8 information on whether or not the depositary, or a third party to whom safe-keeping functions are delegated in accordance with paragraph 15.24 may re-use the assets it has been entrusted with and, if any, the conditions attached to any such re-use;
- 15.3.1.9 the procedures to be followed when an amendment to the AIF rules, instruments constituting the *Directive AIF* or offering documents is being considered, detailing the situations in which the depositary is to be informed, or where the prior agreement of the depositary is needed to proceed with the amendment;
- 15.3.1.10 all necessary information that needs to be exchanged between the *Directive AIF*, the *Directive AIFM*, a third party acting on behalf of the *Directive AIF* or the *Directive AIFM*, on the one hand, and the depositary, on the other hand, related to the sale, subscription, redemption, issue, cancellation and re-purchase of units or shares of the *Directive AIF*;
- 15.3.1.11 all necessary information that needs to be exchanged between the *Directive AIF*, the *Directive AIFM*, a third party acting on behalf of the *Directive AIF* or the *Directive AIFM* and the depositary related to the performance of the depositary's oversight and control function;
- 15.3.1.12 where the parties to the contract envisage appointing third parties to carry out parts of their respective duties, a commitment to provide, on a regular basis, details of any third party appointed and, upon request, information on the criteria used to select the third party and the steps envisaged to monitor the activities carried out by the selected third party;
- 15.3.1.13 information on the tasks and responsibilities of the parties to the contract in respect of obligations relating to the prevention of money laundering and the financing of terrorism;
- 15.3.1.14 information on all cash accounts opened in the name of the *Directive AIF* or in the name of the *Directive AIFM* acting on behalf of the *Directive AIF* and the procedures ensuring that the depositary will be informed when any new account is opened in the name of the *Directive AIF* or in the name of the *Directive AIFM* acting on behalf of the *Directive AIF*;
- 15.3.1.15 details regarding the depositary's escalation procedures, including the identification of the persons to be contacted within the *Directive AIF* and, as the case may be, or the *Directive AIFM* by the depositary when it launches such a procedure;
- 15.3.1.16 a commitment by the depositary to notify the *Directive AIFM* when it becomes aware that the segregation of assets is not, or is no longer sufficient to ensure protection from insolvency of a third party, to whom safe-keeping functions are delegated in accordance with paragraph 15.24 in a specific jurisdiction;
- 15.3.1.17 the procedures ensuring that the depositary, in respect of its duties, has the ability to enquire into the conduct of the *Directive AIFM* and, as the case may be, or the *Directive AIF* and to assess the quality of information transmitted including by way of having access to the

books of the *Directive AIF* and, as the case may be, or *Directive AIFM* or by way of on-site visits;

15.3.1.18 the procedures ensuring that the *Directive AIFM* and, as the case may be, or the *Directive AIF* can review the performance of the depositary in respect of the depositary's contractual obligations.

15.3.2 The details of the means and procedures set out in paragraphs 15.3.1.1 to 15.3.1.18 shall be described in the contract appointing the depositary or any subsequent amendment to the contract.

15.3.3 The contract appointing the depositary or the subsequent amendment to the contract referred to in paragraph 15.3.2 shall be done in writing.

15.3.4 The parties may agree to transmit all or part of the information that flows between them electronically provided that proper recording of such information is ensured.

15.3.5 Unless otherwise provided by applicable law, there shall be no obligation to enter into a specific written agreement for each *Directive AIF*; it shall be possible for the *Directive AIFM* and the depositary to enter into a framework agreement listing the *Directive AIFs* managed by that *Directive AIFM* to which the agreement applies.

15.3.6 The law applicable to the contract appointing the depositary and any subsequent agreement shall be specified.

15.4 A *Jersey Depositary* shall comply with the applicable requirements of this paragraph 15 and paragraph 26.

15.4.1 With specific reference to Recital 34 of the Level 1 *AIFM Directive*, a *Jersey Depositary* in relation to *Directive 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, in accordance with paragraph 15.11.1.1 or generally invest in issuers of non-listed companies in order to potentially acquire control over such companies in accordance with Section 4, shall perform effectively the relevant depositary functions and meet the commitments inherent in those functions.

15.5 In order to avoid conflicts of interest between the depositary, the *AIFM* and/or the *Directive AIF* and/or its investors:

15.5.1 an *AIFM* shall not act as depositary;

15.5.2 a prime broker acting as counterparty to a *Directive AIF* shall not act as depositary for that *Directive AIF* unless it has functionally and hierarchically separated the performance of its depositary functions from its tasks as prime broker and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the *Directive AIF*. Delegation by the depositary to such prime broker of its custody tasks in accordance with paragraph 15.24 is allowed if the relevant conditions are met.

15.6 Without prejudice to the requirements set out in paragraph 15.4.1, the appointment of a depositary shall, at all times, be subject to the following condition:

15.6.1 the depositary shall by contract be liable to the *Directive AIF* or to the investors of the *Directive AIF*, consistently with paragraphs 15.27 and 15.30, and shall expressly agree to comply with paragraph 15.24.

- 15.7 The depositary shall in general ensure that the *Directive AIF's* cash flows are properly monitored, and shall in particular ensure that all payments made by or on behalf of investors upon the subscription of units or shares of a *Directive AIF* have been received and that all cash of the *Directive AIF* has been booked in cash accounts opened in the name of the *Directive AIF* or in the name of the *Directive AIFM* acting on behalf of the *Directive AIF* or in the name of the depositary acting on behalf of the *Directive AIF* at an entity referred to in points (a), (b) and (c) of Article 18(1) of Directive 2006/73/EC, or another entity of the same nature in the relevant market where cash accounts are required provided that such entity is subject to effective prudential regulation and supervision which have the same effect as *Union* law and are effectively enforced and in accordance with the principles set out in Article 16 of Directive 2006/73/EC. Where the cash accounts are opened in the name of the depositary acting on behalf of the *Directive AIF*, no cash of the entity referred to in this paragraph and none of the depositary's own cash shall be booked on such accounts.
- 15.8 Cash monitoring - general requirements (Article 85 of *Level 2 AIFMD Regulation*)
- 15.8.1 Where a cash account is maintained or opened at an entity referred to in paragraph 15.7 in the name of the *Directive AIF*, in the name of the *AIFM* acting on behalf of the *Directive AIF* or in the name of the depositary acting on behalf of the *Directive AIF*, an *AIFM* shall ensure that the depositary is provided, upon commencement of its duties and on an on-going basis, with all relevant information it needs to comply with its obligations.
- 15.8.2 In order to have access to all information regarding the *Directive AIF's* cash accounts and have a clear overview of all the *Directive AIF's* cash flows, a depositary shall at least:
- 15.8.2.1 be informed, upon its appointment, of all existing cash accounts opened in the name of the *Directive AIF*, or in the name of the *Directive AIFM* acting on behalf of the *Directive AIF*;
- 15.8.2.2 be informed at the opening of any new cash account by the *Directive AIF* or by the *Directive AIFM* acting on behalf of the *Directive AIF*;
- 15.8.2.3 be provided with all information related to the cash accounts opened at a third party entity, directly by those third parties.
- 15.9 Monitoring of the *Directive AIF's* cash flows (Article 86 of *Level 2 AIFMD Regulation*)
- 15.9.1 A depositary shall ensure effective and proper monitoring of the *Directive AIF's* cash flows and in particular it shall at least:
- 15.9.1.1 ensure that all cash of the *Directive AIF* is booked in accounts opened with entities referred to in points (a), (b) and (c) of Article 18(1) of Directive 2006/73/EC or another entity of the same nature, or a regulated bank which is registered by the *JFSC* for deposit taking business in Jersey in the relevant markets where cash accounts are required for the purposes of the *Directive AIF's* operations and which are subject to prudential regulation and supervision that has the same effect as *Union* law, is effectively enforced and is in accordance with the principles laid down in Article 16 of Directive 2006/73/EC;
- 15.9.1.2 implement effective and proper procedures to reconcile all cash flow movements and perform such reconciliations on a daily basis or, in case of infrequent cash movements, when such cash flow movements occur;

- 15.9.1.3 implement appropriate procedures to identify at the close of business day significant cash flows and in particular those which could be inconsistent with the *Directive AIF's* operations;
- 15.9.1.4 review periodically the adequacy of those procedures including through a full review of the reconciliation process at least once a year and ensuring that the cash accounts opened in the name of the *Directive AIF*, in the name of the *Directive AIFM* acting on behalf of the *Directive AIF* or in the name of the depositary acting on behalf of the *Directive AIF* are included in the reconciliation process;
- 15.9.1.5 monitor on an on-going basis the outcomes of the reconciliations and actions taken as a result of any discrepancies identified by the reconciliation procedures and notify the *Directive AIFM* if an irregularity has not been rectified without undue delay and also the *JFSC* if the situation cannot be clarified and, as the case may be, or corrected;
- 15.9.1.6 check the consistency of its own records of cash positions with those of the *Directive AIFM*. The *AIFM* shall ensure that all instructions and information related to a cash account opened with a third party are sent to the depositary, so that the depositary is able to perform its own reconciliation procedure.

#### 15.10 Duties regarding subscriptions (Article 87 of *Level 2 AIFMD Regulation*)

- 15.10.1 An *AIFM* shall ensure that the depositary is provided with information about payments made by or on behalf of investors upon the subscription of units or shares of a *Directive AIF* at the close of each business day when the *AIFM*, the *Directive AIF* or a party acting on behalf of it, such as a transfer agent receives such payments or an order from the investor. The *AIFM* shall ensure that the depositary receives all other relevant information it needs to make sure that the payments are then booked in cash accounts opened in the name of the *Directive AIF* or in the name of the *Directive AIFM* acting on behalf of the *Directive AIF* or in the name of the depositary in accordance with the provisions of paragraph 15.7.

#### 15.11 The assets of the *Directive AIF* or the *Directive AIFM* acting on behalf of the *Directive AIF* shall be entrusted to the depositary for safekeeping, as follows:

- 15.11.1 for financial instruments that can be held in custody:
  - 15.11.1.1 the depositary shall hold in custody all financial instruments that can be registered in a financial instruments account opened in the depositary's books and all financial instruments that can be physically delivered to the depositary;
  - 15.11.1.2 for that purpose, the depositary shall ensure that all those financial instruments that can be registered in a financial instruments account opened in the depositary's books are registered in the depositary's books within segregated accounts in accordance with the principles set out in Article 16 of Directive 2006/73/EC, opened in the name of the *Directive AIF* or the *Directive AIFM* acting on behalf of the *Directive AIF*, so that they can be clearly identified as belonging to the *Directive AIF* in accordance with the applicable law at all times;

15.11.2 for other assets:

- 15.11.2.1 the depositary shall verify the ownership of the *Directive AIF* or the *Directive AIFM* acting on behalf of the *Directive AIF* of such assets and shall maintain a record of those assets for which it is satisfied that the *Directive AIF* or the *Directive AIFM* acting on behalf of the *Directive AIF* holds the ownership of such assets;
- 15.11.2.2 the assessment whether the *Directive AIF* or the *Directive AIFM* acting on behalf of the *Directive AIF* holds the ownership shall be based on information or documents provided by the *Directive AIF* or the *Directive AIFM* and, where available, on external evidence;
- 15.11.2.3 the depositary shall keep its records up to date.

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15.12 Financial instruments to be held in custody (Article 88 of *Level 2 AIFMD Regulation*)

- 15.12.1 Financial instruments belonging to the *Directive AIF* or to the *Directive AIFM* acting on behalf of the *Directive AIF* which are not able to be physically delivered to the depositary shall be included in the scope of the custody duties of the depositary where all of the following requirements are met:
  - 15.12.1.1 they are transferable securities including those which embed derivatives as referred to in the last sub-paragraph of Article 51(3) of Directive 2009/65/EC and Article 10 of Directive 2007/16/EC, money market instruments or units of collective investment undertakings.
  - 15.12.1.2 they are capable of being registered or held in an account directly or indirectly in the name of the depositary.
- 15.12.2 Financial instruments which are registered directly in the name of the *Directive AIF* with the issuer itself or its agent, such as a registrar or a transfer agent, shall not be held in custody.
- 15.12.3 Financial instruments belonging to the *Directive AIF* or the *Directive AIFM* acting on behalf of the *Directive AIF* which are able to be physically delivered to the depositary shall always be included in the scope of the custody duties of the depositary.

