



European Securities and  
Markets Authority

# Questions and Answers

*Application of the AIFMD*





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## I. Background

1. The Alternative Investment Fund Managers Directive (AIFMD) puts in place a comprehensive framework for the regulation of alternative investment fund managers within Europe. The extensive requirements with which AIFMs must comply are designed to ensure that these managers can manage AIFs on a cross-border basis and the AIFs that they manage can be sold on a cross-border basis.
2. The AIFMD framework is made up of the following EU legislation:
  - a. Directive 2011/61/EU<sup>1</sup>, which was adopted in 2011. It is a ‘framework’ Level 1 Directive which has been supplemented by technical delegated and implementing measures.
  - b. Commission Regulation (EU) No 231/2013<sup>2</sup>, Commission Regulation (EU) No 447/2013<sup>3</sup> and Commission Regulation (EU) No 448/2013<sup>4</sup>.
3. ESMA is required to play an active role in building a common supervisory culture by promoting common supervisory approaches and practices. In this regard, the Authority develops Q&As as and when appropriate to elaborate on the provisions of certain EU legislation or ESMA guidelines.
4. The European Commission has already published its own Q&A on AIFMD<sup>5</sup>.

## II. Purpose

5. The purpose of this document is to promote common supervisory approaches and practices in the application of the AIFMD and its implementing measures. It does this by providing responses to questions posed by the general public and competent authorities in relation to the practical application of the AIFMD.
6. The content of this document is aimed at competent authorities under AIFMD to ensure that in their supervisory activities their actions are converging along the lines of the responses adopted by ESMA. However, the answers are also intended to help AIFMs by providing clarity as to the content of the AIFMD rules, rather than creating an extra layer of requirements.

## III. Status

7. The Q&A mechanism is a practical convergence tool used to promote common supervisory approaches and practices under Article 29(2) of the ESMA Regulation.<sup>6</sup>

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<sup>1</sup> DIRECTIVE 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010

<sup>2</sup> COMMISSION DELEGATED REGULATION (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision

<sup>3</sup> COMMISSION DELEGATED REGULATION (EU) No 447/2013 of 15 May 2013 establishing the procedure for AIFMs which choose to opt in under Directive 2011/61/EU of the European Parliament and of the Council

<sup>4</sup> COMMISSION DELEGATED REGULATION (EU) No 448/2013 of 15 May 2013 establishing a procedure for determining the Member State of reference of a non-EU AIFM pursuant to Directive 2011/61/EU of the European Parliament and of the Council

<sup>5</sup> <http://ec.europa.eu/yqol/index.cfm?fuseaction=legislation.show&lid=9>

8. Therefore, due to the nature of Q&As, formal consultation on the draft answers is considered unnecessary. However, even if they are not formally consulted on, ESMA may check them with representatives of ESMA's Securities and Markets Stakeholder Group, the relevant Standing Committees' Consultative Working Group or, where specific expertise is needed, with other external parties.
9. ESMA will review these questions and answers on a regular basis to identify if, in a certain area, there is a need to convert some of the material into ESMA guidelines. In such cases, the procedures foreseen under Article 16 of the ESMA Regulation will be followed.

#### **IV. Questions and answers**

10. This document is intended to be continually edited and updated as and when new questions are received. The date each question was last amended is included after each question for ease of reference.
11. General questions on the practical application of the AIFMD may be sent to the following email address: [AIFMD-questions@esma.europa.eu](mailto:AIFMD-questions@esma.europa.eu). However, questions that relate specifically to technical IT issues regarding the AIFMD reporting requirements (such as on the XSD documents or the IT technical guidance) should be sent to: [info.it.aifmd@esma.europa.eu](mailto:info.it.aifmd@esma.europa.eu).

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<sup>6</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC Regulation, 15.12.2010, L331/84.

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## Section I: Remuneration

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**Question 1 [last update 17 February 2014]:** To which accounting period should AIFMs performing activities under the AIFMD before 22 July 2013 and submitting an application for authorisation under the AIFMD between 22 July 2013 and 22 July 2014 apply the AIFMD remuneration rules for the first time?

