

## AIFMD - Transparency

Directive 2011/ 61/EU on Alternative Investment Fund Managers (AIFMD) must be implemented by EU member states by 22 July 2013. AIFMD is supplemented by a delegated regulation (AIFMD Regulation). AIFMD regulates the activities of Alternative Investment Fund Managers (AIFMs) and their Alternative Investment Funds (AIFs). One of the main objectives of the AIFMD is to increase transparency around the activities of AIFMs and their AIFs in their dealings with investors and regulators. For this reason, AIFMD sets out transparency requirements for annual reports, disclosures to investors and reporting to regulators. This note summarises the transparency requirements, other than the specific requirements for AIFM managing leveraged AIFs, AIFMs managing AIFs holding controlling stakes in companies, marketing and passporting requirements, exempt AIFMs, third country requirements or requirements for authorisation as an AIFM. AIFMD has been implemented in Ireland by the European Union (Alternative Investment Funds Managers) Regulations, 2013.

The European Securities and Markets Authority (ESMA) published final guidelines on the reporting obligations to national supervisors. It also published an opinion which proposes introducing additional periodic reporting.

### Annual Reports (AIFMD Article 22)

An AIFM must produce, for each of the AIFs it manages, and for each of the AIFs it markets in the EU, annual reports (Annual Reports) which must be:

- made available no later than 6 months after the financial year end;
- provided to investors on request;
- filed with the AIFM home regulator and, where applicable, the home regulators of the AIF;
- prepared in accordance with the accounting standards of the home member state of the AIF or the third country where the AIF has its registered office; and
- be presented in a manner that provides materially relevant, reliable, comparable and clear information that investors may need in relation to particular AIF structures.
- The accounting information given in the annual report must be audited by an EU auditor (or equivalent, where permitted by member states for AIFMs marketing non-EU AIFs).

The AIFMD sets out minimum requirements for the content of the annual report with the AIFMD Regulation providing more detail as follows:-

- a balance sheet or a statement of assets and liabilities (see AIFMD Regulation, Article 104);
- an income and expenditure account for the financial year (see AIFMD Regulation, Article 104);
- report on activities of the financial year (see AIFMD Regulation Article 105) which must include an overview of investment activities during the year and overview of AIF's portfolio at period end and an overview of AIF performance over the period;
- any material changes<sup>1</sup> in the information which is disclosed to investors under the AIFMD during the financial year in question (see AIFMD Regulation, Article 104);
- total remuneration for the financial year (split into fixed and variable remuneration) paid by the AIFM to its staff members, the number of beneficiaries and, where relevant, carried interest paid by the AIF (see AIFMD Regulation, Article 107); and
- the aggregate amount of remuneration broken down by senior management and members of staff whose actions have a material impact on the risk profile of the AIF (see below).

The annual report must also include a "fair and balanced" review of the activities and performance of the AIF, and description of principal risks and investment or economic uncertainties that the AIF may face. Where necessary, analysis should include both financial and (where applicable) non-financial key performance indicators relevant to the AIF. Where such information is already disclosed to investors in a Transparency Directive-compliant prospectus (by a closed-ended listed AIF), it does not need to be repeated but different time lines apply.

### Remuneration Disclosure

As detailed above, the annual report must set out information on the total amount of remuneration (which should also mention carried interest, where relevant) for the financial year. Article 107 of AIFMD Regulation further elucidates that this disclosure should specify whether it relates to any of the following:

1 "Material change" means changes in information if there is a substantial likelihood that a reasonable investor, becoming aware of such information, would reconsider its investment in the AIF, including for reasons that 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 AIF. AIFM must assess what changes in the information should be provided together with any potential or anticipated impact on the AIF and its investors. In either case, where the information is already made available to investors, cross reference should be made to the medium where such detailed information is available.

- the total remuneration of the entire staff of the AIFM, indicating the number of beneficiaries;
- the total remuneration of those staff of the AIFM who in part or in full are involved in the activities of the AIF indicating the number of beneficiaries;
- the proportion of the total remuneration of the staff of the AIFM attributable to the AIF, indicating the number of beneficiaries.

Where this is disclosed at the level of the AIFM, a breakdown should be given for each AIF, where possible, with an indication of how the breakdown was provided. AIFMs must provide information on the remuneration criteria for relevant categories of staff to enable investors to assess the incentives created and to understand the risk profile of the AIF and its conflicts of interest arrangements.