15.13 Safekeeping duties with regard to assets held in custody (Article 89 of *Level 2 AIFMD Regulation*)

- 15.13.1 In order to comply with the obligations set out under paragraph 15.11.1 with respect to financial instruments to be held in custody, a depositary shall ensure at least that:
  - 15.13.1.1 the financial instruments are properly registered in accordance with paragraph 15.11.1.2;
  - 15.13.1.2 records and segregated accounts are maintained in a way that ensures their accuracy, and in particular record the correspondence with the financial instruments and cash held for *Directive AIFs*;
  - 15.13.1.3 reconciliations are conducted on a regular basis between the depositary's internal accounts and records and those of any third party to whom custody functions are delegated in accordance with paragraph 15.24;
  - 15.13.1.4 due care is exercised in relation to the financial instruments held in custody in order to ensure a high standard of investor protection;

Deleted: 1 September 2016

- 15.13.1.5 all relevant custody risks throughout the custody chain are assessed and monitored and the *Directive AIFM* is informed of any material risk identified;
  - 15.13.1.6 adequate organisational arrangements are introduced to minimise the risk of loss or diminution of the financial instruments, or of rights in connection with those financial instruments as a result of fraud, poor administration, inadequate registering or negligence;
  - 15.13.1.7 the *Directive AIF's* ownership right or the ownership right of the *Directive AIFM* acting on behalf of the *Directive AIF* over the assets is verified.
- 15.13.2 Where a depositary has delegated its custody functions to a third party in accordance with paragraph 15.24, it shall remain subject to the requirements of paragraphs 15.13.1.2 to 15.13.1.5. It shall also ensure that the third party complies with the requirements of paragraphs 15.13.1.2 to 15.13.1.7 and the segregation obligations laid down in paragraph 15.26.
- 15.13.3 A depositary's safe-keeping duties as referred to in paragraphs 15.13.1 and 15.13.2 shall apply on a look-through basis to underlying assets held by financial and, as the case may be, or legal structures controlled directly or indirectly by the *Directive AIF* or the *Directive AIFM* acting on behalf of the *Directive AIF*.
- The requirement referred to in paragraph 15.13.3 shall not apply to fund of funds structures or master-feeder structures where the underlying funds have a depositary which keeps in custody the assets of these funds.
- 15.14 Safekeeping duties regarding ownership verification and record keeping (Article 90 of *Level 2 AIFMD Regulation*)
- 15.14.1 An *AIFM* shall provide the depositary, upon commencement of its duties and on an ongoing basis, with all relevant information the depositary needs in order to comply with its obligations pursuant to paragraph 15.11.2, and ensure that the depositary is provided with all relevant information by third parties.
- 15.14.2 In order to comply with the obligations referred to in paragraph 15.11.2, a depositary shall at least:
- 15.14.2.1 have access without undue delay to all relevant information it needs in order to perform its ownership verification and record-keeping duties, including relevant information to be provided to the depositary by third parties;
  - 15.14.2.2 possess sufficient and reliable information for it to be satisfied of the *Directive AIF's* ownership right or of the ownership right of the *Directive AIFM* acting on behalf of the *Directive AIF* over the assets;
  - 15.14.2.3 maintain a record of those assets for which it is satisfied that the *Directive AIF* or the *Directive AIFM* acting on behalf of the *Directive AIF* holds the ownership. In order to comply with this obligation, the depositary shall:
    - › register in its record, in the name of the *Directive AIF*, assets, including their respective notional amounts, for which it is satisfied that the *Directive AIF* or the *Directive AIFM* acting on behalf of the *Directive AIF* holds the ownership;

- › be able to provide at any time a comprehensive and up-to-date inventory of the *Directive AIF's* assets, including their respective notional amounts.

For the purpose of the second bullet point of paragraph 15.14.2.3, the depositary shall ensure that there are procedures in place so that registered assets cannot be assigned, transferred, exchanged or delivered without the depositary or its delegate having been informed of such transactions and the depositary shall have access without undue delay to documentary evidence of each transaction and position from the relevant third party. The *AIFM* shall ensure that the relevant third party provides the depositary without undue delay with certificates or other documentary evidence every time there is a sale or acquisition of assets or a corporate action resulting in the issue of financial instruments and at least once a year.

15.14.3 In any event, a depositary shall ensure that the *Directive AIFM* has and implements appropriate procedures to verify that the assets acquired by the *Directive AIF* it *manages* are appropriately registered in the name of the *Directive AIF* or in the name of the *Directive AIFM* acting on behalf of the *Directive AIF*, and to check the consistency between the positions in the *Directive AIFM's* records and the assets for which the depositary is satisfied that the *Directive AIF* or the *Directive AIFM* acting on behalf of the *Directive AIF* holds the ownership. The *AIFM* shall ensure that all instructions and relevant information related to the *Directive AIF's* assets are sent to the depositary, so that the depositary is able to perform its own verification or reconciliation procedure.

15.14.4 A depositary shall set up and implement an escalation procedure for situations where an anomaly is detected including written notification of the *Directive AIFM* and of the *JFSC* if the situation cannot be clarified and, as the case may be, or corrected.

15.14.5 A depositary's safe-keeping duties referred to in paragraphs 15.14.1 to 15.14.4 shall apply on a look-through basis to underlying assets held by financial and, as the case may be, or legal structures established by the *Directive AIF* or by the *Directive AIFM* acting on behalf of the *Directive AIF* for the purposes of investing in the underlying assets and which are controlled directly or indirectly by the *Directive AIF* or by the *Directive AIFM* acting on behalf of the *Directive AIF*.

The requirement referred to in paragraph 15.14.5 shall not apply to fund of funds structures and master-feeder structures where the underlying funds have a depositary which provides ownership verification and record-keeping functions for this fund's assets.

## 15.15 Reporting obligations for prime brokers (Article 91 of *Level 2 AIFMD Regulation*)

15.15.1 Where a prime broker has been appointed, the *AIFM* shall ensure that from the date of that appointment an agreement is in place pursuant to which the prime broker is required to make available to the depositary in particular a statement in a durable medium which contains the following information:

- 15.15.1.1 the values of the items listed in paragraph 15.15.3 at the close of each business day;
- 15.15.1.2 details of any other matters necessary to ensure that the depositary of the *Directive AIF* has up-to-date and accurate information about the

Deleted: 1 September 2016

value of assets the safekeeping of which has been delegated in accordance with paragraph 15.24.

- 15.15.2 The statement referred to in paragraph 15.15.1 shall be made available to the depositary of the *Directive AIF* no later than the close of the next business day to which it relates.
- 15.15.3 The items referred to in paragraph 15.15.1.1 shall include:
- 15.15.3.1 the total value of assets held by the prime broker for the *Directive AIF*, where safe-keeping functions are delegated in accordance with paragraph 15.24; and
  - 15.15.3.2 the value of each of the following:
    - › cash loans made to the *Directive AIF* and accrued interest;
    - › securities to be redelivered by the *Directive AIF* under open short positions entered into on behalf of the *Directive AIF*;
    - › current settlement amounts to be paid by the *Directive AIF* under any futures contracts;
    - › short sale cash proceeds held by the prime broker in respect of short positions entered into on behalf of the *Directive AIF*;
    - › cash margins held by the prime broker in respect of open futures contracts entered into on behalf of the *Directive AIF*. This obligation is in addition to the obligations under 15.10 and 15.12;
    - › mark-to-market close-out exposures of any OTC transaction entered into on behalf of the *Directive AIF*;
    - › total secured obligations of the *Directive AIF* against the prime broker; and
    - › all other assets relating to the *Directive AIF*;
  - 15.15.3.3 the value of other assets referred to in paragraph 15.11.2 held as collateral by the prime broker in respect of secured transactions entered into under a prime brokerage agreement;
  - 15.15.3.4 the value of the assets where the prime broker has exercised a right of use in respect of the *Directive AIF's* assets;
  - 15.15.3.5 a list of all the institutions at which the prime broker holds or may hold cash of the *Directive AIF* in an account opened in the name of the AIF or in the name of the *Directive AIFM* acting on behalf of the *Directive AIF* in accordance with paragraph 15.7.
- 15.16 In addition to the tasks referred to in paragraphs 15.7 and 15.11, the depositary shall:
- 15.16.1 ensure that the sale, issue, re-purchase, redemption and cancellation of units or shares of the *Directive AIF* are carried out in accordance with the applicable law and the AIF rules or instruments constituting the *Directive AIF*;
  - 15.16.2 ensure that the value of the units or shares of the *Directive AIF* is calculated in accordance with the applicable law, the AIF rules or instruments constituting the *Directive AIF* and the procedures laid down in paragraph 13;
  - 15.16.3 carry out the instructions of the *Directive AIFM*, unless they conflict with the applicable law or the AIF rules or instruments constituting the *Directive AIF*;

- 15.16.4 ensure that in transactions involving the *Directive AIF*'s assets any consideration is remitted to the *Directive AIF* within the usual time limits;
- 15.16.5 ensure that a *Directive AIF*'s income is applied in accordance with the applicable law and the AIF rules or instruments constituting the *Directive AIF*.
- 15.17 Oversight duties - general requirements (Article 92 of *Level 2 AIFMD Regulation*)
  - 15.17.1 At the time of its appointment, the depositary shall assess the risks associated with the nature, scale and complexity of the *Directive AIF*'s strategy and the *Directive AIFM*'s organisation in order to devise oversight procedures which are appropriate to the *Directive AIF* and the assets in which it invests and which are then implemented and applied. Such procedures shall be regularly updated.
  - 15.17.2 In performing its oversight duties under paragraph 15.16, a depositary shall perform ex-post controls and verifications of processes and procedures that are under the responsibility of the *Directive AIFM*, the *Directive AIF* or an appointed third party. The depositary shall in all circumstances ensure that an appropriate verification and reconciliation procedure exists which is implemented and applied and frequently reviewed. The *AIFM* shall ensure that all instructions related to the *Directive AIF*'s assets and operations are sent to the depositary, so that the depositary is able to perform its own verification or reconciliation procedure.
  - 15.17.3 A depositary shall establish a clear and comprehensive escalation procedure to deal with situations where potential irregularities are detected in the course of its oversight duties, the details of which shall be made available to the *JFSC* upon request.
  - 15.17.4 An *AIFM* shall provide the depositary, upon commencement of its duties and on an on-going basis, with all relevant information it needs in order to comply with its obligations pursuant to paragraph 15.16 including information to be provided to the depositary by third parties. The *AIFM* shall particularly ensure that the depositary is able to have access to the books and perform on-site visits on premises of the *AIFM* and of those of any service provider appointed by the *Directive AIF* or the *AIFM*, such as administrators or external valuers and, as the case may be, or to review reports and statements of recognised external certifications by qualified independent auditors or other experts in order to ensure the adequacy and relevance of the procedures in place.
- 15.18 Duties regarding subscription and redemptions (Article 93 of *Level 2 AIFMD Regulation*)
  - 15.18.1 In order to comply with paragraph 15.16.1 the depositary shall meet the following requirements:
    - 15.18.1.1 The depositary shall ensure that the *Directive AIF*, the *Directive AIFM* or the designated entity establishes, implements and applies an appropriate and consistent procedure to:
      - › reconcile the subscription orders with the subscription proceeds, and the number of units or shares issued with the subscription proceeds received by the *Directive AIF*;
      - › reconcile the redemption orders with the redemptions paid, and the number of units or shares cancelled with the redemptions paid by the *Directive AIF*;
      - › verify on a regular basis that the reconciliation procedure is appropriate.