**Answer 1:** Paragraph 4 of the Guidelines on sound remuneration policies under the AIFMD (ES-MA/2013/232) (the Remuneration Guidelines) states that “*These Guidelines apply from 22 July 2013, subject to the transitional provisions of the AIFMD*”. The Commission Q&A on the AIFMD provided specific guidance on the interpretation of the transitional provisions under Article 61(1) of the AIFMD.<sup>7</sup>

According to Article 61(1) of the AIFMD, AIFMs performing activities under the AIFMD before 22 July 2013 have one year from that date to submit an application for authorisation. Once a firm becomes authorised under the AIFMD, it becomes subject to the AIFMD remuneration rules and the Remuneration Guidelines. Therefore, the relevant rules should start applying as of the date of authorisation.

However, as for the rules on variable remuneration (i.e. the ones for which guidance is provided under Sections XI. (Guidelines on the general requirements on risk alignment) and XII. (Guidelines on the specific requirements on risk alignment) of the Remuneration Guidelines), AIFMs should apply them for the calculation of payments relating to new awards of variable remuneration to their *identified staff* (as defined in the Remuneration Guidelines) for performance periods following that in which they become authorised. So the AIFMD regime on variable remuneration should apply only to full performance periods and should first apply to the first full performance period after the AIFM becomes authorised. For example:

- An existing AIFM whose accounting period ends on 31 December and which obtained an authorisation between 22 July 2013 and 31 December 2013: the AIFMD rules on variable remuneration should apply to the calculation of payments relating to the 2014 accounting period.
- An existing AIFM whose accounting period ends on 31 December obtains an authorisation between 1 January 2014 and 22 July 2014: the AIFMD rules on variable remuneration should apply to the calculation of payments relating to the 2015 accounting period.

However, for an existing AIFM whose accounting period ends on 31 December which submits an application for authorisation by 22 July 2014 and obtains an authorisation after that date (including when the authorisation is obtained after 31 December 2014), the AIFMD rules on variable remuneration should apply to the calculation of payments relating to the 2015 accounting period.

**Question 2 [last update 17 February 2014]:** To which accounting period should AIFMs not performing activities under the AIFMD before 22 July 2013 and obtaining an authorisation under the AIFMD after 22 July 2013 apply the remuneration rules for the first time?

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<sup>7</sup> ID 1180. Transitional provisions, available at: <http://ec.europa.eu/yqol/index.cfm?fuseaction=question.show&questionId=1180>.

**Answer 2:** Once a firm becomes authorised under the AIFMD, it becomes subject to the AIFMD remuneration rules and the Remuneration Guidelines and the relevant rules should start to apply as of the date of authorisation.

However, as for the rules on variable remuneration (i.e. the ones for which guidance is provided under Sections XI. (Guidelines on the general requirements on risk alignment) and XII. (Guidelines on the specific requirements on risk alignment) of the Remuneration Guidelines), AIFMs should apply them for the calculation of payments relating to new awards of variable remuneration to their *identified staff* (as defined in the Remuneration Guidelines) for performance periods following that in which they submit an application for authorisation. An AIFM submitting an application for authorisation in the year N (after 22 July 2013), should apply the AIFMD remuneration regime on variable remuneration only to the calculation of payments relating to the accounting period for year N+1.

**Question 3 [last update 17 February 2014]:** Which staff of the delegate should be covered by the “appropriate contractual arrangements” that ensure there is no circumvention of the remuneration rules as set out in paragraph 18(b) of the Remuneration Guidelines?

**Answer 3:** Such contractual arrangements must only be in place in respect of the delegate’s *identified staff* who have a material impact on the risk profiles of the AIFs it manages as a result of the delegation, and only in respect of the remuneration for such delegated activities.

**Question 4 [last update 17 February 2014]:** In a delegation arrangement where the delegate is subject to the CRD rules, can the delegate be considered to be subject to regulatory requirements on remuneration that are equally as effective as those applicable under the Remuneration Guidelines?

