Linklaters

# AIFMD 2.0

## Level 1: Complete
## Level 2: Loading…


linklaters.com

# Introduction

AIFMD fundamentally changed the way alternative investment fund managers operate and has largely been viewed as a success story. However, since its inception the plan was always to review the framework to ensure that it is fit for purpose. The first stage of this process is now complete, with the publication of a directive to amend AIFMD in the Official Journal on 26 March 2024.

As is the case with any EU directive, Member States will have to implement the new rules into their national laws. The deadline to do so is 16 April 2026.

The amending Directive is known as "Level 1" framework legislation (in the relevant EU law-making process), and it empowers ESMA and the Commission to develop and adopt further detailed rules and guidance. These will be in the form of "Level 2" implementing measures and binding technical standards, and further recommendations and guidelines in "Level 3" measures.

Therefore, although we now have the final framework of the new rules, more of the detail is still to be developed, both at an EU-level, and in Member States at a national level.

Overall, the changes being introduced by AIFMD 2.0 represent an evolution rather than a revolution in approach. Some changes, such as the increased flexibility for depositaries, are responsive to market demands (although a full passport remains out of reach for now), whereas other changes, such as the new loan origination framework and heightened liquidity management rules, are a reflection of market developments since AIFMD came into effect in 2013 and an increasing need for regulators to have greater oversight of these activities. The devil is in the detail however, and in this publication, we take a look at the final Level 1 positions and consider what is to come in Levels 2 and 3.

## Read on for the positions on:



## Resources:

Directive (EU) 2024/927 of the European Parliament and of the Council of 13 March 2024 (the "**amending Directive**" or "**AIFMD 2.0**").

We have prepared an unofficial consolidated text of AIFMD showing the changes to be made by the amending Directive in blackline.

Watch the recording of our webinar on the state of play after trilogues (December 2023).

For more resources on AIFMD, our comprehensive overview is available here.

# 1. AIFM permitted activities and ancillary services

## Permitted activities

- AIFMD 2.0 will extend the permitted activities for EU authorised alternative investment fund managers (“**AIFMs**”) to include originating loans on behalf of an alternative investment fund (“**AIF**”), and servicing securitisation special purpose entities.
- These activities are included in the list of ‘other functions’ an AIFM can perform in the course of the collective management of an AIF in Annex I AIFMD, and therefore form part of an AIFM’s management licence. This reflects the Commission’s explanatory memorandum, which accompanied the original legislative proposal, stating that *“It is proposed to amend Annex I by adding point (3) to recognise lending as a legitimate activity of AIFMs. This means AIFs could extend loans anywhere in the Union, including cross-border”*.
- However, the new AIFMD loan origination rules (discussed later in this note) also allow Member States to impose their own stricter rules, particularly in the case of consumer lending, which means that in practice it may be more difficult to achieve a true loan origination passport. This is a point to watch as the rules develop.

## Ancillary services

- The list of ancillary services (ie top-ups) AIFMs can be authorised to provide in Article 6(4) will also be extended to include:
  - administration of benchmarks in accordance with the Benchmarks Regulation ((EU) 2016/1011), however AIFMs will not be able to administer benchmarks used in the AIFs that they manage;
  - credit servicing activities in accordance with the NPL Directive ((EU) 2021/2167); and
  - as an extra item in the “non-core services”, a clarification that an AIFM can provide any other function or activity which the AIFM already provides for their AIFs or in relation to its services, provided that any potential conflict of interest created thereby is appropriately managed.

  Its not wholly clear what the last item covers, but Recital 6 of the amending Directive suggests this is aimed at corporate services such as human resources and IT, as well as IT services for portfolio and risk management, with the suggestion that this will support the international competitiveness of EU AIFMs by enabling economies of scale and helping to diversify revenue sources.

- A key gap for some AIFMs in the existing rules has been the inability to be authorised to perform the MiFID II regulated activity of “execution of client orders”. This limits those firms from setting up a single EU entity with both fund management and MiFID management businesses, unless they are willing to operate a very limited EU trading desk. AIFMD 2.0 does not explicitly plug this gap, however there may be scope to read the extra item in the “non-core services” noted above broadly, in which case it will be one to watch as to whether this might be enough to cover execution of client orders.

# 2. Delegation

In its original proposal, the Commission acknowledged the delegation model "contributes to the success of the EU fund and manager labels". The AIFMD 2.0 reforms to delegation rules are accretive rather than radical, as a result.

