

AIFMD Factsheet for an EU AIF Appointing a Non-EU Manager

What is the AIFMD?

The Alternative Investment Fund Managers Directive (“**AIFMD**”) introduced a new passport system for the marketing of alternative investment funds (“**AIFs**”) in the European Union (“**EU**”) and created a legal framework operating at European level to monitor and supervise alternative investment fund managers (“**AIFMs**”) within a harmonised system for the first time.

What entity is the AIFM?

The AIFMD provides that each AIF must have a single AIFM, which is responsible for ensuring compliance with the AIFMD. The AIFM may be either an external manager appointed by the AIF or, where the legal form of the AIF permits internal management and it is decided not to appoint an external AIFM, the AIF itself may be authorised as the AIFM.

Can an EU-based internally managed AIF appoint a non-EU manager?

An EU-based internally managed AIF (the AIFM for the purposes of the AIFMD) may delegate its portfolio management or risk management functions to a non-EU manager provided the following conditions are met:

- The AIFM must notify its national regulator before the delegation arrangements become effective.
- The AIFM must be able to justify its entire delegation structure on objective reasons. Implementing measures introduced under the AIFMD (the “**Level 2 Regulation**”) sets out the criteria to be considered when assessing whether the entire delegation structure is based on objective reasons, including optimising of business functions and processes; cost saving; expertise of the delegate in administration or in specific markets or investments; and access of the delegate to global trading capabilities.
- The non-EU manager must have sufficient resources to perform the portfolio management and risk management functions.
- The persons who effectively conduct the functions of the non-EU manager must be of sufficiently good repute and sufficiently experienced. The Level 2 Regulation provides that persons who effectively conduct the functions of the delegate will 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. Negative records will include criminal offences, judicial proceedings or administrative sanctions relevant for the performance of the delegated tasks.
- The non-EU manager must be authorised or registered for the purpose of asset management and subject to supervision. Where this condition cannot be met, the delegation of portfolio management and risk management functions will be subject to the prior approval of the national regulator of the EU AIFM.
- The AIFM may not delegate its functions to the extent that in essence it can no longer be considered to be the manager of the AIF and to the extent that it becomes a letterbox entity. (See below for further information on when the AIFM will be considered to be a letterbox entity).
- Cooperation arrangements must be in place between the national regulator of the EU AIFM and the supervisory authority of the non-EU manager.
- The delegation must not prevent the effectiveness of supervision of the AIFM.
- The AIFM must demonstrate that the non-EU manager is qualified and capable of undertaking the portfolio management and risk management functions, that the non-EU manager was selected with all due care, and that the AIFM can effectively monitor the delegated functions.
- The non-EU manager cannot also be the AIF’s depositary or a delegate of the depositary.

- The non-EU manager cannot be an entity whose interests conflict with those of the AIFM or the investors of the AIF, unless the entity has functionally and hierarchically separated the performance of its portfolio management or risk management tasks from its other potentially conflicting tasks. The potential conflicts of interest must be properly identified, managed, monitored and disclosed to the investors of the AIF.

When will the AIFM be considered to be a letterbox entity?

The Level 2 Regulation provides that the AIFM will be deemed a letterbox entity in any of the following circumstances:

- the AIFM no longer retains the necessary expertise and resources to supervise the delegated tasks effectively and manage the risks associated with the delegation;
- 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;
- where the AIFM loses its contractual rights to inquire, inspect, have access or give instructions to its delegates; or
- where 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.

In relation to (d), the Level 2 Regulation provides that, when assessing the extent of delegation, competent authorities shall consider the entire delegation structure taking into account not only the assets managed under delegation, but also a number of qualitative criteria. These include the types of assets invested in, and the importance of the assets under delegation for the risk and return profile and achievement of the investment goals of the fund; the geographical and sectoral spread of the fund's investments; the risk profile of the fund and the types of investment strategies pursued; the types of task delegated in relation to those retained; and the configuration of the delegates and sub-delegates, their geographical sphere of operation and corporate structure.

Full details of the Asset Management and Investment Funds Group, together with further updates, articles and briefing notes written by members of the Asset Management and Investment Funds team can be accessed at www.matheson.com.

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