**Answer 4 :** Provided that the staff of these entities who are *identified staff* for the purpose of the Remuneration Guidelines are subject to the CRD rules, these entities are subject to regulatory requirements on remuneration that are equally as effective as those applicable under the Guidelines.

**Question 5 [last update 27 June 2014]:** Can AIFMs choose to exclude portfolio managers from the scope of *identified staff* for the purpose of the Remuneration Guidelines purely because they are bound by investment limits set out by law and/or internal risk limits set out in the investment restrictions of the AIF?

**Answer 5:** No.

Paragraph 20 of the Remuneration Guidelines provides for a presumption that certain categories of staff should be included as the *identified staff*. ‘Other risk takers’ are mentioned among these categories of staff. This category includes ‘*staff members, whose professional activities – either individually or collectively, as members of a group (e.g. a unit or part of a department) – can exert material influence on the AIFM’s risk profile or on an AIF it manages*’. When assessing whether a portfolio manager can exert material influence, a number of questions are relevant:

- 1) is the percentage size of the AIF portfolio being managed small?
- 2) is the portfolio manager required to meet (and outperform) a performance benchmark?
- 3) is the percentage deviation from that benchmark which is tolerated by the AIFM small?
- 4) does the AIFM monitor the performance of the portfolio manager daily?

Where the answer to any of the above questions is ‘no’, a portfolio manager is likely to fall within the scope of *identified staff*. Where the answer to all of the questions above is ‘yes’, a portfolio manager is more likely to fall outside the scope of *identified staff*. Given that the criteria are qualitative, it may still be the case that for some combinations of 1) and 3) above, a portfolio manager may still exert material influence on an AIFM’s risk profile or on an AIF it manages, in which case the Remuneration Guidelines should apply.

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## Section II: Notifications of AIFs

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**Question 1 [last update 17 February 2014]:** What additional information should be provided under letter (f) of Annex IV of the AIFMD?

**Answer 1:** Letter (f) of Annex IV of the AIFMD should be understood as requesting all information set out in Article 23(1) of the AIFMD that is not already contained in Annex IV of the AIFMD.

**Question 2 [last update 17 February 2014]:** Should AIFMs that wish to market new investment compartments of AIFs in a Member State where these AIFs have been already notified undertake a new notification procedure via their competent authority?

**Answer 2:** Yes.

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## Section III: Reporting to national competent authorities under Articles 3, 24 and 42

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**Question 1 [last update 17 February 2014]:** When a non-EU AIFM reports information to the national competent authorities of a Member State under Article 42 of the AIFMD, which AIFs have to be included in the reports?

**Answer 1:** When a non-EU AIFM reports information to the national competent authorities of a Member State under Article 42, only the AIFs marketed in that Member State have to be taken into account for the purpose of the reporting.

**Question 2 [last update 25 March 2014]:** Should repurchase transactions (at the level of the portfolio of the AIF) by or on behalf of a reporting AIF be considered as financing operations for the purpose of the AIFMD reporting obligations (questions 54 – 56 and 210- 217 of the consolidated reporting template)?

**Answer 2:** Yes. Therefore, AIFMs should take into account the counterparties of those transactions when reporting the information related to funding sources in questions 54 – 56 and take into account the aggregate amount of these transactions in questions 210-217.

**Question 3 [last update 25 March 2014]:** Which period should AIFMs use when reporting information on ‘Instruments traded and individual exposures’ (questions 121 to 124 of the consolidated reporting template): the residual maturity of the instrument or the maturity at issuance?

**Answer 3:** AIFMs should use the residual maturity as of the reporting date.

**Question 4 [last update 25 March 2014]:** What should be the basis of the numerator for calculating the geographical exposure as a percentage of the NAV of the AIF (question 78 to 85 of the consolidated reporting template)?

**Answer 4:** The numerator used for calculating the geographical exposure as a percentage of the net asset value of the AIF should be the NAV of the AIF for each geographical area. Therefore, this may result in negative values for certain regions but the total should equal 100%.