- › For the purpose of the preceding three bullet points, the depositary shall in particular regularly check the consistency between the total number of units or shares in the *Directive AIF's* accounts and the total number of outstanding shares or units that appear in the *Directive AIF's* register.
- 15.18.2 A depositary shall ensure and regularly check that the procedures regarding the sale, issue, repurchase, redemption and cancellation of shares or units of the *Directive AIF* comply with the applicable law and with the AIF rules or instruments constituting the *Directive AIF* and verify that these procedures are effectively implemented.
- 15.18.3 The frequency of the depositary's checks shall be consistent with the frequency of subscriptions and redemptions.
- 15.19 Duties regarding the valuation of shares/units (Article 94 of *Level 2 AIFMD Regulation*)
  - 15.19.1 In order to comply with paragraph 15.16.2 the depositary shall:
    - 15.19.1.1 verify on an on-going basis that appropriate and consistent procedures are established and applied for the valuation of the assets of the *Directive AIF* in compliance with paragraph 13 and its implementing measures and with the AIF rules and instruments constituting the *Directive AIF*; and
    - 15.19.1.2 ensure that the valuation policies and procedures are effectively implemented and periodically reviewed.
  - 15.19.2 A depositary's procedures shall be conducted at a frequency consistent with the frequency of the *Directive AIF's* valuation policy as defined in paragraph 13 and its implementing measures.
  - 15.19.3 Where a depositary considers that the calculation of the value of the shares or units of the *Directive AIF* has not been performed in compliance with applicable law or the AIF rules or with paragraph 13, it shall notify the *Directive AIFM* and, as the case may be, or the *Directive AIF* and ensure that timely remedial action is taken in the best interest of the investors in the *Directive AIF*.
  - 15.19.4 Where an external valuer has been appointed, a depositary shall check that the external valuer's appointment is in accordance with paragraph 13.
- 15.20 Duties regarding the carrying out of the *Directive AIFM's* instructions (Article 95 of *Level 2 AIFMD Regulation*)
  - 15.20.1 In order to comply with paragraph 15.16.3 the depositary shall at least:
    - 15.20.1.1 set up and implement appropriate procedures to verify that the *Directive AIF* and *Directive AIFM* comply with applicable laws and regulations and with the *Directive AIF's* rules and instruments constituting the *Directive AIF*. In particular, the depositary shall monitor the *Directive AIF's* compliance with investment restrictions and leverage limits set in the *Directive AIF's* offering documents. Those procedures shall be proportionate to the nature, scale and complexity of the *Directive AIF*;
    - 15.20.1.2 set up and implement an escalation procedure where the *Directive AIF* has breached one of the limits or restrictions referred to in paragraph 15.20.1.1.

- 15.21 Duties regarding the timely settlement of transactions (Article 96 of *Level 2 AIFMD Regulation*)
- 15.21.1 In order to comply with paragraph 15.16.4 the depositary shall set up a procedure to detect any situation where a consideration related to the operations involving the assets of the *Directive AIF* or of the *Directive AIFM* acting on behalf of the *Directive AIF* is not remitted to the *Directive AIF* within the usual time limits, notify the *Directive AIFM* and, where the situation has not been remedied, request the restitution of the financial instruments from the counterparty where possible.
- 15.21.2 Where transactions do not take place on a regulated market, the usual time limits shall be assessed with regard to the conditions attached to the transactions (OTC derivative contracts or investments in real estate assets or in privately held companies).
- 15.22 Duties related to the *Directive AIF's* income distribution (Article 97 of *Level 2 AIFMD Regulation*)
- 15.22.1 In order to comply with paragraph 15.16.5, the depositary shall:
- 15.22.1.1 ensure that the net income calculation, once declared by the *Directive AIFM*, is applied in accordance with the *Directive AIF* rules, instruments constituting the *Directive AIF* and applicable national law;
- 15.22.1.2 ensure that appropriate measures are taken where the *Directive AIF's* auditors have expressed reserves on the annual financial statements. The *Directive AIF* or the *AIFM* acting on behalf of the *Directive AIF* shall provide the depositary with all information on reserves expressed on the financial statements; and
- 15.22.1.3 check the completeness and accuracy of dividend payments, once they are declared by the *Directive AIFM*, and, where relevant, of the carried interest.
- 15.22.2 Where a depositary considers that the income calculation has not been performed in compliance with applicable law or with the AIF rules or instruments constituting the *Directive AIF*, it shall notify the *Directive AIFM* and, as the case may be, or the *Directive AIF* and ensure that timely remedial action has been taken in the best interest of the AIF's investors.
- 15.23 In the context of their respective roles, the *AIFM* and the depositary shall act honestly, fairly, professionally, independently and in the interest of the *Directive AIF* and the investors of the *Directive AIF*.
- A depositary shall not carry out activities with regard to the *Directive AIF* or the *Directive AIFM* on behalf of the *Directive AIF* that may create conflicts of interest between the *Directive AIF*, the investors in the *Directive AIF*, the *Directive AIFM* and itself, unless the depositary has functionally and hierarchically separated the performance of its depositary tasks from its other potentially conflicting tasks, and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the *Directive AIF*.
- The assets referred to in paragraph 15.11 shall not be reused by the depositary without the prior consent of the *Directive AIF* or the *Directive AIFM* acting on behalf of the *Directive AIF*.
- 15.24 The depositary shall not delegate to third parties its functions as described in this paragraph, save for those referred to in paragraph 15.11. In this regard, please note the guidance under Recital 42 of *Leve1 1 AIFM Directive*.

The depositary may delegate to third parties the functions referred to in paragraph 15.11 subject to the following conditions:

- 15.24.1 the tasks are not delegated with the intention of avoiding the requirements of the *Code*;
- 15.24.2 the depositary can demonstrate that there is an objective reason for the delegation;
- 15.24.3 the depositary has exercised all due skill, care and diligence in the selection and the appointment of any third party to whom it wants to delegate parts of its tasks, and keeps exercising all due skill, care and diligence in the periodic review and ongoing monitoring of any third party to whom it has delegated parts of its tasks and of the arrangements of the third party in respect of the matters delegated to it; and
- 15.24.4 the depositary ensures that the third party meets the following conditions at all times during the performance of the tasks delegated to it:
  - 15.24.4.1 the third party has the structures and the expertise that are adequate and proportionate to the nature and complexity of the assets of the *Directive AIF* or the *Directive AIFM* acting on behalf of the *Directive AIF* which have been entrusted to it;
  - 15.24.4.2 for custody tasks referred to in paragraph 15.11.1, the third party is subject to effective prudential regulation, including minimum capital requirements, and supervision in the jurisdiction concerned and the third party is subject to an external periodic audit to ensure that the financial instruments are in its possession;
  - 15.24.4.3 the third party segregates the assets of the depositary's clients from its own assets and from the assets of the depositary in such a way that they can at any time be clearly identified as belonging to clients of a particular depositary;
  - 15.24.4.4 the third party does not make use of the assets without the prior consent of the *Directive AIF* or the *Directive AIFM* acting on behalf of the *Directive AIF* and prior notification to the depositary; and
  - 15.24.4.5 the third party complies with the general obligations and prohibitions set out in paragraphs 15.11 and 15.23.
- 15.24.5 Notwithstanding paragraph 15.24.4.2, where the law of a third country requires that certain financial instruments be held in custody by a local entity and no local entities satisfy the delegation requirements laid down in that point, the depositary may delegate its functions to such a local entity only to the extent required by the law of the third country and only for as long as there are no local entities that satisfy the delegation requirements, subject to the following requirements:
  - 15.24.5.1 the investors of the relevant *Directive AIF* must be duly informed that such delegation is required due to legal constraints in the law of the third country and of the circumstances justifying the delegation, prior to their investment; and
  - 15.24.5.2 the *Directive AIF*, or the *Directive AIFM* on behalf of the *Directive AIF*, must instruct the depositary to delegate the custody of such financial instruments to such local entity.

The third party may, in turn, sub-delegate those functions, subject to the same requirements. In such case, paragraph 15.30 shall apply *mutatis mutandis* to the relevant parties.

For the purposes of this paragraph, the provision of services as specified by Directive 98/26/EC by securities settlement systems as designated for the purposes of that Directive or the provision of similar services by third-country securities settlement systems shall not be considered a delegation of its custody functions.

15.25 Due diligence (Article 98 of *Level 2 AIFMD Regulation*)

- 15.25.1 In order to fulfil the obligations set out under paragraph 15.24.3, a depositary shall implement and apply an appropriate documented due diligence procedure for the selection and on-going monitoring of the delegate. That procedure shall be reviewed regularly, at least once a year, and made available upon request to the JFSC.
- 15.25.2 When selecting and appointing a third party, to whom safekeeping functions are delegated in accordance with paragraph 15.24, a depositary shall exercise all due skill, care and diligence to ensure that entrusting financial instruments to this third party provides an adequate standard of protection. It shall at least :
- 15.25.2.1 assess the regulatory and legal framework, including country risk custody risk and the enforceability of the third party's contracts. That assessment shall in particular enable the depositary to determine the potential implication of an insolvency of the third party for the assets and rights of the *Directive AIF*. If a depositary becomes aware that the segregation of assets is not sufficient to ensure protection from insolvency because of the law of the country where the third party is located, it shall immediately inform the *Directive AIFM*;
- 15.25.2.2 assess whether the third party's practice, procedures and internal controls are adequate to ensure that the financial instruments of the *Directive AIF* or of the *Directive AIFM* acting on behalf of the *Directive AIF* are subject to a high standard of care and protection;
- 15.25.2.3 assess whether the third party's financial strength and reputation are consistent with the tasks delegated. That assessment shall be based on information provided by the potential third party as well as other data and information, where available.
- 15.25.2.4 ensure that the third party has the operational and technological capabilities to perform the delegated custody tasks with a satisfactory degree of protection and security.
- 15.25.3 A depositary shall exercise all due skill, care and diligence in the periodic review and on-going monitoring to ensure that the third party continues to comply with the criteria provided for in paragraph 15.25.1 and the conditions set out in paragraph 15.24.4. To this end the depositary shall at least:
- 15.25.3.1 monitor the third party's performance and its compliance with the depositary's standards;
- 15.25.3.2 ensure that the third party exercises a high standard of care, prudence and diligence in the performance of its custody tasks and in particular that it effectively segregates the financial instruments in line with the requirements of paragraph 15.26;

- 15.25.3.3 review the custody risks associated with the decision to entrust the assets to the third party and without undue delay notify the *Directive AIF* or *Directive AIFM* of any change in those risks. That assessment shall be based on information provided by the third party and other data and information where available. During market turmoil or when a risk has been identified, the frequency and the scope of the review shall be increased. If the depositary becomes aware that the segregation of assets is no longer sufficient to ensure protection from insolvency because of the law of the country where the third party is located, it shall immediately inform the *Directive AIFM*.
- 15.25.4 Where the third party further delegates any of the functions delegated to it, the conditions and criteria set out in paragraphs 15.25.1, 15.25.2 and 15.25.3 shall apply mutatis mutandis.
- 15.25.5 A depositary shall monitor compliance with paragraph 15.5.
- 15.25.6 A depositary shall devise contingency plans for each market in which it appoints a third party in accordance with paragraph 15.24 to perform safekeeping duties. Such a contingency plan shall include the identification of an alternative provider, if any.
- 15.25.7 A depositary shall take measures, including termination of the contract, which are in the best interest of the *Directive AIF* and its investors where the delegate no longer complies with the requirements.
- 15.26 Segregation obligation (Article 99 of *Level 2 AIFMD Regulation*)
  - 15.26.1 Where safekeeping functions have been delegated wholly or partly to a third party, a depositary shall ensure that the third party, to whom safe-keeping functions are delegated pursuant to paragraph 15.24, acts in accordance with the segregation obligation laid down in paragraph 15.24.4.3 by verifying that the third party:
    - 15.26.1.1 keeps such records and accounts as are necessary to enable it at any time and without delay to distinguish assets of the depositary's *Directive AIF* clients from its own assets, assets of its other clients, assets held by the depositary for its own account and assets held for clients of the depositary which are not *Directive AIFs*;
    - 15.26.1.2 maintains records and accounts in a way that ensures their accuracy, and in particular their correspondence to the assets safe-kept for the depositary's clients;
    - 15.26.1.3 conducts, on a regular basis, reconciliations between its internal accounts and records and those of the third party to whom it has delegated safe-keeping functions in accordance with paragraph 15.24;
    - 15.26.1.4 introduces adequate organisational arrangements to minimise the risk of loss or diminution of financial instruments or of rights in connection with those financial instruments as a result of misuse of the financial instruments, fraud, poor administration, inadequate record-keeping or negligence;
    - 15.26.1.5 Where the third party is an entity referred to in points (a), (b) and (c) of Article 18(1) of Directive 2006/73/EC which is subject to effective prudential regulation and supervision that has the same effect as

Union law and is effectively enforced, the depositary shall take the necessary steps to ensure that the *Directive AIF*'s cash is held in an account or accounts in accordance with paragraph 15.7.