## Delegation rules

- Article 20 will be amended to clarify that the delegation rules apply to delegation by an EU AIFM of both ancillary services in Article 6(4) as well as core functions in Annex I, and corresponding changes are made throughout Article 20 to include references to services/clients as well as functions/AIFs.
- A new requirement is included for AIFMs to ensure that performance of their Annex I functions, and the provision of any other services, comply with the requirements in AIFMD, irrespective of any delegate's or sub-delegate's regulatory status or location.
- Marketing of an AIF by a distributor acting on its own behalf (under MiFID II or the Insurance Distribution Directive), will not be considered to be a delegation, and therefore not subject to the delegation rules, even if they have a distribution agreement with the AIFM.

## AIFM authorisation applications

The information that AIFMs will need to provide about their delegates on their initial application for authorisation pursuant to Article 7 will increase. In respect of each AIF, an AIFM will need to briefly describe any delegated management and risk functions and the level of delegation, and confirm what due diligence measures will be undertaken to monitor any delegation. AIFMs will also need to describe in detail their "human and technical resources" for monitoring delegated activities.

## Reporting

Article 24 will be enhanced to require ongoing reporting to regulators on delegation arrangements concerning risk or portfolio management. This will also apply to non-EU AIFMs marketing AIFs under Article 42. The Recitals flag that this data is for the purposes of providing a greater overview of the operation of delegation, and is not on its own an evidential indicator for determining the adequacy of substance or risk management, or the effectiveness of oversight or control arrangements at the level of the manager. See "Reporting to regulators", for more information on the detail to be reported.

## Third party AIFMs

Article 14 will include heightened conflicts rules for third party AIFMs (described in the amendments as "managing an AIF at the initiative of a third party"), requiring those AIFMs to, among other things, provide detailed explanations and evidence of their compliance with the AIFMD conflicts of interest rules to their home regulator.

## Report and review

- A new Article 7(8) will require ESMA to provide a one-off report to the EU co-legislators on market practices regarding delegation and compliance with Articles 7 and 20. The report is to be based on data reported to it by regulators and from its own supervisory convergence powers, among other things. This was significantly scaled back from the original proposals.
- ESMA's report is to be provided by 16 April 2029.
- Thereafter, the Commission is obliged to begin a review of the functioning of the rules of AIFMD, which will include a focus on delegation arrangements and their effectiveness. See "Next steps, timing and review", for more information on the review.

# 3. Substance, costs and remuneration

## Minimum substance

Although many Member States already have greater requirements, the following minimum substance requirements will be prescribed in AIFMD:

- Article 8 will be amended to clarify that EU AIFMs must, on a full-time basis, employ or engage (as executive members or members of the governing body of the AIFM) at least two persons domiciled in the EU.
- Recital 8 of the amending Directive notes that “more resources” may be necessary depending on the size and complexity of the AIF, and that “domiciled” is intended to mean “having their habitual residence in the Union”.
- Although not included as a legal requirement, Recital 9 also suggests that AIFMs managing AIFs with retail investors should be encouraged, where possible under national law or under the industry standards of the home Member State of the AIFM, to appoint as a member of their governing body at least one independent or non-executive director. Such director should be “independent in character and in judgement” and have sufficient expertise and experience to be able to assess whether the AIFM manages the relevant AIF in the best interest of investors.

## AIFM authorisation applications

Article 7 will be amended to clarify that, as part of the authorisation process, AIFMs will need to provide their home regulator with information about the persons effectively conducting the business of the AIFM, in particular with regard to the functions referred to in Annex I, including:

- a description of the role, title, and level of seniority of those persons;
- a description of the reporting lines and responsibilities of those persons within and outside the AIFM;
- an overview of the amount of time that each of those persons allocates to each responsibility; and
- a description of the human and technical resources that support the activities of those persons.

## Costs and remuneration

- ESMA will be mandated, in Article 12, to report to the EU co-legislators by 16 October 2025, on costs charged by AIFMs to investors in the AIFs they manage, explaining the reasons for the level of those costs and for any differences between them, including differences resulting from the nature of the AIFs concerned. This report is intended to support the general principle for AIFMs to treat all AIF investors fairly. As part of its assessment, ESMA will analyse the appropriateness and effectiveness of the criteria set out in ESMA’s convergence tools on the supervision of costs.
- Regulators will need to provide ESMA with one-off data on costs (including all fees, charges and expenses which are directly or indirectly borne by the investors, or by the AIFM in connection with the operations of the AIF, and that are to be directly or indirectly allocated to the AIF), for the purposes of that report, using their existing powers, including to require AIFMs to provide information.
- Recital 38 of the amending Directive suggests that ESMA should update its Guidelines on sound remuneration policies, as regards aligning incentives with ESG risks in remuneration policies. There is no set timing for this, however.