**Question 5 [last update 25 March 2014]:** What should be the basis of the numerator and the denominator for calculating the geographical exposure as a percentage of the aggregated value of the AIF (questions 86 to 93 of the consolidated reporting template)?

**Answer 5:** The numerator used for calculating the geographical exposure as a percentage of the aggregated value of the AIF should be the total value of assets under management of the AIF for each geographical area. The basis for the denominator should be the total value of assets under management of the AIF. The total should equal 100%.

**Question 6 [last update 25 March 2014]:** What should be the basis of the numerator for calculating the breakdown of investment strategies as a percentage of the NAV of the AIF (question 60 of the consolidated reporting template)?

**Answer 6:** The numerator used for calculating the breakdown of investment strategies as a percentage of the NAV of the AIF should be the net asset value of the AIF for each investment strategy. Therefore, this may result in negative values for certain investment strategies but the total should equal 100%.

**Question 7 [last update 25 March 2014]:** ESMA's guidelines recommend that AIFMs submit the last report of the AIF immediately after it has been liquidated or put into liquidation. When should AIFMs submit this last report?

**Answer 7:** AIFMs should submit the last AIF report not later than one month after the end of the quarter in which the AIF has been liquidated or put into liquidation.

**Question 8 [last update 25 March 2014]:** How should AIFMs calculate the percentage of market value for securities traded on regulated markets and OTC markets (questions 148 and 149 of the consolidated reporting template)?

**Answer 8:** AIFMs should aggregate the market value of all securities traded and report the percentage of the market value of securities traded on a regulated exchange and OTC. Regulated exchanges include regulated markets, multilateral trading facilities and organised trading facilities. For the European Union, regulated markets<sup>8</sup> and multilateral trading facilities<sup>9</sup> are published on ESMA's website. Securities that are not traded on regulated exchanges should be considered as traded OTC. This means that the total should equal 100%.

**Question 9 [last update 25 March 2014]:** How should AIFMs calculate the percentage of trade volumes for derivatives traded on regulated markets and OTC markets (questions 150 and 151 of the consolidated reporting template)?

**Answer 9:** AIFMs should take into account the total number of trades and report the percentage of number of trades on a regulated exchange and OTC. Regulated exchanges include regulated markets,

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[http://mifiddatabase.esma.europa.eu/Index.aspx?sectionlinks\\_id=23&language=o&pageName=REGULATED\\_MARKETS\\_Display](http://mifiddatabase.esma.europa.eu/Index.aspx?sectionlinks_id=23&language=o&pageName=REGULATED_MARKETS_Display)

<sup>9</sup> [http://mifiddatabase.esma.europa.eu/Index.aspx?sectionlinks\\_id=22&language=o&pageName=MTF\\_Display](http://mifiddatabase.esma.europa.eu/Index.aspx?sectionlinks_id=22&language=o&pageName=MTF_Display)



multilateral trading facilities and organised trading facilities. For the European Union, regulated markets<sup>10</sup> and multilateral trading facilities<sup>11</sup> are published on ESMA's website. Securities that are not traded on regulated exchanges should be considered as traded OTC. This means that the total should equal 100%.

**Question 10 [last update 25 March 2014]:** How should AIFMs report the information on the liquidity portfolio when the AIF is invested in assets with no current liquidity for which it is not possible to determine the future liquidity (questions 178 -184 of the consolidated reporting template)?

**Answer 10:** In that case, AIFMs should adopt a conservative approach and assign the instrument to the longest period bucket.

**Question 11 [last update 25 March 2014]:** How should AIFMs report the information on investor liquidity?

**Answer 11:** AIFMs should divide the AIF's NAV among the period buckets depending on the shortest period within which investors are entitled, under the fund documents, to withdraw invested funds or receive redemption payments, as applicable.

