
STATUTORY INSTRUMENTS

2013 No. 1773

The Alternative Investment Fund Managers Regulations 2013

PART 4

Operating conditions for external valuers, full-scope AIFMs and depositaries

Valuation

24.—(1) An external valuer must carry out the valuation function described in Article 19 of the directive impartially, and with all due skill, care and diligence.

(2) An external valuer may not delegate such valuation function to a third party.

(3) If the FCA considers the appointment of an external valuer does not comply with the implementing provisions, the FCA may require that another external valuer be appointed instead.

(4) Any liability of a full-scope UK AIFM to an AIF managed by it, or to an investor of such an AIF, arising out of the AIFM's responsibility for the proper valuation of AIF assets, the calculation of the net asset value of the AIF and the publication of that net asset value, is not affected by the appointment by the AIFM of an external valuer in respect of that AIF.

(5) Irrespective of any contractual arrangements that provide otherwise, an external valuer is liable to the AIFM of an AIF in respect of which the external valuer is appointed for any losses suffered by the AIFM as a result of the external valuer's negligence or intentional failure to perform its tasks.

Disqualification of external valuer

25.—(1) If it appears to the FCA that an external valuer has failed to comply with an implementing provision applicable to it, it may disqualify the valuer from acting as an external valuer, or from so acting for any particular class of AIFs.

(2) If the FCA proposes to disqualify a valuer under this section, it must give the valuer a warning notice.

(3) If the FCA decides to disqualify a valuer—

- (a) it must give the valuer a decision notice; and
- (b) the valuer may refer the matter to the Tribunal.

(4) The FCA may remove any disqualification imposed under this regulation if satisfied the disqualified person will in future comply with the implementing provisions.

Approval for delegation of functions by full-scope UK AIFMs

26.—(1) A full-scope UK AIFM may not delegate its functions of portfolio management or risk management for an AIF to an undertaking, and that undertaking may not sub-delegate such function to another undertaking, unless—

- (a) the undertaking to whom the functions are to be delegated or sub-delegated falls within paragraph (2); or

Status: Point in time view as at 03/12/2015.

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- (b) the FCA has approved such delegation or sub-delegation.
- (2) An undertaking falls within this paragraph if it is—
 - (a) authorised or registered for the purpose of asset management; and
 - (b) subject to supervision in relation to its asset management function.
- (3) An application for approval under paragraph (1)(b)—
 - (a) must be made in such manner as the FCA may direct; and
 - (b) must contain or be accompanied by such information as the FCA may reasonably require for the purposes of determining the application.
- (4) At any time after receiving an application and before determining it, the FCA may require the applicant to provide it with such further information as it considers necessary to enable it to determine the application.
- (5) An application under paragraph (3) must be determined by the FCA within one month of receiving the completed application.
- (6) The FCA may determine an incomplete application if it considers it appropriate to do so; and it must in any event determine such an application within two months of receiving the application.
- (7) If the FCA proposes to refuse an application under paragraph (3) it must give the applicant a written notice.
- (8) If the FCA decides to refuse an application under paragraph (3)—
 - (a) it must give the applicant a written notice explaining its reasons for the decision; and
 - (b) the applicant may refer the matter to the Tribunal.

Revocation of approval for delegation

- 27.**—(1) The FCA may revoke its approval granted under regulation 26.
- (2) If the FCA proposes to revoke its approval it must give the applicant a warning notice.
- (3) If the FCA decides to revoke its approval—
 - (a) it must give the applicant a decision notice; and
 - (b) the applicant may refer the matter to the Tribunal.

Liability following delegation under Article 20 of the directive

- 28.**—(1) Irrespective of any contractual arrangements that provide otherwise, any liability of a full-scope UK AIFM to an AIF it manages, or to an investor of such an AIF, is not affected by—
 - (a) the delegation of functions by the AIFM to a third party (“a delegate”);
 - (b) any sub-delegation of such functions by the delegate to another person (“a sub-delegate”);
 - or
 - (c) any further sub-delegation of such functions by a sub-delegate.
- (2) A delegate or sub-delegate which has delegated or sub-delegated such functions must review on an ongoing basis the services provided by the person to whom functions have been delegated or sub-delegated.

Depositary liability: general provisions

- 29.**—(1) This regulation and regulations 30 to 32 apply in relation to the depositary of a UK AIF managed by a full-scope UK AIFM or an EEA AIFM.

(2) Any obligation or liability of a depositary under regulation 30 or 31 to the investors of the AIF may be invoked directly or indirectly through the AIFM, depending on the nature of the legal relationship between the depositary, the AIFM and the investors.

(3) For the purposes of regulations 30 to 32, the provision of services as specified by Directive 98/26/EC of the European Parliament and of the Council of 19th May 1998 on settlement finality in payment and securities settlement systems^{M1} by a securities settlement system designated for the purposes of that Directive, or the provision of similar services by a third-country securities settlement system, is not to be considered a delegation of custody functions.

Marginal Citations

M1 OJ L 166, 11.6.1998, p.45.

Depositary liability for loss of financial instruments held in custody

30.—(1) This regulation applies where a financial instrument held in custody in accordance with Article 21.8(a) of the directive by the depositary or a third party to whom the custody has been delegated or sub-delegated is deemed to have been lost under Article 100 of the Commission Delegated Regulation.