# 4. Loan origination

Although AIFMD was not conceived as a product-regulating directive, it has nevertheless always regulated a limited number of activities (such as asset stripping and use of leverage) at a product level. The creation of a new loan origination framework can be seen in this light, particularly given the increasing prevalence of lending by AIFs since AIFMD came into effect in 2013, albeit the expectation had been that these rules would be set out in a product-specific regulation rather than directly in AIFMD itself. That being said, as can be seen from the definitions, a number of the new rules will apply to any AIF which originates loans, and not just to direct lending funds per se.

The new loan origination rules are included in Article 15 (*risk management*) and Article 16 (*liquidity management*) AIFMD, and therefore apply to EU AIFMs. However, there is a lot that still needs to be clarified either via regulatory technical standards ("**RTS** ") to be prepared by ESMA and then adopted by the Commission, or in Member State implementation and guidance, and so the picture is still a developing one.

The question of whether the amendments to AIFMD amount to a loan origination passport is discussed in "AIFM permitted activities and ancillary services", above.

## New definitions

The following definitions will be added:

> "**loan origination**" or "**originating a loan**" means the granting of a loan:

  (i) directly by an AIF as the original lender; or

  (ii) indirectly through a third party or special purpose vehicle which originates a loan for or on behalf of the AIF, or for or on behalf of an AIFM in respect of the AIF, where the AIFM or AIF is involved in structuring the loan, or defining or pre-agreeing its characteristics, prior to gaining exposure to the loan.

> "**loan-originating AIF**" means an AIF:

  (i) whose investment strategy is mainly to originate loans; or

  (ii) whose originated loans have a notional value that represents at least 50% of its net asset value.

The timeframe for assessing the 50% threshold is not currently clear and will need to be clarified in future RTS or in guidance.

> "**capital of the AIF**" means aggregate capital contributions and uncalled capital committed to an AIF, calculated on the basis of amounts investible after the deduction of all fees, charges and expenses that are directly or indirectly borne by investors.

## Policies, procedures and processes

AIFMs must implement effective policies, procedures and processes for the granting of loans, for all loan originating activities (ie even if an AIF does not meet the definition of a loan-originating AIF).

Where AIFMs manage AIFs that engage in loan origination, including when those AIFs gain exposure to loans through third parties, they must also implement effective policies, procedures and processes for assessing the credit risk and for administering and monitoring credit portfolios. They will need to keep those policies, procedures and processes up-to-date and effective, and review them regularly (at least once a year).

## Investment strategy

Member States are required to prohibit AIFMs from managing AIFs whose investment strategy, or part of it, is to originate loans with the sole purpose of transferring those loans or exposures to third parties (ie an originate-to-distribute strategy). Recital 20 of the amending Directive notes this is regardless of whether those AIFs meet the definition of loan-originating AIFs.

## Proceeds and costs

Where an AIF originates loans, the proceeds of the loans, minus any allowable fees for their administration, must be attributed to the AIF in full, with all costs and expenses linked to the administration of the loan disclosed to investors in accordance with Article 23.

# 4. Loan origination

## Risk retention

AIFMs must ensure that an AIF retains 5% of the notional value of each loan that the AIF has originated and sold off: (i) until maturity for all consumer loans or loans whose maturity is up to eight years, and (ii) for at least eight years for other loans. There are exceptions to this requirement, including where the AIFM begins selling assets to redeem units or shares as part of the liquidation of the AIF; if the disposal is necessary for compliance with sanctions or product requirements (eg to stop it breaching diversification limits); to implement the strategy of the AIF in the best interests of investors; or because the sale is due to a deterioration in the risk associated with the loan.

## Lending limits

> An AIFM must ensure that where an AIF it manages originates loans, the notional value of the loans originated to any single borrower by that AIF does not exceed, in aggregate, 20% of the capital of the AIF where the borrower is a ‘financial undertaking’ or a fund. This is intended to contain the risk of interconnectedness among loan-originating AIFs and other financial market participants.

> This limit does not apply for up to the first 24 months of an AIF’s life (with some exceptions) and also ceases to apply once the AIFM begins selling assets as part of the liquidation of the AIF. It can also be temporarily suspended, for no longer than is strictly necessary (and for no more than 12 months), during periods where the capital of the AIF is increased or reduced. Any thresholds, restrictions and conditions in the ELTIF, EuVECA and EuSEF Regulations will override for those products.

> The following leverage limits will apply to loan-originating AIFs:

> > 175% of NAV, based on the commitment method, for open-ended AIFs;

> > 300% of NAV, based on the commitment method, for closed-ended AIFs.

This excludes borrowing arrangements which are fully covered by contractual capital commitments from investors.

> An AIF may not grant loans to its AIFM or the AIFM’s staff; its depositary or its delegates; an entity to which its AIFM has delegated functions or the staff of that entity; or an entity within the same group as the AIFM unless that entity is a financial undertaking that exclusively finances borrowers that are not any of the foregoing.

> Member States may prohibit consumer lending by AIFs.