For example, an AIF has a NAV of € 1,000,000 with two investors. According to the fund documents, investor A whose share of the NAV is €600,000 is entitled to withdraw 50% of its investment on a daily basis and 50% of its investments between 2 and 7 days. Investor B, whose share of the NAV is €400,000, is entitled to withdraw 60% of its investments between 31 and 90 days and 40% of its investment within 91 and 180 days. The investor profile of the AIF will be the following

1 day or less	2-7 days	8-30 days	31-90 days	91-180 days	181-365 days	More than 365 days
30%	30%	0	24%	16%	0	0

**Question 12 [last update 25 March 2014]:** According to question 22 of the consolidated reporting template, AIFMs must indicate the inception date of the AIF. What does inception date mean?

**Answer 12:** If an AIF is subject to pre-authorisation, the inception date should be the date of authorisation. If an AIF is established without pre-authorisation by the competent authority, the inception date should be the date when the AIF was established. Finally, if the AIF is subject to registration obligation at national level with its competent authority after the date of establishment, the inception date should be the date when the AIF was constituted.

**Question 13 [last update 25 March 2014]:** Should AIFMs report the information in English or in the language of the jurisdiction to which they report?

**Answer 13:** Apart from the sections on assumptions and stress tests, where text is allowed, the rest of the information to be reported will consist of figures, predetermined values or names of counterparties. For assumptions and stress tests, ESMA recommends that the national competent authority allow AIFMs to report the information in English, which would allow multinational groups to centralise and harmonise their AIFMD reporting. However, this will depend on the national legislation transposing the AIFMD.

**Question 14 [last update 25 March 2014]:** There are predetermined codes for the XML filing. Should these codes be translated into national languages?

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[http://mifiddatabase.esma.europa.eu/Index.aspx?sectionlinks\\_id=23&language=0&pageName=REGULATED\\_MARKETS\\_Display](http://mifiddatabase.esma.europa.eu/Index.aspx?sectionlinks_id=23&language=0&pageName=REGULATED_MARKETS_Display)

<sup>11</sup> [http://mifiddatabase.esma.europa.eu/Index.aspx?sectionlinks\\_id=22&language=0&pageName=MTF\\_Display](http://mifiddatabase.esma.europa.eu/Index.aspx?sectionlinks_id=22&language=0&pageName=MTF_Display)

**Answer 14:** No. These codes are predetermined values that cannot be changed for the XML filing.

**Question 15 [last update 25 March 2014]:** Is cash resulting from repurchase agreements included in the amount of cash and cash equivalents to be reported by AIFMs under questions 121 -124?

**Answer 15:** Yes. When reporting information on cash and cash equivalents, AIFMs should include all amounts of cash held, including as a result of repurchase arrangements.

**Question 16 [last update 25 March 2014]:** According to questions 163 and 164 of the consolidated reporting template, AIFMs should report the BIC and LEI of the five biggest counterparties to which an AIF has exposure. How should AIFMs identify those counterparties if they do not have such codes?

**Answer 16:** In that case, AIFMs should only report the full name of the counterparty.

**Question 17 [last update 25 March 2014]:** What information should AIFMs report for question 137 of the consolidated reporting template when they do not have an expected annual return/IRR in normal market conditions?

**Answer 17:** In that case, AIFMs should report the value 'N/A' for non-applicable.

**Question 18 [last update 25 March 2014]:** Must all AIFMs answer questions 296 to 301 of the consolidated reporting template?

**Answer 18:** No. Only AIFMs managing AIFs employing leverage on a substantive basis must answer questions 296 to 301 of the consolidated reporting template.

**Question 19 [last update 27 June 2014]:** Pursuant to questions 19 of the consolidated reporting template for AIF-specific information and 20 of the consolidated reporting template for AIFM-specific information, AIFMs must specify whether the AIFs and the AIFMs are EEA AIFs and EEA AIFMs. Which countries are covered by the reference to "EEA"?

**Answer 19:** EEA AIFs and EEA AIFMs should be understood as AIFs and AIFMs established in one of the 28 EU Member States or Iceland, Norway and Liechtenstein.

**Question 20 [last update 27 June 2014]:** According to Article 24(2) of the AIFMD, AIFMs must report specific information for all EU AIFs they manage or AIFs they market in the Union. Which countries are covered by the reference to "the Union"?

