



**Financial Services  
Commission**

## **Information page**

# **Alternative Investment Fund Managers Directive Operating conditions - General**

Issued :

19 March 2013



**Table of Contents**

1. Introduction .....	3
2. General operating principles .....	3
3. Duty to act in best interests of the AIF, investors and integrity of the market .....	4
4. Due diligence in the selection of investments.....	4
5. Due diligence when investing in assets of limited liquidity .....	4
6. Due diligence in selection and appointment of counterparties and prime brokers ...	5
7. Acting honestly, fairly and with due skills.....	5
8. Resources.....	6
9. Fair treatment of investors in the AIF .....	6
10. Inducements.....	6
11. Effective employment of resources and procedures – handling of orders .....	7
12. Reporting obligations on execution of subscription and redemption orders .....	8
13. Execution of decisions to deal on behalf of the managed AIF .....	8
14. Placing orders to deal on behalf of AIFs with other entities for execution.....	9
15. Aggregation and allocation of trading orders.....	10
16. Application of implementing measures.....	10

Financial Services Commission  
PO Box 940, Suite 3, Ground Floor,  
Atlantic Suites, Europort Avenue,  
Gibraltar

*Any advice or interpretation covered in this information page represents the views of the FSC as to its expectations of how the requirements of the AIFMD are to be complied with and/or how it fails to be applied. This however is not intended as a definitive interpretation of the AIFMD which is ultimately a matter for the courts to determine. The FSC does not provide, or purport to offer, legal advice.*



## 1. Introduction

- 1.1 In this information page, reference is made to the Alternative Investment Fund Managers Directive 2011/61/EU ("AIFMD") and to the supplementing Level 2 Delegated Regulation ("Level 2").
- 1.2 The AIFMD requires Alternative Investment Fund Managers ("AIFMs") to operate in accordance with conditions set out in the AIFMD and Level 2. The purpose of this information page is to provide AIFMs with clear information, based on the information on the AIFMD and Level 2, on what requirements and conditions they must comply with.

## 2. General operating principles

### *Article 12 of the AIFMD*

Article 12 of AIFMD covers the general operating principles which apply to AIFMs.

- 2.1 AIFMs must at all times:
- (a) act honestly, with due skill, care and diligence and fairly in conducting their activities;
  - (b) act in the best interests of the AIFs or the investors of the AIFs they manage and the integrity of the market;
  - (c) have and employ effectively the resources and procedures that are necessary for the proper performance of their business activities;
  - (d) 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 AIFs and their investors and to ensure that the AIFs they manage are fairly treated;
  - (e) comply with all regulatory requirements applicable to the conduct of their business activities so as to promote the best interests of the AIFs or the investors of the AIFs they manage and the integrity of the market;
  - (f) treat all AIF investors fairly; in particular, no investor in an AIF may obtain preferential treatment, unless it is disclosed in the relevant AIF's rules or instruments of incorporation<sup>1</sup>.
- 2.2 In the case of an AIFM the authorisation which also covers the discretionary portfolio management service referred to in Article 6(4)(a) of the AIFMD, the AIFM must:
- (a) not be permitted to invest all or part of the client's portfolio in units or shares of the AIFs it manages, unless it receives prior general approval from the client, and
  - (b) with regard to the services referred to in Article 6(4), be subject to Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes.

---

<sup>1</sup> 'rules or instruments of incorporation' shall mean the memorandum and articles of association for a company, the partnership agreement for a partnership or the trust deed for a unit trust.

### **3. Duty to act in best interests of the AIF, investors and integrity of the market**

#### *Article 17 of Level 2*

- 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.
- 3.2 AIFMs shall ensure that the AIFs they manage or the investors in these AIFs are not charged undue costs.

### **4. Due diligence in the selection of investments**

#### *Article 18 of Level 2*

- 4.1 AIFMs shall apply a high standard of diligence in the selection and ongoing monitoring of investments.
- 4.2 AIFMs shall ensure that they have adequate knowledge and understanding of the assets in which the AIF is invested.
- 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 AIFs are carried out in compliance with the objectives, the investment strategy and, where applicable, the risk limits of the AIF.
- 4.4 The policies and procedures on due diligence referred to in section 4.3 shall be regularly reviewed and updated.