## Closed-ended or open-ended?

All loan-originating AIFs must in principle be closed-ended but can be open-ended provided that the AIFM is able to demonstrate to its home regulator that the AIF’s liquidity management system is compatible with its investment strategy and redemption policy. Any thresholds, restrictions and conditions in the ELTIF, EuVECA and EuSEF Regulations will override for those products.

## Transitional provisions

> AIFMs managing AIFs that originate loans that were constituted before 15 April 2024 will be deemed, for five years (ie until 16 April 2029), to comply with the provisions regarding:

> > the 20% concentration limit;

> > the leverage limits; and

> > the requirement to be, in principle, closed-ended.

> AIFMs managing AIFs that originate loans, that were constituted before 15 April 2024 and that do not raise additional capital after 15 April 2024, will be deemed, in respect of those AIFs with no time limit, to comply with the provisions regarding:

> > the 20% concentration limit;

> > the leverage limits; and

> > the requirement to be, in principle, closed-ended.

> Until 16 April 2029, where the notional value of the loans originated by an AIF to any single borrower, or the leverage of an AIF, is above the required limits, AIFMs managing those AIFs may not increase that value or that leverage. Where the notional value of the loans originated by an AIF to any single borrower, or the leverage of an AIF, is below the required limits, AIFMs managing those AIFs may not increase that value or that leverage above those limits.

> AIFMs may choose to opt-in AIFs that originate loans early, provided that the AIFM’s home regulator is notified thereof.

# 4. Loan origination

- Where AIFs originate loans before 15 April 2024, AIFMs may continue to manage such AIFs without complying with certain provisions with respect to those loans, including:
  - the requirement to implement effective policies, procedures and processes for the granting of loans;
  - the prohibition on granting loans to certain entities;
  - the proceeds and costs rules;
  - the (optional) prohibition Member States can apply on granting loans to consumers in their territory and servicing credits granted to such consumers;
  - the prohibition on AIFMs from managing AIFs with an originate-to-distribute strategy; and
  - the 5% risk retention requirement.

## RTS, ITS and guidelines

ESMA will be required to develop draft RTS (by 16 April 2025) to determine the requirements with which loan-originating AIFs are to comply in order to maintain an open-ended structure. Those requirements shall include a sound liquidity management system, the availability of liquid assets and stress testing, as well as an appropriate redemption policy having regard to the liquidity profile of loan-originating AIFs. The requirements must also take due account of the underlying loan exposures, the average repayment time of the loans and the overall granularity and composition of the portfolios of loan-originating AIFs.

# 5. Shareholder loans

In order to avoid catching common downstream structuring practices within the ambit of some of the loan origination rules, there are certain exceptions for AIFs which make shareholder loans, which are defined as: "a loan which is granted by an AIF to an undertaking in which it holds directly or indirectly at least 5% of the capital or voting rights, and which cannot be sold to third parties independently of the capital instruments held by the AIF in the same undertaking".

## Policies, procedures and processes

> The policies, procedures and processes rules do not apply to the origination of shareholder loans, where the notional value of such loans does not exceed, in aggregate, 150% of the capital of the AIF.

> This is without prejudice to the requirement (in Article 12(1)(b)) that Member States must ensure AIFMs at all times act in the best interests of the AIFs or the investors of the AIFs they manage, and the integrity of the market.

## Leverage limits

> The leverage limits do not apply to a loan-originating AIF whose lending activities consist solely of originating shareholder loans, provided that the notional value of those loans does not exceed, in aggregate, 150% of the capital of the AIF.

> This is without prejudice to the duty of regulators (in Article 25(3)) to assess the market risks of the use of leverage, and to impose other leverage limits.

# 6. Liquidity management

## Selection of LMTs

> Article 16 will be amended to require EU AIFMs of open-ended AIFs to select at least two liquidity management tools ("**LMTs**") (as described in a new Annex V to AIFMD, choosing from points (2) to (8) of that list) that are suitable for the AIF's investment strategy, liquidity profile and redemption policy. AIFMs cannot select only swing pricing and dual pricing. As an exception, Money Market Funds only require one LMT to be selected.

> The selected LMTs will need to be included in the AIF's rules or instruments of incorporation.

### Annex V LMTs

(1) Suspension of subscriptions, repurchases and redemptions

(2) Redemption gate

(3) Extension of notice periods

(4) Redemption fee

(5) Swing pricing

(6) Dual pricing

(7) Anti-dilution levy

(8) Redemption in-kind

(9) Side pockets

## Policies and procedures

AIFMs must implement detailed policies and procedures for the activation and deactivation of any selected LMT, and the operational and administrative arrangements for the use of such tool.