**Answer 20:** The reference to the Union should be understood as including the 28 EU Member States and, once the AIFMD has been incorporated into the EEA agreement, Norway, Iceland and Liechtenstein.

**Question 21 [last update 27 June 2014]:** The technical guidance indicates for each information item whether the information is mandatory (M), optional (O) or conditional (C). What do these categories mean?

**Answer 21:** Information marked as mandatory should be reported by all AIFMs. Information marked as optional has to be reported if the AIFM has information to report. For example, question 10 of the reporting template (change in AIF reporting obligation frequency code) is marked as optional. This means that AIFMs should report this information if the reporting code has changed compared to the previous reporting. Information marked as conditional is linked to other information (flags) in the reporting template. If those flags are answered with "Yes", the corresponding conditional information has to be reported. However, if those flags are answered with "No", the corresponding conditional information should not be reported. For example, if the question 41 (master feeder flag) is answered with "Yes", AIFMs should indicate in field 42 the name of the master AIFs.

**\*\*\*New\*\*\* Question 22 [last update 18 July 2014]:** How should AIFMs calculate the percentage of trade volumes for derivatives cleared by a CCP and bilaterally (questions 152 and 153 of the consolidated reporting template)?

**\*\*\*New\*\*\* Answer 22:** AIFMs should take into account the total number of trades and report the percentage of number of trades cleared by a CCP and bilaterally. The total should equal 100%.

**\*\*\*New\*\*\* Question 23 [last update 18 July 2014]:** How should AIFMs calculate the percentage of market value for repo trades cleared by a CCP, bilaterally or on a tri-party basis (questions 154 and 156 of the consolidated reporting template)?

**\*\*\*New\*\*\* Answer 23:** AIFMs should aggregate the market value of all repo trades and report the percentage of the market value of repo trades cleared by a CCP, bilaterally or on a tri-party basis. The total should equal 100%.

**\*\*\*New\*\*\* Question 24 [last update 18 July 2014]:** How should AIFMs classify FX spot trades when answering questions such as on individual exposures (questions 121 to 124 of the consolidated reporting template for AIF-specific information) or value of turnover in each asset class over the reporting period (questions 125 to 127 of the consolidated reporting template for AIF-specific information)?

**\*\*\*New\*\*\* Answer 24:** When reporting information other than value of turnover, AIFMs should classify FX spot trades as *'other cash equivalent (excluding government securities)'* with the sub-asset type code 'SEC\_CSH\_OTH'. When reporting information on value of turnover, AIFMs should classify FX spot trades as *'other cash equivalent'* with the sub-asset type code 'SEC\_CSH\_CSH'.

**\*\*\*New\*\*\* Question 25 [last update 18 July 2014]:** AIFMs have to report value of turnover in each asset class over the reporting period (questions 125 to 127 of the consolidated reporting template for AIF-specific information). What information should AIFMs report for these questions when no trades took place during the reporting period?

**\*\*\*New\*\*\* Answer 25:** AIFMs should use the field *'total other'* with the sub-asset type code 'OTH\_OTH\_OTH' and report 'o'.

**\*\*\*New\*\*\* Question 26 [last update 18 July 2014]:** How should AIFMs classify cross-currency interest swaps when answering questions such as those on individual exposures (questions 121 to 124 of the consolidated reporting template for AIF-specific information) or value of turnover in each asset class over the reporting period (questions 125 to 127 of the consolidated reporting template for AIF-specific information)?

**\*\*\*New\*\*\* Answer 26:** When reporting information other than value of turnover, AIFMs should classify cross-currency interest swaps as *'interest rate derivatives'* with the sub-asset type code 'DER\_IRD\_INTR'. When reporting information on value of turnover, AIFMs should classify cross-currency interest swaps as *'interest rate derivatives'* with the sub-asset type code 'DER\_IRD\_IRD'.

**\*\*\*New\*\*\* Question 27 [last update 18 July 2014]:** When answering questions 148 and 149 of the consolidated reporting template, should AIFMs include repo and reverse repurchase agreements?