(2) Subject to paragraphs (3) and (4), the depositary must return a financial instrument of the identical type or the corresponding amount to the AIF, or the AIFM acting on behalf of the AIF, without undue delay.

(3) The depositary is not required to comply with the obligation in paragraph (2) if it can prove that the loss arose as a result of an external event beyond the depositary's reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary.

(4) The depositary is not required to comply with the obligation in paragraph (2) if it can prove that—

- (a) the lost financial instrument was held in custody by a third party;
- (b) the depositary had delegated its functions to the third party in accordance with implementing provisions relating to the second paragraph of Article 21.11 of the directive;
- (c) a written contract between the depositary and the third party—
 - (i) expressly transfers the obligation in paragraph (2) to the third party; and
 - (ii) enables the AIF, or the AIFM acting on behalf of the AIF, to make a claim against the third party in respect of the loss of the financial instrument, or for the depositary to make such a claim on their behalf; and
- (d) a written contract between the depositary and the AIF, or the AIFM acting on behalf of the AIF, expressly allows a transfer of the depositary's obligation in paragraph (2) and establishes an objective reason for the transfer.

(5) A third party (“A”) to which custody of a financial instrument has been delegated and to which the obligation in paragraph (2) has been transferred in accordance with paragraph (4) is not required to return a financial instrument of the identical type or corresponding amount to the AIF, or the investors of the AIF, if it can prove that—

- (a) the lost financial instrument was held in custody by another third party (“B”);
- (b) A had sub-delegated its functions to B in accordance with implementing provisions relating to the second paragraph of Article 21.11 of the directive;
- (c) a written contract between A and B—

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- (i) expressly transfers from A to B the obligation to return a financial instrument of the identical type or corresponding amount to the AIF, or the investors of the AIF; and
 - (ii) enables the AIF, or the AIFM acting on behalf of the AIF, to make a claim against B in respect of the loss of the financial instrument, or for the depositary to make such a claim on their behalf; and
 - (d) a written contract between A and the depositary expressly allows a transfer of A's obligation to return a financial instrument of the identical type or corresponding amount to the AIF, or the investors of the AIF, and establishes an objective reason for the transfer.
- (6) Irrespective of any contractual arrangements that provide otherwise, but subject to paragraphs (4) and (5) and regulation 32(2), the obligation of the depositary under paragraph (2) or of a third party as referred to in paragraph (4)(c) or (5)(c) is not affected by any delegation by the depositary or sub-delegation by the third party of the functions referred to in Article 21.8 of the directive.
- [^{F1}(7) Paragraphs (4) and (5) do not apply to a depositary of an EEA ELTIF or a UK ELTIF that is marketed to retail investors under Chapter V of the ELTIF Regulation.]

Textual Amendments

F1 [Reg. 30\(7\)](#) inserted (3.12.2015) by [The European Long-term Investment Funds Regulations 2015 \(S.I. 2015/1882\)](#), regs. 1, [4\(4\)](#)

Depositary liability for other losses

31.—(1) If an AIF, or investors of an AIF, have suffered losses other than the loss by the depositary or a third party to which custody has been delegated or sub-delegated of financial instruments held in custody in accordance with Article 21.8(a) of the directive, the depositary is liable to the AIF, or investors of the AIF, if the losses are a result of the depositary's negligent or intentional failure to comply with an implementing provision that applies to it.

(2) Irrespective of any contractual arrangements that provide otherwise, any liability of the depositary to the AIF, or to investors of the AIF, under paragraph (1) is not affected by any delegation by the depositary of the functions referred to in Article 21.8 of the directive.

Depositary liability and third country custodians

32.—(1) This regulation applies where—

- (a) the law of a third country requires certain financial instruments to be held in custody by a local entity; and
- (b) there is no local entity that satisfies the delegation requirements in implementing provisions relating to Article 21.11(d)(ii) of the directive.

(2) The depositary is not required to comply with the obligation in regulation 30(2) in relation to the financial instruments mentioned in paragraph (1)(a) if—

- (a) the rules or instruments of incorporation of the AIF concerned expressly allow for a discharge of the obligation;
- (b) the investors of the AIF were informed of the discharge and of the circumstances justifying the discharge prior to their investment;
- (c) the AIF, or the AIFM on behalf of the AIF, instructed the depositary to delegate the custody of the financial instruments to a local entity;
- (d) a written contract between the depositary and the AIF, or the AIFM acting on behalf of the AIF, expressly allows for such a discharge; and

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- (e) a written contract between the depositary and the local entity expressly transfers the obligation of the depositary to the local entity and enables the AIF, or the AIFM acting on behalf of the AIF, to make a claim against the local entity in respect of the loss of financial instruments or for the depositary to make such a claim on their behalf.

[^{F2}(3) This regulation does not apply to a depositary of an EEA ELTIF or a UK ELTIF that is marketed to retail investors under Chapter V of the ELTIF Regulation.]

Textual Amendments

F2 [Reg. 32\(3\)](#) inserted (3.12.2015) by [The European Long-term Investment Funds Regulations 2015 \(S.I. 2015/1882\)](#), regs. 1, **4(5)**

Management of third country AIFs

33. A full-scope UK AIFM may manage a third country AIF that is not marketed in an EEA State only if appropriate cooperation arrangements are in place between the FCA and the supervisory authorities of the third country where the AIF is established in order to ensure an efficient exchange of information that enables the FCA to carry out its duties in accordance with the directive.

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