## Suspensions

AIFMs managing open-ended AIFs may, in the interests of investors, temporarily suspend subscriptions, repurchases and redemptions only in exceptional cases where circumstances so require and where suspension is justified in the interests of the AIF's investors.

## Side pockets

An AIFM may only activate side pockets in exceptional cases where circumstances so require and where justified in the interests of the AIF's investors.

## Redemptions in-kind

Redemptions in-kind will only be permitted for professional investors. The redemption must correspond to a pro rata share of the assets of the AIF, unless the AIF is solely marketed to professional investors or is an ETF designed to replicate an index.

## Notifying regulators and ESMA

> AIFMs will need to inform their home regulator of the two chosen LMTs for each relevant AIF, as well as the details of their policies and procedures.

> AIFMs must notify their home regulator, without delay, when activating or deactivating:

> > suspension of subscriptions, repurchases and redemptions;

> > any of the LMTs in Annex V, points (2) to (8) in a manner that is not in the ordinary course of business as envisaged in the AIFs rules or instruments of incorporation.

> AIFMs must notify their home regulator, within a reasonable timeframe before activating or deactivating side pockets.

> Home regulators must, without delay, inform host regulators as well as ESMA (and the ESRB if there are potential risks to the stability and integrity of the financial system), of any notifications received from AIFMs.

# 6. Liquidity management

## Regulator intervention

National regulators will be empowered in Article 46 to require an AIFM to activate or deactivate suspension of subscriptions, repurchases and redemptions. This must only be where it is in the interests of investors, in exceptional circumstances and after consulting with the AIFM; and where there are investor protection or financial stability risks that, on a reasonable and balanced view, necessitate such activation or deactivation.

## ESMA intervention

Although Article 16 doesn't currently apply to non-EU AIFMs, Article 47 will be amended to empower ESMA to request that national regulator(s) require non-EU AIFMs that are marketing AIFs in the EU that they manage, or EU AIFMs managing non-EU AIFs, to activate or deactivate suspension of subscriptions, repurchases and redemptions. This must only be after consulting with the AIFM, and where it is in the interests of investors; in exceptional circumstances; and where there are investor protection or financial stability risks that, on a reasonable and balanced view, necessitate such activation or deactivation.

## RTS, ITS and guidelines

- ESMA will be required to develop draft RTS (by 16 April 2025) to specify the characteristics of the liquidity management tools set out in Annex V, taking account of the diversity of investment strategies and underlying assets of AIFs. Those standards shall not restrict the ability of AIFMs to use any appropriate LMT for all asset classes, jurisdictions and market conditions.
- ESMA will be required to develop guidelines (by 16 April 2025) on the selection and calibration of LMTs by AIFMs for liquidity risk management and for mitigating financial stability risks. Those guidelines must recognise that the primary responsibility for liquidity risk management remains with AIFMs. They must include indications as to the circumstances in which side pockets can be activated. They must allow adequate time for adaptation before they apply, in particular for existing AIFs.
- ESMA will be required to develop guidelines (by 16 April 2026) on regulators exercising their powers to request AIFMs activate or deactivate suspensions.

# 7. Third country marketing (NPPR)

These changes apply to Article 36 *(conditions for the marketing in Member States without a passport of non-EU AIFs managed by an EU AIFM)* and Article 42 *(conditions for the marketing in Member States without a passport of AIFs managed by a non-EU AIFM)*.

They also apply to Article 35, Article 37 and Article 40, none of which have been 'switched on' yet, as they relate to the third country passport.

## Changes to current standards

Currently, the relevant third country provisions within AIFMD require non-EU AIFMs and non-EU AIFs that wish to access the EU market to, among other things, be established in countries which are not Financial Action Task Force ("**FATF**") non-cooperative countries or territories. This will be replaced with a requirement to not be established in countries which are identified as high-risk third countries under EU anti-money laundering legislation (Directive (EU) 2015/849).

## New requirements

AIFMD will also require that third countries where an AIFM and/or AIF are established must:

> have signed an agreement with each relevant Member State (eg where marketing will take place and, if relevant, also with an EU AIFM's home Member State), that fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters including any multilateral agreements; and

> not be on the EU's Annex I list (ie the "blacklist") of non-cooperative jurisdictions for tax purposes.

## Timing?

There were a number of different formulations for these changes in the Commission's, Parliament's and Council's negotiating texts, particularly regarding the date at which the relevant blacklist should be assessed, and whether any grace period for compliance should be included if a relevant third country is placed on the blacklist. The final text only provides an up to two-year grace period for Article 37.

## What about the passport?

In terms of wider changes to the AIFMD marketing framework, there have recently been modifications made by the cross-border distribution of funds package. Therefore, it seems a sensible approach to give time for those changes to become established practice and for any impacts to be monitored, rather than making wider changes now. It does appear that any moves to extend the passport to third countries is still some way off.