15.26.2 Where a depositary has delegated its custody functions to a third party in accordance with paragraph 15.24, the monitoring of the third party's compliance with its segregation obligations shall ensure that the financial instruments belonging to its clients are protected from any insolvency of that third party. If according to the applicable law, including in particular the law relating to property or insolvency, the requirements laid down in paragraph 15.26.1 are not sufficient to achieve that objective, the depositary shall assess what additional arrangements are to be made in order to minimise the risk of loss and maintain an adequate standard of protection.

15.26.3 Paragraphs 15.26.1 and 15.26.2 shall apply mutatis mutandis when the third party, to whom safe-keeping functions are delegated in accordance with paragraph 15.24, has decided to delegate all or part of its safe-keeping functions to another third party pursuant to paragraph 15.24.

15.27 The depositary shall be liable to the *Directive AIF* or to the investors of the *Directive AIF*, for the loss by the depositary or a third party to whom the custody of financial instruments held in custody in accordance with paragraph 15.11.1 has been delegated.

In the case of such a loss of a financial instrument held in custody, the depositary shall return a financial instrument of identical type or the corresponding amount to the *Directive AIF* or the *Directive AIFM* acting on behalf of the *Directive AIF* without undue delay. The depositary shall not be liable if it can prove that the loss has arisen as a result of an external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary.

The depositary shall also be liable to the *Directive AIF*, or to the investors of the *Directive AIF*, for all other losses suffered by them as a result of the depositary's negligent or intentional failure to properly fulfil its obligations pursuant to the *Code*.

15.28 Loss of a financial instrument held in custody (Article 100 of *Level 2 AIFMD Regulation*)

15.28.1 A loss of a financial instrument held in custody within the meaning of paragraph 15.27 shall be deemed to have taken place when, in relation to a financial instrument held in custody by the depositary or by a third party to whom the custody of financial instruments held in custody has been delegated, any of the following conditions is met:

15.28.1.1 a stated right of ownership of the *Directive AIF* is demonstrated not to be valid because it either ceased to exist or never existed;

15.28.1.2 the *Directive AIF* has been definitively deprived of its right of ownership over the financial instrument;

15.28.1.3 the *Directive AIF* is definitively unable to directly or indirectly dispose of the financial instrument.

15.28.2 The ascertainment by the *Directive AIFM* of the loss of a financial instrument shall follow a documented process readily available to the *JFSC*. Once a loss is ascertained, it shall be notified immediately to investors in a durable medium.

15.28.3 A financial instrument held in custody shall not be deemed to be lost within the meaning of paragraph 15.27 where a *Directive AIF* is definitively deprived of its

right of ownership in respect of a particular instrument, but this instrument is substituted by or converted into another financial instrument or instruments.

- 15.28.4 In the event of insolvency of the third party to whom the custody of financial instruments held in custody has been delegated, the loss of a financial instrument held in custody shall be ascertained by the *AIFM* as soon as one of the conditions listed in paragraph 15.28.1 is met with certainty.

There shall be certainty as to whether any of the conditions set out in paragraph 15.28.1 is fulfilled at the latest at the end of the insolvency proceedings. The *AIFM* and the depositary shall monitor closely the insolvency proceedings to determine whether all or some of the financial instruments entrusted to the third party to whom the custody of financial instruments has been delegated are effectively lost.

- 15.28.5 A loss of a financial instrument held in custody shall be ascertained irrespective of whether the conditions listed in paragraph 15.28.1 are the result of fraud, negligence or other intentional or non-intentional behaviour.

15.29 Liability discharge under paragraph 15.27 of the *Code* (Article 101 of *Level 2 AIFMD Regulation*)

- 15.29.1 A depositary's liability under paragraph 15.27 shall not be triggered provided the depositary can prove that all the following conditions are met:

15.29.1.1 the event which led to the loss is not the result of any act or omission of the depositary or of a third party to whom the custody of financial instruments held in custody in accordance with paragraph 15.11.1 has been delegated;

15.29.1.2 the depositary could not have reasonably prevented the occurrence of the event which led to the loss despite adopting all precautions incumbent on a diligent depositary as reflected in common industry practice;

15.29.1.3 despite rigorous and comprehensive due diligence, the depositary could not have prevented the loss.

This condition may be deemed to be fulfilled when the depositary has ensured that the depositary and the third party to whom the custody of financial instruments held in custody in accordance with paragraph 15.11.1 has been delegated have taken all of the following actions:

- › establishing, implementing, applying and maintaining structures and procedures and insuring expertise that are adequate and proportionate to the nature and complexity of the assets of the *Directive AIF* in order to identify in a timely manner and monitor on an ongoing basis external events which may result in loss of a financial instrument held in custody;
- › assessing on an ongoing basis whether any of the events identified under the first indent presents a significant risk of loss of a financial instrument held in custody;
- › informing the *Directive AIFM* of the significant risks identified and taking appropriate actions, if any, to prevent or mitigate the loss of financial instruments held in custody, where actual or potential external events have been identified which are believed to present a significant risk of loss of a financial instrument held in custody.

- 15.29.2 The requirements referred to in paragraphs 15.29.1.1 and 15.29.1.2 may be deemed to be fulfilled in the following circumstances:
- 15.29.2.1 natural events beyond human control or influence;
  - 15.29.2.2 the adoption of any law, decree, regulation, decision or order by any government or governmental body, including any court or tribunal, which impacts the financial instruments held in custody;
  - 15.29.2.3 war, riots or other major upheavals
- 15.29.3 The requirements referred to in paragraphs 15.29.1.1 and 15.29.1.2 shall not be deemed to be fulfilled in cases such as an accounting error, operational failure, fraud, failure to apply the segregation requirements at the level of the depositary or a third party to whom the custody of financial instruments held in custody in accordance with paragraph 15.11.1 has been delegated.
- 15.29.4 This paragraph shall apply mutatis mutandis to the delegate when the depositary has contractually transferred its liability in accordance with paragraph 15.30 and 15.32.
- 15.30 The depositary's liability shall not be affected by any delegation referred to in paragraph 15.24.
- Notwithstanding paragraph 15.30, in case of a loss of financial instruments held in custody by a third party pursuant to paragraph 15.24, the depositary may discharge itself of liability if it can prove that:
- 15.30.1 all requirements for the delegation of its custody tasks set out in paragraph 15.24 are met;
  - 15.30.2 a written contract between the depositary and the third party expressly transfers the liability of the depositary to that third party and makes it possible for the *Directive AIF* or the *Directive AIFM* acting on behalf of the *Directive AIF* to make a claim against the third party in respect of the loss of financial instruments or for the depositary to make such a claim on their behalf; and
  - 15.30.3 a written contract between the depositary and the *Directive AIF* or the *Directive AIFM* acting on behalf of the *Directive AIF*, expressly allows a discharge of the depositary's liability and establishes the objective reason to contract such a discharge.
- 15.31 Objective grounds for the depositary to contract a discharge of liability (Article 102 of *Level 2 AIFMD Regulation*)
- 15.31.1 The objective grounds for contracting a discharge pursuant to paragraph 15.30 shall be:
    - 15.31.1.1 limited to precise and concrete circumstances characterising a given activity;
    - 15.31.1.2 consistent with the depositary's policies and decisions.
  - 15.31.2 The objective grounds shall be established each time the depositary intends to discharge itself of liability.
  - 15.31.3 The depositary shall be deemed to have objective grounds for contracting the discharge of its liability in accordance with paragraph 15.30 when the depositary can demonstrate that it had no other option but to delegate its custody duties to a third party. In particular, this shall be the case where:

- 15.31.3.1 the law of a third country requires that certain financial instruments be held in custody by a local entity and local entities exist that satisfy the delegation criteria laid down in paragraph 15.24; or
  - 15.31.3.2 the *Directive AIFM* insists on maintaining an investment in a particular jurisdiction despite warnings by the depositary as to the increased risk this presents.
- 15.32 Further, where the law of a third country requires that certain financial instruments are held in custody by a local entity and there are no local entities that satisfy the delegation requirements laid down in paragraph 15.24.4.2, the depositary can discharge itself of liability provided that the following conditions are met:
- 15.32.1 the rules or instruments constituting the *Directive AIF* concerned expressly allow for such a discharge under the conditions set out in this paragraph;
  - 15.32.2 the investors of the relevant *Directive AIF* have been duly informed of that discharge and of the circumstances justifying the discharge prior to their investment;
  - 15.32.3 the *Directive AIF* or the *Directive AIFM* on behalf of the *Directive AIF* instructed the depositary to delegate the custody of such financial instruments to a local entity;
  - 15.32.4 there is a written contract between the depositary and the *Directive AIF* or the *Directive AIFM* acting on behalf of the *Directive AIF*, which expressly allows such a discharge; and
  - 15.32.5 there is a written contract between the depositary and the third party that expressly transfers the liability of the depositary to that local entity and makes it possible for the *Directive AIF* or the *Directive AIFM* acting on behalf of the *Directive AIF* to make a claim against that local entity in respect of the loss of financial instruments or for the depositary to make such a claim on their behalf.
- 15.33 Liability to the investors of the *Directive AIF* may be invoked directly or indirectly through the *Directive AIFM*, depending on the legal nature of the relationship between the depositary, the *Directive AIFM* and the investors.
- 15.34 The depositary shall make available to the *JFSC*, on request, all information which it has obtained while performing its duties and that may be necessary for the competent authorities of the *Directive AIF* or the *Directive AIFM*.

## Section 3: Transparency requirements

### 16 Annual Report (Article 22 of the Level 1 AIFM Directive)<sup>16</sup>

- 16.1 An AIFM shall, for each of the *EU AIFs* it *manages* and for each of the *Directive AIFs* it markets in the *Union*, make available an annual report for each financial year no later than 6 months following the end of the financial year. The annual report shall be provided to investors on request. The annual report shall be made available to the *JFSC*.
- 16.2 General principles for the annual report (Article 103 of *Level 2 AIFMD Regulation*)
- 16.2.1 All information provided in the annual report, including the information specified in this paragraph, shall be presented in a manner that provides materially relevant, reliable, comparable and clear information. The annual report shall contain the information investors need in relation to particular *Directive AIF* structures.
- 16.3 The annual report shall at least contain the following:
- 16.3.1 a balance-sheet or a statement of assets and liabilities;
- 16.3.2 an income and expenditure account for the financial year;
- 16.3.3 a report on the activities of the financial year;
- 16.3.4 any material changes in the information listed in paragraph 17 during the financial year covered by the report;
- 16.3.5 the total amount of remuneration for the financial year, split into fixed and variable remuneration, paid by the *AIFM* to its staff, and number of beneficiaries, and, where relevant, carried interest paid by the *Directive AIF*;
- 16.3.6 the aggregate amount of remuneration broken down by senior management and members of staff of the *AIFM* whose actions have a material impact on the risk profile of the *Directive AIF*.
- 16.4 Content and format of the balance sheet or statement of assets and liabilities and of the income and expenditure account (Article 104 of *Level 2 AIFMD Regulation*)
- 16.4.1 The balance sheet or statement of assets and liabilities shall contain at least the following elements and underlying line items in accordance with paragraph
- 16.4.1.1 'assets' comprising the resources controlled by the *Directive AIF* as a result of past events and from which future economic benefits are expected to flow to the *Directive AIF*. Assets shall be sub-classified according to the following line items:
- › 'investments', including, but not limited to, debt and equity securities, real estate and property and derivatives;

<sup>16</sup> Recital 48 of the *Level 1 AIFM Directive*.  
Section 3.2.12 of the *Explanatory Memorandum* and Recitals 125 to 127 of *Level 2 AIFMD Regulation*.