### **5. Due diligence when investing in assets of limited liquidity**

#### *Article 19 of Level 2*

- 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 section 4 above:
  - (a) set out and regularly update a business plan consistent with the duration of the AIF and market conditions;
  - (b) seek and select possible transactions consistent with the business plan referred to in point (a);
  - (c) 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;
  - (d) perform due diligence activities related to the transactions prior to arranging execution;
  - (e) monitor the performance of the AIF with respect to the business plan referred to in point (a).

- 5.2 AIFMs shall retain records of the activities carried out pursuant to section 5.1 for at least five years.

## **6. Due diligence in selection and appointment of counterparties and prime brokers**

### *Article 20 of Level 2*

- 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.
- 6.2 When selecting prime brokers or counterparties of an AIFM or an 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:
- (a) they are subject to ongoing supervision by a public authority;
  - (b) they are financially sound;
  - (c) they have the necessary organisational structure and resources for performing the services which are to be provided by them to the AIFM or the AIF.
- 6.3 When appraising the financial soundness referred to in section 6.2(b), 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.
- 6.4 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 section 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.

## **7. Acting honestly, fairly and with due skills**

### *Article 21 of Level 2*

- 7.1 In order to establish whether an AIFM conducts its activities honestly, fairly and with due skills, the FSC will assess, at least, whether the following conditions are met:
- (a) 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 AIF is invested;
  - (b) the members of the governing body commit sufficient time to properly perform their functions in the AIFM;
  - (c) each member of the governing body acts with honesty, integrity and independence of mind;



- (d) the AIFM devotes adequate resources to the induction and training of members of the governing body.

## 8. Resources

### *Article 22 of Level 2*

- 8.1 AIFMs shall employ sufficient personnel with the skills, knowledge and expertise necessary for discharging the responsibilities allocated to them.
- 8.2 For the purposes of section 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.

## 9. Fair treatment of investors in the AIF

### *Article 23 of Level 2*

- 9.1 The AIFM shall ensure that its decision-making procedures and its organisational structure (for further information please refer to the FSC information page on "AIFMD – Organisational requirements – General") ensure fair treatment of investors.
- 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.

## 10. Inducements

### *Article 24 of Level 2*

- 10.1 AIFMs shall not be regarded as acting honestly, fairly and in accordance with the best interests of the AIFs they manage or the investors in these AIFs if, in relation to the activities performed when carrying out the functions referred to in Annex I of the AIFMD, they pay or are paid any fee or commission, or provide or are provided with any non-monetary benefit, other than the following:
- (a) a fee, commission or non-monetary benefit paid or provided to or by the AIF or a person on behalf of the AIF;
  - (b) 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:
    - (i) 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 AIF in a manner that is comprehensive, accurate and understandable, prior to the provision of the relevant service;
    - (ii) the payment of the fee or commission, or the provision of the nonmonetary 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 AIF it manages or the investors in the AIF.

- (c) 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 AIF it manages or the investors of the AIF.
- 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 point (i) of section 10.1(b), provided that the AIFM commits to disclose further details at the request of the investor in the AIF it manages and provided that it fulfils this commitment.

## **11. Effective employment of resources and procedures – handling of orders**

### *Article 25 of Level 2*

- 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 AIF.
- 11.2 The procedures and arrangements referred to in section 11.1 shall satisfy the following requirements:
- (a) they shall ensure that orders executed on behalf of AIFs are promptly and accurately recorded and allocated;
  - (b) they shall execute otherwise comparable AIF orders sequentially and promptly unless the characteristics of the order or prevailing market conditions make this impracticable, or the interests of the AIF or of the investors in the AIF require otherwise.
- 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 AIF.
- 11.4 AIFMs shall not misuse information related to pending AIF orders, and shall take all reasonable steps to prevent the misuse of such information by any of their relevant persons.
- 11.5 The 'relevant person' in relation to an AIFM means any of the following:
- (a) a director, partner or equivalent, or manager of the AIFM;
  - (b) an employee of the AIFM, or any other natural person whose services are placed at the disposal and under the control of the AIFM and who is involved in the provision of collective portfolio management services by the AIFM;
  - (c) a natural or legal person who is directly involved in the provision of services to the AIFM under a delegation arrangement to third parties for the purpose of the provision of collective portfolio management by the AIFM.