# 8. Disclosures to investors

Article 23 will be modified to include new disclosures and ongoing reporting to investors. All of these disclosures apply to both EU AIFMs and non-EU AIFMs marketing AIFs in the EU.

## New pre-contractual disclosures

The following new disclosures must be made available to investors, before they invest:

> the name of the AIF;

> the possibility of, and conditions for, using LMTs;

> a list of fees, charges and expenses that are borne by the AIFM in connection with the operation of the AIF and that are to be directly or indirectly allocated to the AIF.

## New periodic disclosures

> AIFMs will need to periodically report to investors on the composition of any originated loan portfolio.

> AIFMs will need to report annually to investors on (i) all fees, charges and expenses that were directly or indirectly borne by investors; and (ii) any parent undertaking, subsidiary or special purpose vehicle utilised in relation to an AIF's investments by or on behalf of the AIFM.

## RTS, ITS and guidelines

In order to ensure the uniform application of the rules relating to the name of the AIF, ESMA is mandated to develop guidelines (by 16 April 2026) to specify the circumstances in which the name of an AIF is unfair, unclear or misleading. Those guidelines need to take into account relevant sectoral legislation. Sectoral legislation setting standards for fund names or marketing of funds will take precedence over those guidelines.

ESMA noted in a statement dated 14 December 2023 that it is waiting until this new mandate is in effect before finalising its guidelines on funds' names using ESG or sustainability-related terms, shortly thereafter. The guidelines will then apply three months after the date of their publication on ESMA's website in all EU official languages. Managers of new funds will be expected to comply in respect of those funds from the date of application of the guidelines. Managers of funds existing before the date of application of the guidelines should comply with respect to those funds six months after the application date.

Introduction
1. AIFM permitted activities and ancillary services
2. Delegation
3. Substance, costs and remuneration
4. Loan origination
5. Shareholder loans
6. Liquidity management
7. Third country marketing (NPPR)
8. Disclosures to investors
9. Reporting to regulators
10. Depositary services
11. UK AIFMD
12. Next steps, timing and review
Contacts

# 9. Reporting to regulators

Article 24 will be substantially modified to expand certain existing reporting as well as to include new reporting obligations.

These provisions apply to both EU AIFMs and non-EU AIFMs marketing AIFs in the EU.

## Expansion of existing reporting

> The changes will increase the data regulators should receive from AIFMs on markets and instruments in which the AIFM trades on behalf of AIFs, and on exposures of those AIFs, by:

> > deleting the "principal" qualifier in the requirement to report on principal markets and instruments in which an AIFM trades on behalf of the AIFs it manages;

> > deleting the word "main" in the requirement to report on the main instruments in which an AIF is trading;

> > deleting the word "principal" in the requirement to report on the principal exposures (albeit also deleting "and the most important concentrations of each of the AIFs it manages"); and

> > including a clarification that the reported information must include identifiers that are necessary to connect the data provided on assets, AIF and AIFMs to other supervisory or publicly available data sources.

> The reporting on risk profile of an AIF will need to include the total amount of leverage employed by the AIF.

## New reporting obligations

> Reporting on delegation arrangements concerning portfolio management and risk management functions will have much greater prescribed detail, and will need to include:

> > information on the delegates (including names, domicile or registered office or branch, any close links with the AIFM, their regulatory status and supervisory authority);

> > the number of full-time equivalent human resources employed by the AIFM for performing day-to-day portfolio or risk management within the AIFM, and for monitoring delegation arrangements;

> > a list and description of the activities concerning portfolio management and risk management functions which are delegated;

> > where portfolio management is delegated, the amount and percentage of the AIF's assets which are subject to delegation arrangements concerning the portfolio management function;

> > the number and dates of the periodic due diligence reviews carried out by the AIFM to monitor delegated activities, a list of issues identified and, where relevant, of the measures adopted to address those issues and the date by which those measures are to be implemented;

> > where sub-delegation arrangements are in place, certain of the above in respect of the sub-delegates and the activities so sub-delegated; and

> > the commencement and expiry dates of delegation and sub-delegation arrangements.

> AIFMs will also need to provide a list of Member States in which an AIF is actually marketed by the AIFM or by a distributor which is acting on behalf of that AIFM.

### RTS, ITS and guidelines

> ESMA will be mandated to produce draft RTS (by 16 April 2027) on the detail of the reporting required; the appropriate level of standardisation of the information to be reported on delegation arrangements; and the reporting frequency and timing. ESMA must take into account other reporting already required of AIFMs, and expressly must not introduce reporting obligations relating to delegation arrangements in addition to those set out in Article 24.