- › 'cash and cash equivalents', including, but not limited to, cash-in-hand, demand deposits and qualifying short-term liquid investments;
  - › 'receivables', including, but not limited to, amounts receivable in relation to dividends and interest, investments sold, amounts due from brokers and 'prepayments', including, but not limited to, amounts paid in advance in relation to expenses of the *Directive AIF*.
- 16.4.1.2 'liabilities', comprising present obligations of the *Directive AIF* arising from past events, the settlement of which is expected to result in an outflow from the *Directive AIF* of resources embodying economic benefits. Liabilities shall be sub-classified according to the following line items:
  - › 'payables', including, but not limited to, amounts payable in relation to the purchase of investments or redemption of units or shares in the *Directive AIF* and amounts due to brokers and 'accrued expenses', including, but not limited to, liabilities for management fees, advisory fees, performance fees, interest and other expenses incurred in the course of operations of the *Directive AIF*;
  - › 'borrowings', including, but not limited to, amounts payable to banks and other counterparties;
  - › 'other liabilities', including, but not limited to, amounts due to counterparties for collateral on return of securities loaned, deferred income and dividends and distributions payable;
- 16.4.1.3 'net assets', representing the residual interest in the assets of the *Directive AIF* after deducting all its liabilities.
- 16.4.2 The income and expenditure account shall contain at least the following elements and underlying line items:
  - 16.4.2.1 'income', representing any increases in economic benefits during the accounting period in the form of inflows or enhancements of assets or decreases of liabilities that result in increases in net assets other than those relating to contributions from investors. Income shall be sub-classified according to the following line items:
    - › 'investment income', which can be further sub-classified as follows:
    - › 'dividend income', relating to dividends on equity investments to which the *Directive AIF* is entitled;
    - › 'interest income', relating to interest on debt investments and on cash to which the *Directive AIF* is entitled;
    - › 'rental income', relating to rental income from property investments to which the *Directive AIF* is entitled;
    - › 'realised gains on investments', representing gains on the disposal of investments;
    - › 'unrealised gains on investments', representing gains on the revaluation of investments; and
    - › 'other income' including, but not limited to, fee income from securities loaned and from miscellaneous sources.

- 16.4.2.2 'expenses', representing decreases in economic benefits during the accounting period in the form of outflows or depletions of assets or incurrences of liabilities that result in decreases in net assets, other than those relating to distributions to investors. Expenses shall, be sub-classified according to the following line items:
- › 'investment advisory or management fees', representing contractual fees due to the investment adviser or *AIFM*;
  - › 'other expenses', including, but not limited to, administration fees, professional fees, custodian fees and interest. Individual items, if material in nature, should be disclosed separately;
  - › 'realised loss on investments', representing loss on the disposal of investments;
  - › 'unrealised loss on investments', representing loss on the revaluation of investments;
- 16.4.2.3 'net income or expenditure', representing the excess of income over expenditure or expenditure over income, as applicable.
- 16.4.3 The layout, nomenclature and terminology of line items shall be consistent with the accounting standards applicable to or the rules adopted by the *Directive AIF*, and shall comply with legislation applicable where the *Directive AIF* is established. Such line items may be amended or extended to ensure compliance with the above.
- 16.4.4 Additional line items, headings and subtotals shall be presented when such presentation is relevant to the understanding of a *Directive AIF's* financial position in the balance sheet or statement of assets and liabilities or a *Directive AIF's* financial performance in the content and format of the income and expenditure account. Any relevant additional information shall be presented in the notes to the financial statements. The purpose of the notes shall be to provide narrative descriptions or disaggregation of items presented in the primary statements and information about items that do not qualify for recognition in these statements.
- 16.4.5 Each material class of similar items shall be presented separately. Individual items, if material, shall be disclosed. Materiality shall be assessed under the requirements of the accounting framework adopted.
- 16.4.6 The presentation and classification of items in the balance sheet or statement of assets and liabilities shall be retained from one reporting or accounting period to the next unless it is apparent that another presentation or classification would be more appropriate, as when a shift in the investment strategy leads to different trading patterns, or because an accounting standard has required a change in presentation.
- 16.4.7 With respect to the content and format of the income and expenditure account set out to in Annex IV of *Level 2 AIFMD Regulation*, all items of income and expense shall be recognised in a given period in the income and expenditure account unless an accounting standard adopted by the *Directive AIF* requires otherwise.
- 16.5 Report on the activities of the financial year (Article 105 of *Level 2 AIFMD Regulation*)
- 16.5.1 The report on activities of the financial year shall include at least:

- 16.5.1.1 an overview of investment activities during the year or period, and an overview of the *Directive AIF's* portfolio at year-end or period end;
  - 16.5.1.2 an overview of the *Directive AIF's* performance over the year or period;
  - 16.5.1.3 material changes as defined below in the information listed in paragraph 17 not already present in the financial statements.
- 16.5.2 The report shall include a fair and balanced review of the activities and performance of the *Directive AIF*, containing also a description of the principal risks and investment or economic uncertainties that the *Directive AIF* might face.
- 16.5.3 To the extent necessary for an understanding of the *Directive AIF's* investment activities or its performance, the analysis shall include both financial and non-financial key performance indicators relevant to that *Directive AIF*. The information provided in the report shall be consistent with national rules where the *Directive AIF* is established.
- 16.5.4 The information in the report on the activities of the financial year shall form part of the directors' or investment manager's report insofar as this is usually presented alongside the financial statements of the *Directive AIF*.
- 16.6 Material changes (Article 106 of *Level 2 AIFMD Regulation*)
  - 16.6.1 Any changes in information shall be deemed material within the meaning of paragraph 16.3.4 if there is a substantial likelihood that a reasonable investor, becoming aware of such information, would reconsider its investment in the *Directive AIF*, including because such information could impact an investor's ability to exercise its rights in relation to its investment, or otherwise prejudice the interests of one or more investors in the *Directive AIF*.
  - 16.6.2 In order to comply with paragraph 16.3.4, *AIFMs* shall assess changes in the information referred to in paragraph 17 during the financial year in accordance with paragraph 16.6.1.
  - 16.6.3 Information shall be disclosed in line with the requirements of the accounting standards and accounting rules adopted by the *Directive AIF* together with a description of any potential or anticipated impact on the *Directive AIF* and, as the case may be, or investors in the *Directive AIF*. Additional disclosures shall be made when compliance with specific requirements of the accounting standards and accounting rules may be insufficient to enable investors to understand the impact of the change.
  - 16.6.4 Where the information required to be disclosed in accordance with paragraph 16.6.1 is not covered by the accounting standards applicable to a *Directive AIF*, or its accounting rules, a description of the material change shall be provided together with any potential or anticipated impact on the *Directive AIF* and, as the case may be, or investors in the *Directive AIF*.
- 16.7 Remuneration disclosure (Article 107 of *Level 2 AIFMD Regulation*)
  - 16.7.1 When information required by paragraph 16.3.5 is given, it shall be specified whether or not the total remuneration relates to any of the following:
    - 16.7.1.1 the total remuneration of the entire staff of the *AIFM*, indicating the number of beneficiaries;

- 16.7.1.2 the total remuneration of those staff of the *AIFM* who are fully or partly involved in the activities of the *Directive AIF*, indicating the number of beneficiaries;
  - 16.7.1.3 the proportion of the total remuneration of the staff of the *AIFM* attributable to the *Directive AIF*, indicating the number of beneficiaries.
- 16.7.2 Where relevant, the total remuneration for the financial year shall also mention the carried interest paid by the *Directive AIF*.
- 16.7.3 Where information is disclosed at the level of the *AIFM*, an allocation or breakdown shall be provided in relation to each *Directive AIF*, insofar as this information exists or is readily available. As part of this disclosure, a description of how the allocation or breakdown has been provided shall be included.
- 16.7.4 *AIFMs* shall provide general information relating to the financial and non-financial criteria of the remuneration policies and practices for relevant categories of staff to enable investors to assess the incentives created. In accordance with the principles set out in Annex II of the Level 1 *AIFM Directive*, *AIFMs* shall disclose at least the information necessary to provide an understanding of the risk profile of the *Directive AIF* and the measures it adopts to avoid or manage conflicts of interest.
- 16.8 The accounting information given in the annual report shall be prepared in accordance with the:
  - 16.8.1 accounting standards of the home *Member State* of the *Directive AIF*; or
  - 16.8.2 accounting standards of the third country where the *Directive AIF* is established; and
  - 16.8.3 with the accounting rules laid down in the AIF rules or instruments constituting the *Directive AIF*.
- 16.9 Where there is any conflict or dissimilarity between the accounting standards and accounting rules laid down in the AIF rules or instruments constituting the *Directive AIF*, the accounting rules shall be followed to the extent permitted by the JFSC. Any identified conflicts/dissimilarities between accounting standards and accounting rules are to be raised with the JFSC at the application stage.
- 16.10 The accounting information given in the annual report shall be audited by one or more persons empowered by law to audit accounts in accordance with the Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts for *EU AIFs* or in accordance with the international auditing standards in force in the country where the *Non-EU AIF* is established.
- 16.11 The auditor's report, including any qualifications, shall be reproduced in full in the annual report.

## 17 Disclosure to investors (Article 23 of the Level 1 AIFM Directive)<sup>17</sup>

17.1 AIFMs shall for each of the EU AIFs that they *manage* and for each of the *Directive AIFs* that they *market* in the *Union* make available to *Directive AIF* investors, in accordance with the AIF rules or instruments constituting the *Directive AIF*, the following information before they invest in the *Directive AIF*, as well as any material changes thereof:

- 17.1.1 a description of the investment strategy and objectives of the *Directive AIF*, information on where any master *Directive AIF* is established and where the underlying funds are established if the *Directive AIF* is a fund of funds, a description of the types of assets in which the *Directive AIF* may invest, the techniques it may employ and all associated risks, any applicable investment restrictions, the circumstances in which the *Directive AIF* may use *leverage*, the types and sources of *leverage* permitted and the associated risks, any restrictions on the use of *leverage* and any collateral and asset reuse arrangements, and the maximum level of *leverage* which the AIFM are entitled to employ on behalf of the *Directive AIF*;
- 17.1.2 a description of the procedures by which the *Directive AIF* may change its investment strategy or investment policy, or both;
- 17.1.3 a description of the main legal implications of the contractual relationship entered into for the purpose of investment, including information on jurisdiction, on the applicable law and on the existence or not of any legal instruments providing for the recognition and enforcement of judgments in the territory where the *Directive AIF* is established;
- 17.1.4 the identity of the AIFM, the *Directive AIF's* depositary, auditor and any other service providers and a description of their duties and the investors' rights;
- 17.1.5 a description of how the AIFM is complying with the requirements of paragraph 5.6;
- 17.1.6 a description of any delegated management function as referred to in Annex I of the Level 1 AIFM Directive by the AIFM and of any safe-keeping function delegated by the depositary, the identification of the delegate and any conflicts of interest that may arise from such delegations;
- 17.1.7 a description of the *Directive AIF's* valuation procedure and of the pricing methodology for valuing assets, including the methods used in valuing hard-to-value assets in accordance with paragraph 13;
- 17.1.8 a description of the *Directive AIF's* liquidity risk management, including the redemption rights both in normal and in exceptional circumstances, and the existing redemption arrangements with investors;
- 17.1.9 a description of all fees, charges and expenses and of the maximum amounts thereof which are directly or indirectly borne by investors;
- 17.1.10 a description of how the AIFM ensures a fair treatment of investors and, whenever an investor obtains preferential treatment or the right to obtain preferential treatment, a description of that preferential treatment, the type of

<sup>17</sup> Section 3.2.12 of the *Explanatory Memorandum* and Recitals 7, 124 and 128 to 130 of *Level 2 AIFMD Regulation*.