### Disclosure to investors before investing (AIFMD Article 23)

AIFM must make specific information available to investors before they invest in the AIF, together with any material changes. This information includes a description of:

- the investment strategy and objectives of the AIF, the assets in which it may invest, the techniques it may employ and all associated risks, any applicable investment restrictions, and details in relation to any leverage (when it will use it, types, sources, risks, restrictions on use and maximum level) and collateral and asset re-use arrangements;
- information on where any master AIF is established and where the underlying funds are established if the AIF is a fund of funds;
- a description of the procedures by which the AIF may change its investment strategy or policy;
- the main legal implications of the investment contract (jurisdiction, applicable law, documentation for recognition and enforcement of judgements in the AIF home territory);
- the identity of the AIFM, the AIF's depositary, auditor and any other service providers, with a description of their duties and the investors' rights;
- how the AIFM covers professional liability risks under the capital requirement provisions, i.e. either via additional own funds or professional indemnity insurance;
- any delegated management or depositary function and any associated conflicts of interest;
- the AIF's valuation procedure and pricing methodology;
- the AIF's liquidity risk management, including redemption rights;
- all fees, charges and expenses (including maximum amounts) borne by investors (both directly or indirectly);
- a description of how the AIFM ensures fair treatment of investors;
- a description and details of any preferential treatment (or right to preferential treatment) received by an investor (such as by way of a side letter);
- the latest annual report (see above);
- the procedure and conditions of issue and sale of units or shares;
- the latest net asset value of the AIF or the latest market price of the units or shares of the AIF;
- the historical performance of the AIF (where available);
- details of prime brokerage arrangements;
- any arrangements made by the depositary to contractually discharge itself of its liability under the AIFMD, together with any changes with respect to depositary liability; and
- details of how and when periodic disclosures will be made.

An AIFM must inform investors before they invest of any arrangement to discharge depositary liability and must inform investors without delay of any changes regarding depositary liability.

Where such information is already disclosed to investors in a Prospectus Directive-compliant prospectus (by a closed-ended listed corporate AIF), it does not need to be repeated.

### Periodic and Regular Disclosure to investors (AIFMD Article 23)

Each AIFM must periodically disclose the following information to investors (see AIFMD Regulation, Article 108 and 109):

- net asset value per unit or share;
- the percentage of the AIF's assets which are subject to special arrangements arising from their illiquid nature;
- any new arrangements for managing the liquidity of the AIF;
- the current risk profile of the AIF and risk management systems employed by the AIFM; and
- where an AIFM manages or markets in the EU an AIF employing leverage, it must regularly disclose the maximum level of leverage permitted (as well as any right of re-use of collateral or any guarantee granted under the leveraging arrangement) and the total amount of leverage employed by the AIF.

## Reporting Obligations to Regulators (AIFMD Article 24)

The AIFM must regularly report to its home regulator aggregated information on the main instruments in which it trades, the markets of which it is a member or actively trades, and the diversification of the AIF's portfolio including its principal exposures and most important concentrations of each of the AIFs it manages (see AIFMD Regulation, Article 110). The AIFM must notify its home regulator of changes to information submitted, such as changes to its delegation arrangements (such as any sub-delegation) or launches of new sub-funds.

The AIFM must also provide information to its home regulator on:

- the percentage of the AIF's assets subject to special arrangements arising from their illiquid nature;
- new arrangements for managing the liquidity of the AIF;
- the risk profile of the AIF and risk management systems employed to manage market risk, liquidity risk, counterparty risk and other risks including operational risk;
- the main categories of assets in which the AIF is invested; and
- the results of stress tests in respect of investment risk and liquidity risk.

The information must be provided to the AIFM's home regulator:

- half-yearly for AIFs whose assets under management exceed either € 100m or €500m, but do not exceed €1bn for each EU AIF;
- quarterly for AIFs whose assets under management exceed €1bn for each EU AIF;
- quarterly for AIFs whose assets under management include any assets acquired through leverage and exceed €500m for each EU AIF;
- annually for unleveraged AIFs which as a part of their core investment policy invest in non-listed companies and issuers so as to acquire control.

The AIFM's home regulator may request additional information, including the annual report of each EU AIF and each AIF marketed in the EU; a list of all AIF which the AIFM manages for the end of each quarter; and additional information which the AIFM's home regulator requires to monitor risk effectively.

## KEY CONTACTS



**Brian McDermott**

Partner

T: +353 1 649 2307

E: [bmcdermott@algoodbody.com](mailto:bmcdermott@algoodbody.com)



**Michael Barr**

Partner

T: +353 1 649 2327

E: [mbarr@algoodbody.com](mailto:mbarr@algoodbody.com)



**Mary McKenna**

Partner

T: +353 1 649 2344

E: [mmckenna@algoodbody.com](mailto:mmckenna@algoodbody.com)



**Niamh Ryan**

Partner

T: +44 20 73 820 820

E: [nryan@algoodbody.com](mailto:nryan@algoodbody.com)



**Elaine Keane**

Partner

T: +353 1 649 2544

E: [elkeane@algoodbody.com](mailto:elkeane@algoodbody.com)



**Nollaig Greene**

Professional Support Lawyer

T: +353 1 649 2359

E: [ngreene@algoodbody.com](mailto:ngreene@algoodbody.com)

The contents of this note are necessarily expressed in broad terms and limited to general information rather than detailed analyses or legal advice. Specialist professional advice should always be obtained to address legal and other issues arising in specific contexts.

© A&L Goodbody November 2013