> ESMA will also be required to develop draft implementing technical standards ("**ITS**") (by 16 April 2027) specifying format and data for the reporting; the identifiers necessary to be reported; methods and arrangements for submitting the reports; and a template, including the minimum additional reporting requirements, to be used by AIFMs in exceptional circumstances for reporting when requested to do so by regulators for the purposes of monitoring systemic risk.

# 10. Depositary services

## A depositary passport?

- Article 21 will be amended to introduce an exception to the requirement that an AIFM must appoint a depositary established in the same country as the relevant EU AIF, which will give Member States the ability to empower regulators to permit the appointment of a depositary established in another Member State, provided that:
  - the AIF's home regulator has received a "reasoned request" from an AIFM to appoint a depositary established in another Member State, which demonstrates the lack of depositary services in the home Member State that are able to meet effectively the needs of the AIF, having regard to its investment strategy;
  - the national depositary market of that home Member State holds, in aggregate, less than €50bn of assets of EU AIFs managed by EU AIFMs in safekeeping (with certain exclusions from this calculation).

  Even if those conditions are met, the regulator will still need to make a case-by-case assessment of the lack of relevant depositary services, having regard to the investment strategy of the AIF.
- Regulators must inform ESMA of any instance when it allows the appointment of a depositary established in another Member State.
- Amid much debate, it seems therefore that the introduction of a depositary passport is out of reach for now, however the amendments to AIFMD will nevertheless provide some limited flexibility in this area. As noted below in "Next steps, timing and review", the functioning of this will be assessed as part of the five-year review of AIFMD in 2029.

## New rules for CSDs

- The depositary rules will be amended to clarify that where an AIF's assets are kept by a central securities depository ("**CSD**"), the CSD (where it acts as an issuer CSD), will not be considered to be a delegate of the AIF's depositary's custody functions. However, where it acts as an investor CSD, it will be considered to be a delegate of the AIF's depositary's custody functions, however, the depositary would not need to comply with the due diligence requirement for the appointment of the CSD.

## Third country depositaries

- Similarly to the changes made for third country marketing, where third country depositaries are used for non-EU AIFs marketed in the Union under Article 36, the current reference to the FATF non-cooperative list is changed to exclude those in jurisdictions identified as high-risk under EU anti-money laundering legislation, and they must also not be on the EU list of non-cooperative jurisdictions for tax purposes.
- This assessment is made at the time the depositary is appointed, however if the relevant third country is subsequently added to the lists, an up to two-year grace period will apply to appoint another depositary.

# 11. UK AIFMD

The changes being made to AIFMD in the EU will not automatically be made to the corresponding rules in the UK, and there is currently no indication the UK will follow any of these changes.

However, in the UK, the FCA is considering what, if any changes to make to the UK rulebook, and has been listening to industry requests to retain the core framework of the existing UK AIFMD, while making it more proportionate in some areas and more tailored to the UK market.

To address this:

> The FCA would like to use a set of consistent rules across all managers of alternative funds. Rather than having two different categories of manager (ie above and below an AuM threshold) and applying different rules to each, it is exploring ways to ensure the regime operates proportionately depending on the nature and scale of a firm's business. The FCA will work with the Treasury to explore how to make regulation work better for "small registered", "small authorised", and "full scope" managers.

> Respondents to the FCA's 2023 discussion paper on updating and improving the UK regime for asset management, highlighted that AIFMD prevents full-scope AIFMs from carrying out other activities within the same legal entity. The FCA are considering modifications in this area.

> The FCA is considering if changes could be made to ease some of the reporting requirements, such as the requirement to report to regulators when a fund is newly established, when there are any material changes to a fund, when there's an acquisition or disposal of major holdings and in relation to the control of non-listed companies.

## Next steps

The FCA will be consulting on amending UK AIFMD and re-evaluating the UK AIFMD rules for non-UCITS retail funds in 2024 and will review the regulatory reporting regime in 2025.

# 12. Next steps, timing and review

## Next steps

- The final text was published in the Official Journal of the EU on 24 March 2024 and came into force on 15 April 2024.
- However, as is the case with any EU "Level 1" framework, the detailed rules will be found in "Level 2" and "Level 3" measures, and in national Member State implementation, all of which are still to be developed.

## Timing

- Members States have 24 months (ie until 16 April 2026) to adopt and publish the laws, regulations and administrative provisions necessary to comply with the amending Directive.
- Those measures must apply from 16 April 2026, with the exception of the measures implementing the new Article 24 (reporting to regulators) provisions, which have an extra 12 months, applying from 16 April 2027.
- We are expecting ESMA to begin consulting on Level 2 measures during the course of 2024.