- investors who obtain such preferential treatment and, where relevant, their legal or economic links with the *Directive AIF* or *AIFM*;
- 17.1.11 the latest annual report referred to in paragraph 16;
  - 17.1.12 the procedure and conditions for the issue and sale of units or shares;
  - 17.1.13 the latest net asset value of the *Directive AIF* or the latest market price of the unit or share of the *Directive AIF*, in accordance with paragraph 13;
  - 17.1.14 where available, the historical performance of the *Directive AIF*;
  - 17.1.15 the identity of the prime broker and a description of any material arrangements of the *Directive AIF* with its prime brokers and the way the conflicts of interest in relation thereto are managed and the provision in the contract with the depositary on the possibility of transfer and re-use of *Directive AIF* assets, and information about any transfer of liability to the prime broker that may exist;
  - 17.1.16 a description of how and when the information required under paragraphs 17.4 and 17.6 will be disclosed.
- 17.2 The *AIFM* shall inform the investors before they invest in the *Directive AIF* of any arrangement made by the depositary to contractually discharge itself of liability in accordance with paragraph 15.30. The *AIFM* shall also inform investors of any changes with respect to depositary liability without delay.
- 17.3 Where the *Directive AIF* is required to publish a prospectus in accordance with Directive 2003/71/EC or in accordance with applicable law, only such information referred to in paragraphs 17.1 and 17.2 which is in addition to that contained in the prospectus needs to be disclosed separately or as additional information in the prospectus.
- 17.4 *AIFMs* shall, for each of the *EU AIFs* that they *manage* and for each of the *Directive AIFs* that they *market* in the *Union*, periodically disclose to investors:
- 17.4.1 the percentage of the *Directive AIF's* assets which are subject to *special arrangements* arising from their illiquid nature;
  - 17.4.2 any new arrangements for managing the liquidity of the *Directive AIF*;
  - 17.4.3 the current risk profile of the *Directive AIF* and the risk management systems employed by the *AIFM* to manage those risks.
- 17.5 Periodic disclosure to investors (Article 108 of *Level 2 AIFMD Regulation*)
- 17.5.1 The information referred to in paragraph 17.4 shall be presented in a clear and understandable way.
  - 17.5.2 When disclosing the percentage of the *Directive AIF's* assets which are subject to *special arrangements* arising from their illiquid nature in accordance with paragraph 17.4.1 the *AIFM* shall:
    - 17.5.2.1 provide an overview of any *special arrangements* in place including whether they relate to side pockets, gates or other similar arrangements, the valuation methodology applied to assets which are subject to such arrangements and how management and performance fees apply to these assets;
    - 17.5.2.2 disclose this information as part of the *Directive AIF's* periodic reporting to investors, as required by the *Directive AIF's* rules or instruments constituting the *Directive AIF*, or at the same time as the

prospectus and offering document and - as a minimum - at the same time as the annual report is made available in accordance with paragraph 16.1.

The percentage of the *Directive AIF's* assets which are subject to *special arrangements* shall be calculated as the net value of those assets subject to *special arrangements* divided by the net asset value of the *Directive AIF* concerned.

- 17.5.3 For any new arrangements for managing the liquidity of the *Directive AIF* in accordance with paragraph 17.4.2 *AIFMs* shall:
- 17.5.3.1 for each *Directive AIF* that they *manage* which is not an unleveraged closed-ended *Directive AIF*, notify to investors whenever they make changes to the liquidity management systems and procedures referred to in paragraph 10.1 which are material in accordance with paragraph 16.6.1;
  - 17.5.3.2 immediately notify investors where they activate gates, side pockets or similar *special arrangements* or where they decide to suspend redemptions;
  - 17.5.3.3 provide an overview of the changes to arrangements concerning liquidity, whether or not these are *special arrangements*. Where relevant, the terms under which redemption is permitted and circumstances determining when management discretion applies shall be included. Also any voting or other restrictions exercisable, the length of any lock-up or any provision concerning 'first in line' or 'pro-rating' on gates and suspensions shall be included.
- 17.5.4 The disclosure of the risk profile of the *Directive AIF* in accordance with paragraph 17.4.3 shall outline:
- 17.5.4.1 measures to assess the sensitivity of the *Directive AIF's* portfolio to the most relevant risks to which the *Directive AIF* is or could be exposed;
  - 17.5.4.2 if risk limits set by the *AIFM* have been or are likely to be exceeded and where these risk limits have been exceeded, a description of the circumstances and the remedial measures taken;
- The information required under this paragraph shall be disclosed as part of the *Directive AIF's* periodic reporting to investors, as required by the *Directive AIF's* rules or instruments constituting the *Directive AIF* or at the same time as the prospectus and offering document and - at a minimum - at the same time as the annual report is made available in accordance with paragraph 16.1.
- 17.5.5 The risk management systems employed by the *AIFM* in accordance with paragraph 17.4.3 shall outline the main features of the risk management systems employed by the *AIFM* to manage the risks to which each *Directive AIF* it *manages* is or may be exposed. In the case of a change the disclosure shall include the information relating to the change and its anticipated impact on the *Directive AIF* and its investors.
- The information required under this paragraph shall be disclosed as part of the *Directive AIF's* periodic reporting to investors, as required by the *Directive AIF's* rules or instruments constituting the *Directive AIF* or at the same time as the prospectus and offering document and - as a minimum - at the same time as the annual report is made available or made public in accordance with paragraph 16.1.

- 17.6 *AIFMs managing EU AIFs* employing leverage or marketing in the Union Directive AIFs employing leverage shall, for each such Directive AIF disclose, on a regular basis:
- 17.6.1 any changes to the maximum level of leverage which the AIFM may employ on behalf of the Directive AIF as well as any right of the reuse of collateral or any guarantee granted under the leveraging arrangement;
  - 17.6.2 the total amount of leverage employed by that Directive AIF.
- 17.7 Regular disclosure to investors (Article 109 of Level 2 AIFMD Regulation)
- 17.7.1 The information referred to in paragraph 17.6 shall be presented in a clear and understandable way.
  - 17.7.2 Information on changes to the maximum level of leverage calculated in accordance with the gross and commitment methods and any right of re-use of collateral or any guarantee under the leveraging arrangements shall be provided without undue delay and shall include:
    - 17.7.2.1 the original and revised maximum level of leverage calculated in accordance with paragraphs 2.9 and 2.10, whereby the level of leverage shall be calculated as the relevant exposure divided by the net asset value of the Directive AIF;
    - 17.7.2.2 the nature of the rights granted for the reuse of collateral;
    - 17.7.2.3 the nature of guarantees granted; and
    - 17.7.2.4 details of changes in any service providers relating to one of the items above.
  - 17.7.3 Information on the total amount of leverage calculated in accordance with the gross and commitment methods employed by the Directive AIF shall be disclosed as part of the Directive AIF's periodic reporting to investors, as required by the Directive AIF's rules or instruments constituting the Directive AIF, or at the same time as the prospectus and offering document and at least at the same time as the annual report is made available according to paragraph 16.1.

## 18 Reporting obligations to the JFSC (Article 24 of the Level 1 AIFM Directive)<sup>18</sup>

- 18.1 An AIFM shall regularly report, in writing, to the JFSC on the principal markets and instruments in which it trades on behalf of the Directive AIFs it manages.
- It shall provide information on the main instruments in which it is trading, on markets of which it is a member or where it actively trades, and on the principal exposures and most important concentrations of each of the Directive AIFs it manages.
- 18.2 An AIFM shall, for each of the EU AIFs it manages and for each of the Directive AIFs it markets in the Union, provide the following to the JFSC in writing:
- 18.2.1 the percentage of the Directive AIF's assets which are subject to special arrangements arising from their illiquid nature;

<sup>18</sup> Section 3.2.12 of the *Explanatory Memorandum* and Recitals 12, 131 and 132 of Level 2 AIFMD Regulation.

- 18.2.2 any new arrangements for managing the liquidity of the *Directive AIF*;
  - 18.2.3 the current risk profile of the *Directive 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;
  - 18.2.4 information on the main categories of assets in which the *Directive AIF* invested; and
  - 18.2.5 the results of the stress tests performed in accordance with paragraph 9.11.2 and the second subparagraph of paragraph 10.1.
- 18.3 Reporting to the JFSC (Article 110 of *Level 2 AIFMD Regulation*)
- 18.3.1 In order to comply with the requirements of the second subparagraph of paragraph 18.1 and paragraph 2.5.4, an *AIFM* shall provide the following information in writing when reporting to the JFSC:
    - 18.3.1.1 the main instruments in which it is trading, including a break-down of financial instruments and other assets, including the *Directive AIF's* investment strategies and their geographical and sectoral investment focus;
    - 18.3.1.2 the markets of which it is a member or where it actively trades;
    - 18.3.1.3 the diversification of the *Directive 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 18.3.3. Where the *Directive AIF* is a fund of funds this period may be extended by the *AIFM* by 15 days.
  - 18.3.2 For each of the *EU AIFs* they manage and for each of the *Directive AIFs* they market in the *Union*, *AIFMs* shall provide to the JFSC the following information in accordance with paragraph 18.2:
    - 18.3.2.1 the percentage of the *Directive AIF's* assets which are subject to *special arrangements* arising from their illiquid nature as referred to in paragraph 17.4.1;
    - 18.3.2.2 any new arrangements for managing the liquidity of the *Directive AIF*;
    - 18.3.2.3 the risk management systems employed by the *AIFM* to manage the market risk, liquidity risk counterparty risk and other risks including operational risk;
    - 18.3.2.4 the current risk profile of the *Directive AIF*, including:
      - › the market risk profile of the investments of the *Directive AIF*, including the expected return and volatility of the *Directive AIF* in normal market conditions;
      - › the liquidity profile of the investments of the *Directive AIF*, including the liquidity profile of the *Directive AIF's* assets, the profile of redemption terms and the terms of financing provided by counterparties to the *Directive AIF*;
    - 18.3.2.5 information on the main categories of assets in which the *Directive AIF* invested including the corresponding short market value and long market value, the turnover and performance during the reporting period; and

- 18.3.2.6 the results of periodic stress tests, under normal and exceptional circumstances, performed in accordance with paragraph 9.11.2 and the second subparagraph of paragraph 10.1.
- 18.3.3 The information referred to in paragraphs 18.3.1 and 18.3.2 shall be reported as follows:
  - 18.3.3.1 on a half-yearly basis by *AIFMs managing* portfolios of *Directive AIFs* whose assets under management calculated in accordance with paragraph 2.2 in total exceed the threshold of either EUR 100 million or EUR 500 million laid down in paragraphs 2.1.1 and 2.1.2 but do not exceed EUR 1 billion, for each of the *EU AIFs* they *manage* and for each of the *Directive AIFs* they market in the *Union*;
  - 18.3.3.2 on a quarterly basis by *AIFMs managing* portfolios of *Directive AIFs* whose assets under management calculated in accordance with paragraph 2.2 in total exceed EUR 1 billion, for each of the *EU AIFs* they *manage*, and for each of the *Directive AIFs* they market in the *Union*;
  - 18.3.3.3 on a quarterly basis by *AIFMs* which are subject to the requirements referred to in paragraph 18.3.3.1, for each *Directive AIF* whose assets under management, including any assets acquired through use of *leverage*, in total exceed EUR 500 million, in respect of that *Directive AIF*;
  - 18.3.3.4 on an annual basis by *AIFMs* in respect of each unleveraged *Directive AIF* under their management which, in accordance with its core investment policy, invests in non-listed companies and issuers in order to acquire control.
- 18.3.4 *AIFMs managing* one or more *Directive AIFs* which they have assessed to be employing *leverage* on a substantial basis in accordance with paragraph 18.6 shall provide the information required under paragraph 18.5 at the same time as that required under paragraph 18.3.2.
- 18.3.5 *AIFMs* shall provide the information specified under paragraphs 18.3.1, 18.3.2 and 18.3.4 in accordance with the pro-forma reporting template set out in Annex IV of *Level 2 AIFMD Regulation*.
- 18.4 The *AIFM* shall provide the following documents to the *JFSC*:
  - 18.4.1 an annual report of each *EU AIF* managed by the *AIFM* and of each *Directive AIF* marketed by it in the *Union*, for each financial year, in accordance with paragraph 16.1;
  - 18.4.2 for the end of each quarter a detailed list of all *Directive AIFs* which the *AIFM* manages.
- 18.5 An *AIFM managing Directive AIFs* employing *leverage* on a substantial basis shall make available, in writing, information about the overall level of *leverage* employed by each *Directive AIF* it *manages*, a break-down between *leverage* arising from borrowing of cash or securities and *leverage* embedded in financial derivatives and the extent to which the *Directive AIF's* assets have been reused under leveraging arrangements to the *JFSC*.  
That information shall include the identity of the five largest sources of borrowed cash or securities for each of the *Directive AIFs* managed by the *AIFM*, and the amounts of *leverage* received from each of those sources for each of those *Directive AIFs*.