## 12. Reporting obligations on execution of subscription and redemption orders

### *Article 26 of Level 2*

- 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.
- 12.2 Section 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.
- 12.3 The essential information referred to in sections 12.1 and 12.2 shall include the following information:
- (a) the identification of the AIFM;
  - (b) the identification of the investor;
  - (c) the date and time of receipt of the order;
  - (d) the date of execution;
  - (e) the identification of the AIF;
  - (f) the gross value of the order including charges for subscription or the net amount after charges for redemptions.
- 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.

## 13. Execution of decisions to deal on behalf of the managed AIF

### *Article 27 of Level 2*

- 13.1 AIFMs shall act in the best interests of the AIFs or the investors in the AIFs they manage when executing decisions to deal on behalf of the managed AIF in the context of the management of their portfolio.
- 13.2 Whenever AIFMs buy or sell financial instruments or other assets for which best execution is relevant, and for the purposes of section 13.1, they shall take all reasonable steps to obtain the best possible result for the AIFs they manage or the investors in these 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:
- (a) the objectives, investment policy and risks specific to the AIF, as indicated in the AIF's rules or articles of association, prospectus or offering documents of the AIF;
  - (b) the characteristics of the order;
  - (c) the characteristics of the financial instruments or other assets that are the subject of that order;



- (d) the characteristics of the execution venues to which that order can be directed.
- 13.3 AIFMs shall establish and implement effective arrangements for complying with the obligations referred to in sections 13.1 and 13.2. In particular, the AIFM shall establish in writing and implement an execution policy to allow AIFs and their investors to obtain, for AIF orders, the best possible result in accordance with section 13.2.
- 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.
- 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 AIFs.
- 13.6 AIFMs must be able to demonstrate that they have executed orders on behalf of the AIF in accordance with their execution policy.
- 13.7 Whenever there is no choice of different execution venues, sections 13.2 to 13.5 shall not apply. However, AIFMs must be able to demonstrate that there is no choice of different execution venues.

## **14. Placing orders to deal on behalf of AIFs with other entities for execution**

### *Article 28 of Level 2*

- 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 AIFs it manages or the investors in the AIFs when placing orders to deal on behalf of the managed AIFs with other entities for execution, in the context of the management of their portfolio.
- 14.2 AIFMs shall take all reasonable steps to obtain the best possible result for the AIF or the investors in the 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 section 13.2 above.
- AIFMs shall establish, implement and apply a policy to enable them to comply with the obligation referred to in the paragraph above. 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 section 14. The AIFM shall make available to investors in the AIFs it manages appropriate information on the policy established in accordance with this paragraph and on any material changes to that policy.
- 14.3 AIFMs shall monitor on a regular basis the effectiveness of the policy established in accordance with section 14.2 and, in particular, 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 AIFs.

- 14.4 AIFMs shall be able to demonstrate that they have placed orders on behalf of the AIF in accordance with the policy established pursuant to section 14.2.
- 14.5 Whenever there is no choice of different execution venues, sections 14.2 to 14.5 shall not apply. However, AIFMs shall be able to demonstrate that there is no choice of different execution venues.

## 15. Aggregation and allocation of trading orders

### *Article 29 of Level 2*

- 15.1 AIFMs can only carry out an AIF order in aggregate with an order of another AIF, a UCITS or a client or with an order made when investing their own funds where:
- (a) it can be reasonably expected that the aggregation of orders will not work overall to the disadvantage of any AIF, UCITS or clients whose order is to be aggregated;
  - (b) 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.
- 15.2 Where an AIFM aggregates an AIF order with one or more orders of other AIFs, UCITS or clients and the aggregated order is partially executed, it shall allocate the related trades in accordance with its order allocation policy.
- 15.3 Where an AIFM aggregates transactions for its own account with one or more orders of AIFs, UCITS or clients, it shall not allocate the related trades in a way that is detrimental to the AIF, UCITS or a client.
- 15.4 Where an AIFM aggregates an order of an 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 AIF, UCITS or to clients in priority over those for its own account.
- 15.5 However, if the AIFM is able to demonstrate to the 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 point (b) of section 15.1.

## 16. Application of implementing measures

Any measures adopted by the European Union Commission under Article 12(3) of the AIFMD will also be applicable.