## Review

- A new Article 69-a mandates the Commission to initiate a review of the functioning of the rules, 60 months after entry into force of the amending Directive (ie by 16 April 2029). In practice, this will mean three years after it has been implemented into Member States' national laws.
- The review must cover:
  - the impact on financial stability of the availability and activation of LMTs by AIFMs;
  - the effectiveness of the AIFM authorisation requirements in Articles 7 and 8 as regards the Article 20 delegation regime, in particular with regard to preventing the creation of letterbox entities in the EU;
  - the appropriateness of the requirements applicable to AIFMs managing AIFs which originate loans;
  - the functioning of the exception allowing the appointment of a depositary established in another Member State and the potential benefits and risks, including the impact on investor protection, on financial stability, on supervisory efficiency and on the availability of market choices, of amending the scope of that derogation, in line with the objectives of the capital markets union;
  - the appropriateness of the requirements applicable to third party AIFMs, and the need for additional safeguards to prevent circumvention of those requirements, and, in particular, whether the provisions of AIFMD on conflicts of interest are effective and appropriate in order to identify, manage, monitor and, where applicable, disclose conflicts of interest arising from the relationship between the AIFM and the third-party initiator; and
  - the appropriateness and impact on investor protection of the appointment of at least one non-executive or independent director to the governing body of the AIFM, where it manages AIFs marketed to retail investors.

### What should you be doing now?

Although its still a developing picture, now's the time to think about existing and new products, and how they might be impacted by AIFMD 2.0. For example:

- You will need to analyse all of your existing AIFs (and not just your direct lending AIFs) to determine whether they are within scope of the loan origination rules.
- You will need to assess the impact of the related transitional provisions on any in scope AIFs.
- If you are intending to rely on the shareholder loans carve out, you will need to review and possibly update any relevant instruments.
- If you are designing new products at this stage, it may be helpful to ensure that the impact of the new rules are considered and, to the extent relevant and possible, complied with to ensure future proofing.

Please reach out to any of your usual contacts or any of the contacts on the following page to discuss.

# Contacts

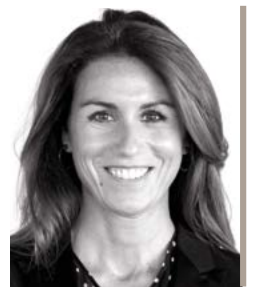
For more information, please contact your usual Linklaters LLP contact or anyone shown below.

**Clare Baker**
Partner, London
Tel: +44 20 7456 2798
clare.baker@linklaters.com

**Silke Bernard**
Partner, Luxembourg
Tel: +352 2608 8223
silke.bernard@linklaters.com

**Hermann Beythan**
Of Counsel, Luxembourg
Tel: +352 2608 8234
hermann.beythan@linklaters.com

**Richard Cole**
Counsel, London
Tel: +44 20 7456 2154
richard.cole@linklaters.com



**Paloma Fierro**
Partner, Madrid
Tel: +34 91 399 6054
paloma.fierro@linklaters.com

**Emily Harmsworth**
Counsel, London
Tel: +44 20 7456 5315
emily.harmsworth@linklaters.com

**Raoul Heinen**
Partner, Luxembourg
Tel: +352 2608 8331
raoul.heinen@linklaters.com

**Bas Jennen**
Partner, Amsterdam
Tel: +31 20 799 6287
bas.jennen@linklaters.com

**Ben Jennings**
Partner, London
Tel: +44 20 7456 2769
benjamin.jennings@linklaters.com

**Matt Keogh**
Partner, London
Tel: +44 20 7456 3118
matthew.keogh@linklaters.com

**Ngoc-Hong Ma**
Partner, Paris
Tel: +33 1 56 43 58 93
ngoc-hong.ma@linklaters.com

**Martin Mager**
Partner, Luxembourg
Tel: +352 2608 8325
martin.mager@linklaters.com

**Rahul Manvatkar**
Partner, London
Tel: +44 20 7456 4392
rahul.manvatkar@linklaters.com

**Raza Naeem**
Partner, London
Tel: +44 20 7456 5272
raza.naeem@linklaters.com

**Claire Prospert**
Partner, Luxembourg
Tel: +352 2608 8339
claire.prospert@linklaters.com

**Olena Tokman**
Partner, Frankfurt
Tel: +49 69 71003 962
olena.tokman@linklaters.com

**Emanuele Umberto Aurilia**
Managing Associate, Milan
Tel: +39 02 88 393 5272
emanuele_umberto.aurilia
@linklaters.com

**Andreas Van Impe**
Counsel, Brussels
Tel: +32 2 501 95 19
andreas.vanimpe@linklaters.com

**Alex Vogt**
Partner, Frankfurt
Tel: +49 69 71003 414
alexander.vogt@linklaters.com

**Markus Wollenhaupt**
Partner, Frankfurt
Tel: +49 69 71003 117
markus.wollenhaupt@linklaters.com