Deleted: 1 September 2016

The reporting obligations referred to in this paragraph are limited to *EU AIFs* managed by the *AIFM* and *Non-EU AIFs* marketed by the *AIFM* in the *Union*.

- 18.6 Use of *leverage* on a 'substantial basis' (Article 111 of *Level 2 AIFMD Regulation*)
- 18.6.1 *Leverage* shall be considered to be employed on a substantial basis for the purposes of paragraph 18.5 when the exposure of a *Directive AIF* as calculated according to the commitment method under paragraph 2.10 exceeds three times its net asset value.
- 18.6.2 Where the requirements referred to in paragraph 18.6.1 are fulfilled, *AIFMs* shall provide written information in accordance with paragraph 18.5 to the *JFSC* in accordance with the principles laid down in paragraph 18.3.3.

**Notifying or providing information via the *JFSC*'s online portal**

- 18.7 Where the *JFSC* so specifies (whether in the *Code* or otherwise) an *AIFM* must notify or provide information by means of the *JFSC*'s online portal.
- If, because of a systems failure of any kind, an *AIFM* is unable to access the online portal to make a relevant notification or provide required information it must notify the *JFSC* in writing within one business day of the systems failure being identified.

## Section 4: AIFMs managing specific types of Directive AIF

### 19 AIFMs managing leveraged *Directive AIFs* – Use of information by the JFSC and limits to leverage (Article 25 of the Level 1 AIFM Directive)<sup>19</sup>

- 19.1 The *AIFM* shall demonstrate that the *leverage* limits set by it for each *Directive AIF* it *manages* are reasonable and that it complies with those limits at all times.
- 19.2 Restrictions on the management of *Directive AIFs* (Article 112 of *Level 2 AIFMD Regulation*)
- 19.2.1 The principles laid down in this paragraph shall apply in order to specify the circumstances in which the *JFSC* may exercise its power to impose *leverage* limits or other restrictions on *AIFMs*.
- 19.2.2 When assessing the information received under paragraphs 9.12 and 18.5, the *JFSC* shall take into account the extent to which the use of *leverage* by an *AIFM* or its interaction with a group of *Directive AIFMs* or other financial institutions can contribute to the build-up of systemic risk in the financial system or risks creating disorderly markets.
- 19.2.3 The *JFSC* shall take into account at least the following aspects in its assessment:
- 19.2.3.1 the circumstances in which the exposure of an *Directive AIF* or several *Directive AIFs* including those exposures resulting from financing or investment positions entered into by the *AIFM* for its own account or on behalf of the *Directive AIFs* could constitute an important source of market, liquidity or counterparty risk to a financial institution;
- 19.2.3.2 the circumstances in which the activities of an *AIFM* or its interaction with, for example, a group of *AIFMs* or other financial institutions, in particular with respect to the types of assets in which the *Directive AIF* invests and the techniques employed by the *AIFM* through the use of *leverage*, contribute or could contribute to a downward spiral in the prices of financial instruments or other assets in a manner that threatens the viability of such financial instruments or other assets;
- 19.2.3.3 criteria such as the type of *Directive AIF*, the investment strategy of the *AIFM* with respect to the *Directive AIFs* concerned, the market conditions in which the *AIFM* and the *Directive AIF* operate and any likely pro-cyclical effects that could result from the imposition by the *JFSC* of limits or other restrictions on the use of *leverage* by the *AIFM* concerned;
- criteria, such as the size of a *Directive AIF* or several *Directive AIFs* and any related impact in a particular market sector, concentrations of risks in particular markets in which the *Directive AIF* or several *Directive AIFs* are investing, any contagion risk to other markets from

<sup>19</sup> Recitals 49 to 51 of the Level 1 *AIFM Directive*.

a market where risks have been identified, liquidity issues in particular markets at a given time, the scale of asset/liability mismatch in a particular *AIFM* investment strategy or irregular movements in the prices of assets in which a *Directive AIF* may invest.

## 20 AIFMs managing Directive AIFs which acquire control of non-listed companies and issuers – Scope (Article 26 of the Level 1 AIFM Directive)<sup>20</sup>

- 20.1 This paragraph and the following paragraphs 21 to 24 shall apply to the following:
- 20.1.1 *AIFMs managing one or more Directive AIFs* which either individually or jointly on the basis of an agreement aimed at acquiring control, acquire control of a non-listed company in accordance with paragraph 20.5;
  - 20.1.2 *AIFMs cooperating with one or more other Directive AIFMs* on the basis of an agreement pursuant to which the *Directive AIFs* managed by those *Directive AIFMs* jointly, acquire control of a non-listed company in accordance with paragraph 20.5.
- 20.2 This paragraph and the following paragraphs 21 to 24 shall not apply where the non-listed companies concerned are:
- 20.2.1 small and medium-sized enterprises within the meaning of Article 2(1) of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (broadly meaning enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding €50 million, and/or an annual balance sheet total not exceeding €43 million); or
  - 20.2.2 special purpose vehicles with the purpose of purchasing, holding or administering real estate.
- 20.3 Without prejudice to paragraphs 20.1 and 20.2, paragraph 21.1 shall also apply to *AIFMs managing Directive AIFs* that acquire a non-controlling participation in a non-listed company.
- 20.4 Paragraphs 22.1, 22.2 and 22.3 and paragraph 24 shall apply also to *AIFMs managing Directive AIFs* that acquire control over issuers. For the purposes of those paragraphs, paragraphs 20.1 and 20.2 shall apply *mutatis mutandis*.
- 20.5 For the purpose of this Section 4, for non-listed companies, control shall mean more than 50 % of the voting rights of the companies.
- When calculating the percentage of voting rights held by the relevant *Directive AIF*, in addition to the voting rights held directly by the relevant *Directive AIF*, the voting rights of the following shall be taken into account, subject to control as referred to in the first subparagraph being established:
- 20.5.1 an undertaking controlled by the *Directive AIF*; and

<sup>20</sup> Recital 58 of the Level 1 *AIFM Directive*.

20.5.2 a natural or legal person acting in its own name but on behalf of the *Directive AIF* or on behalf of an undertaking controlled by the *Directive AIF*.

The percentage of voting rights shall be calculated on the basis of all the shares to which voting rights are attached even if the exercise thereof is suspended.

Notwithstanding point (i) of Article 4(1) of the Level 1 *AIFM Directive* (which provides that 'control' means control as defined in Article 1 of Directive 83/349/EEC), for the purpose of paragraphs 22.1, 22.2 and 22.3 and paragraph 24 in regard to issuers control shall be determined in accordance with Article 5(3) of Directive 2004/25/EC.

20.6 This paragraph and the following paragraphs 21 to 24 shall apply subject to the conditions and restrictions set out in Article 6 of Directive 2002/14/EC.

20.7 This paragraph and the following paragraphs 21 to 24 shall apply without prejudice to any stricter rules adopted by *Member States* with respect to the acquisition of holdings in issuers and non-listed companies in their territories.

## 21 Notification of the acquisition of major holdings and control of non-listed companies (Article 27 of the Level 1 AIFM Directive)<sup>21</sup>

21.1 When a *Directive AIF* acquires, disposes of or holds shares of a non-listed company, the *AIFM managing* such a *Directive AIF* shall notify the *JFSC* in writing of the proportion of voting rights of the non-listed company held by the *Directive AIF* any time when that proportion reaches, exceeds or falls below the thresholds of 10%, 20%, 30%, 50% and 75%.

21.2 When a *Directive AIF* acquires, individually or jointly, control over a non-listed company pursuant to paragraph 20.1, in conjunction with paragraph 20.5, the *AIFM managing* such a *Directive AIF* shall notify in writing the following of the acquisition of control by the *Directive AIF*:

21.2.1 the non-listed company;

21.2.2 the shareholders of which the identities and addresses are available to the *AIFM* or can be made available by the non-listed company or through a register to which the *AIFM* has or can obtain access; and

21.2.3 the *JFSC*.

21.3 The notification required under paragraph 21.2 shall contain the following additional information:

21.3.1 the resulting situation in terms of voting rights;

21.3.2 the conditions subject to which control was acquired, including information about the identity of the different shareholders involved, any natural person or legal entity entitled to exercise voting rights on their behalf and, if applicable, the chain of undertakings through which voting rights are effectively held; and

21.3.3 the date on which control was acquired.

<sup>21</sup> Recitals 52 to 54 and 58 of the Level 1 *AIFM Directive*.

- 21.4 In its notification to the non-listed company, the *AIFM* shall request the board of directors of the company to inform the employees' representatives or, where there are none, the employees themselves, without undue delay of the acquisition of control by the *Directive AIF* managed by the *AIFM* and of the information referred to in paragraph 21.3. The *AIFM* shall use its best efforts to ensure that the employees' representatives or, where there are none, the employees themselves, are duly informed by the board of directors in accordance with this paragraph.
- 21.5 The notifications referred to in paragraphs 21.1, 21.2 and 21.3 shall be made as soon as possible, but no later than 10 working days after the date on which the *Directive AIF* has reached, exceeded or fallen below the relevant threshold or has acquired control over the non-listed company.

## 22 Disclosure in case of acquisition of control (Article 28 of the Level 1 AIFM Directive)<sup>22</sup>

- 22.1 When a *Directive AIF* acquires, individually or jointly, control of a non-listed company or an issuer pursuant to paragraph 20.1, in conjunction with paragraph 20.5, the *AIFM* managing such *Directive AIF* shall make the information referred to in paragraph 22.2 available to:
- 22.1.1 the company concerned;
  - 22.1.2 the shareholders of the company of which the identities and addresses are available to the *AIFM* or can be made available by the company or through a register to which the *AIFM* has or can obtain access; and
  - 22.1.3 the *JFSC*.
- 22.2 The *AIFM* shall make available:
- 22.2.1 the identity of the *Directive AIFMs* which either individually or in agreement with other *Directive AIFMs* manage the *Directive AIFs* that have acquired control;
  - 22.2.2 the policy for preventing and managing conflicts of interest, in particular between the *AIFM*, the *Directive AIF* and the company, including information about the specific safeguards established to ensure that any agreement between the *AIFM* and/or the *Directive AIF* and the company is concluded at arm's length; and
  - 22.2.3 the policy for external and internal communication relating to the company in particular as regards employees.
- 22.3 In its notification to the company pursuant to paragraph 22.1.1, the *AIFM* shall request the board of directors of the company to inform the employees' representatives or, where there are none, the employees themselves, without undue delay of the information referred to in paragraph 22.1. The *AIFM* shall use its best efforts to ensure that the employees' representatives or, where there are none, the employees themselves, are duly informed by the board of directors in accordance with this paragraph.
- 22.4 When a *Directive AIF* acquires, individually or jointly, control of a non-listed company pursuant to paragraph 20.1, in conjunction with paragraph 20.5, the *AIFM* managing such *Directive AIF* shall ensure that the *Directive AIF*, or the *Directive AIFM* acting on behalf of

<sup>22</sup> Recitals 52 to 56 and 58 of the Level 1 *AIFM Directive*.

the *Directive AIF*, discloses its intentions with regard to the future business of the non-listed company and the likely repercussions on employment, including any material change in the conditions of employment, to:

- 22.4.1 the non-listed company; and
- 22.4.2 the shareholders of the non-listed company of which the identities and addresses are available to the *AIFM* or can be made available by the non-listed company or through a register to which the *AIFM* has or can obtain access.

In addition, the *AIFM managing* the relevant *Directive AIF* shall request and use its best efforts to ensure that the board of directors of the non-listed company makes available the information set out in the first subparagraph to the employees' representatives or, where there are none, the employees themselves, of the non-listed company.

- 22.5 When a *Directive AIF* acquires control of a non-listed company pursuant to paragraph 20.1 in conjunction with paragraph 20.5, the *AIFM managing* such a *Directive AIF* provide the *JFSC* and the *Directive AIF's* investors with written information on the financing of the acquisition.

## 23 Specific provisions regarding the annual report of Directive AIFs exercising control of non-listed companies (Article 29 of the Level 1 AIFM Directive)<sup>23</sup>

- 23.1 When a *Directive AIF* acquires, individually or jointly, control of a non-listed company pursuant to paragraph 20.1 in conjunction with paragraph 20.5, the *AIFM managing* such a *Directive AIF* shall either:
  - 23.1.1 request and use its best efforts to ensure that the annual report of the non-listed company drawn up in accordance with paragraph 23.2 is made available by the board of directors of the company to the employees' representatives or, where there are none, to the employees themselves within the period such annual report has to be drawn up in accordance with the national applicable law; or
  - 23.1.2 for each such *Directive AIF* include in the annual report provided for in paragraph 16 the information referred to in paragraph 23.2 relating to the relevant non-listed company.
- 23.2 The additional information to be included in the annual report of the company or the *Directive AIF*, in accordance with paragraph 23.1, shall include at least a fair review of the development of the company's business representing the situation at the end of the period covered by the annual report. The report shall also give an indication of:
  - 23.2.1 any important events that have occurred since the end of the financial year;
  - 23.2.2 the company's likely future development; and
  - 23.2.3 the information concerning acquisitions of own shares prescribed by Article 22(2) of Council Directive 77/91/EEC.
- 23.3 The *AIFM managing* the relevant *Directive AIF* shall either:

<sup>23</sup> Recitals 52 to 55 and 58 of the Level 1 *AIFM Directive*.

- 23.3.1 request and use its best efforts to ensure that the board of directors of the non-listed company makes available the information referred to in paragraph 23.1.2 relating to the company concerned to the employees' representatives of the company concerned or, where there are none, to the employees themselves within the period referred to in paragraph 16.1; or
- 23.3.2 make available the information referred to in paragraph 23.1.1 to the investors of the *Directive AIF*, in so far as already available, within the period referred to in paragraph 16.1 and, in any event, no later than the date on which the annual report of the non-listed company is drawn up in accordance with the national applicable law.

## 24 Asset stripping (Article 30 of the Level 1 AIFM Directive)<sup>24</sup>

- 24.1 When a *Directive AIF*, individually or jointly, acquires control of a non-listed company or an issuer pursuant to paragraph 20.1, in conjunction with paragraph 20.5, the *AIFM managing* such a *Directive AIF* shall for a period of 24 months following the acquisition of control of the company by the *Directive AIF*:
  - 24.1.1 not be allowed to facilitate, support or instruct any distribution, capital reduction, share redemption and/or acquisition of own shares by the company as described in paragraph 24.2;
  - 24.1.2 in so far as the *AIFM* is authorised to vote on behalf of the *Directive AIF* at the meetings of the governing bodies of the company, not vote in favour of a distribution, capital reduction, share redemption and/or acquisition of own shares by the company as described in paragraph 24.2; and
  - 24.1.3 in any event use its best efforts to prevent distributions, capital reductions, share redemptions and/or the acquisition of own shares by the company as described in paragraph 24.2.
- 24.2 The obligations imposed on *AIFMs* pursuant to paragraph 24.1 shall relate to the following:
  - 24.2.1 any distribution to shareholders made when on the closing date of the last financial year the net assets as set out in the company's annual accounts are, or following such a distribution would become, lower than the amount of the subscribed capital plus those reserves which may be not distributed under the law or the statutes, on the understanding that where the uncalled part of the subscribed capital is not included in the assets shown in the balance sheet, this amount shall be deducted from the amount of subscribed capital;
  - 24.2.2 any distribution to shareholders the amount of which would exceed the amount of the profits at the end of the last financial year plus any profits brought forward and sums drawn from reserves available for this purpose, less any losses brought forward and sums placed to reserve in accordance with the law or the statutes;
  - 24.2.3 to the extent that acquisitions of own shares are permitted, the acquisitions by the company, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's

<sup>24</sup> Recital 57 of the Level 1 *AIFM Directive*.

behalf, that would have the effect of reducing the net assets below the amount mentioned in paragraph 24.2.1.

24.3 For the purposes of paragraph 24.2:

- 24.3.1 the term 'distribution' referred to in paragraphs 24.2.1 and 24.2.2 shall include, in particular, the payment of dividends and of interest relating to shares;
- 24.3.2 the provisions on capital reductions shall not apply on a reduction in the subscribed capital, the purpose of which is to offset losses incurred or to include sums of money in a non-distributable reserve provided that, following that operation, the amount of such reserve is not more than 10 % of the reduced subscribed capital; and
- 24.3.3 the restriction set out in paragraph 24.2.3 shall be subject to points (b) to (h) of Article 20(1) of Directive 77/91/EEC.

## Section 5: Specific rules in relation to Jersey

### 25 Conditions for the marketing in Member States without a passport of Directive AIFs managed by a non-EU AIFM (Article 42 of the Level 1 AIFM Directive) (Private Placement Rules)<sup>25</sup>

- 25.1 Without prejudice to Articles 37, 39 and 40 of the Level 1 *AIFM Directive*, *AIFMs* may market to professional investors, in the territory of the investor only, units or shares of *Directive AIFs* they *manage* subject at least to the condition that:
- 25.1.1 the *AIFM* complies with Section 3 (comprising paragraphs 16, 17 and 18) in respect of each *Directive AIF* marketed by it pursuant to this paragraph, and with Section 4 (comprising paragraphs 19 to 24 but in this case excepting paragraph 19) where a *Directive AIF* marketed by it pursuant to this paragraph falls within the scope of paragraph 20.1. Competent authorities and *Directive AIF* investors referred to in those paragraphs shall be deemed those of *Member States* where the *Directive AIFs* are marketed.
- 25.2 For reference,
- 25.2.1 compliance with those parts of Section 3 and Section 4 identified in paragraph 25.1.1 shall only be necessary insofar as such provisions are relevant to the *AIFM* and the *Directive AIF* to be marketed; and
- 25.2.2 *Member States* may impose stricter rules on the *AIFM* in respect of the *marketing* of units or shares of *Directive AIFs* to investors in their territory in addition to the requirements set out under the *Codes*.

### 26 Conditions for the marketing in Member States without a passport of *Non-EU* AIFs managed by an EU AIFM (Article 36 of the Level 1 AIFM Directive) (Depositary Lite)

- 26.1 *Member States* may allow an authorised *EU AIFM* to market to professional investors, in their territory only, units or shares of *Directive AIFs* it *manages* and of *EU* feeder AIFs that do not fulfil the requirements referred to in the second subparagraph of Article 31(1) *Level 1 AIFM Directive*, provided that:
- 26.1.1 the *EU AIFM* complies with all the requirements established in *Level 1 AIFM Directive* with the exception of paragraph 15. That *EU AIFM* shall however ensure that one or more entities are appointed to carry out the duties referred to in paragraphs 15.7 to 15.22. The *EU AIFM* shall not perform those functions. The *EU*

<sup>25</sup> Recitals 15, 19 and 74 of the Level 1 *AIFM Directive*.  
Section 3.2.13 of the *Explanatory Memorandum* and Recitals 134 and 135 of *Level 2 AIFMD Regulation*.

*AIFM* shall provide its supervisory authorities with information about the identity of those entities responsible for carrying out the duties referred to in paragraphs 15.17 to 15.22.

## **27 Authorisation of Non-EU AIFMs intending to manage EU AIFs and/or market Directive AIFs managed by them in the Union with a passport in accordance with Article 39 or 40 of the Level 1 AIFM Directive (Article 37 of the Level 1 AIFM Directive) (Guidance for reference purposes only from Level 1 AIFM Directive)**

- 27.1 *Directive AIFs* managed and marketed by an *AIFM* shall be marketed only to professional investors.
- 27.2 For the purpose of considering compliance with *Level 1 AIFM Directive*, an *AIFM* intending to obtain prior authorisation from the competent authority of the relevant *Member State* of reference (where that concept is applicable) as referred to in Articles 39 and 40 *Level 1 AIFM Directive* shall comply with *Level 1 AIFM Directive*. If and to the extent that compliance with a provision of the *Level 1 AIFM Directive* is incompatible with compliance with the law to which the *AIFM* and/or the *Directive AIF* marketed in the *Union* is subject, there shall be no obligation on the *AIFM* to comply with that provision of the *Level 1 AIFM Directive* if it can demonstrate that:
- 27.2.1 it is impossible to combine such compliance with compliance with a mandatory provision in the law to which the *AIFM* and/or *Directive AIF* marketed in the *Union* is subject;
  - 27.2.2 the law to which the *AIFM* and/or *Directive AIF* is subject provides for an equivalent rule having the same regulatory purpose and offering the same level of protection to the investors of the relevant *Directive AIF*; and
  - 27.2.3 the *AIFM* and/or the *Directive AIF* complies with the equivalent rule referred to in paragraph 27.2.2.
- 27.3 An *AIFM* intending to obtain prior authorisation as referred to in paragraph 27.2 shall have a legal representative established in its *Member State* of reference (where that concept is applicable). The legal representative shall be the contact point of the *AIFM* in the *Union* and any official correspondence between the competent authorities and the *AIFM* and between the *EU* investors of the relevant *Directive AIF* and the *AIFM* as set out in *Level 1 AIFM Directive* shall take place through that legal representative. The legal representative shall perform the compliance function relating to the management and *marketing* activities performed by the *AIFM* under *Level 1 AIFM Directive* together with the *AIFM*.

## 28 Marketing of AIFs by AIFMs to retail investors (Article 43 of the Level 1 AIFM Directive) (Guidance for reference purposes only from Level 1 AIFM Directive)

- 28.1 Without prejudice to other instruments of *Union* law, *Member States* may allow *AIFMs* to market to retail investors in their territory units or shares of *Directive AIFs* they manage in accordance with *Level 1 AIFM Directive*, irrespective of whether such *Directive AIFs* are marketed on a domestic or cross-border basis or whether they are *EU AIFs* or *Non – EU AIFs*.
- 28.2 In such cases, *Member States* may impose stricter requirements on the *AIFM* or the *Directive AIF* than the requirements applicable to the *Directive AIFs* marketed to professional investors in their territory in accordance with *Level 1 AIFM Directive*. However, *Member States* shall not impose stricter or additional requirements on *EU AIFs* established in another *Member State* and marketed on a cross-border basis than on *Directive AIFs* marketed domestically.