**\*\*\*New\*\*\* Answer 27:** Yes.

**\*\*\*New\*\*\* Question 28 [last update 18 July 2014]:** How should AIFMs managing AIFs holding cash report the breakdown of investment strategies?

**\*\*\*New\*\*\* Answer 28:** When the holding of cash is part of a strategy such as a CTA<sup>12</sup> strategy, AIFMs should not report cash separately. For example, an AIF with a CTA strategy representing 70% of its NAV, out of which 30% of the NAV is made up of cash at the time of the reporting date, should allocate 70% of its NAV to the CTA strategy.

If the holding of cash is not part of an investment strategy, AIFMs should use the strategy 'other' of the predominant AIF type selected and report the corresponding percentage of the NAV held in cash. AIFMs should also use the field 'description' to make it clear that the field 'other' is made up of cash.

**\*\*\*New\*\*\* Question 29 [last update 18 July 2014]:** Question 6 above clarifies that negative values can be reported for investment strategies. How should AIFMs report information on investment strategies with negative values?

**\*\*\*New\*\*\* Answer 29:** AIFMs should allocate the status of predominant AIF type to the strategy with the highest absolute percentage of the NAV. The predominant AIF type 'multi-strategy hedge fund' should be used when no strategy has an absolute value greater than 50% of the NAV.

**\*\*\*New\*\*\* Question 30 [last update 18 July 2014]:** Should AIFMs consider bank overdrafts as funding sources?

**\*\*\*New\*\*\* Answer 30:** Yes.

**\*\*\*New\*\*\* Question 31 [last update 18 July 2014]:** Pursuant to Article 111 of the implementing Regulation, leverage shall be considered to be employed on a substantial basis when the exposure of an AIF, as calculated according to the commitment method, exceeds three times its NAV. How should AIFMs assess this limit?

**\*\*\*New\*\*\* Answer 31:** AIFs should be considered as employing leverage on a substantial basis if, over the reporting period, the average daily calculation of the exposure as calculated according to the commitment method exceeds three times the average daily calculation of the NAV. If the exposure is calculated less frequently than daily, AIFs should be considered as employing leverage on a substantial basis where, at least once during the reporting period, the exposure as calculated according to the commitment method exceeds three times its NAV.

**\*\*\*New\*\*\* Question 32 [last update 18 July 2014]:** How should AIFMs managing AIFs with multiple share classes identify the AIFs?

**\*\*\*New\*\*\* Answer 32:** AIFMs reporting information for AIFs with multiple share classes should answer questions 24 and questions 30 to 40 of the consolidated reporting template.

For AIFs with only one share class, AIFMs should only answer questions 24 to 33 of the consolidated reporting template.

**\*\*\*New\*\*\* Question 33 [last update 18 July 2014]:** In question 282 of the consolidated reporting template, should AIFMs report the percentage of collateral posted to all counterparties that has been re-hypothecated as of the last business day of the reporting period or during the reporting period?

**\*\*\*New\*\*\* Answer 33:** AIFMs should report the percentage of the market value of the collateral that has been re-hypothecated during the reporting period. This percentage should be the ratio of the aggregated market value of the collateral re-hypothecated during the reporting period by all counterparties over the aggregated market value of all the collateral posted by AIFMs to all counterparties.

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<sup>12</sup> A commodity trading advisor (CTA) generally acts as an asset manager, following a set of investment strategies utilizing futures contracts and options on futures contracts on a wide variety of underlying instruments.

**\*\*\*New\*\*\* Question 34 [last update 18 July 2014]:** What information should AIFMs report under questions 283 to 286 of the consolidated reporting template?

**\*\*\*New\*\*\* Answer 34:** For questions 283, 284, 285 and 286, AIFMs should aggregate the market value of cash and securities borrowed.

**\*\*\*New\*\*\* Question 35:** In which currency, should AIFMs report information on the five principal markets and five principal instruments in which they trade (questions 29 and 32 of the consolidated reporting template for AIFM-specific information)?

**\*\*\*New\*\*\* Answer 35: [last update 18 July 2014]:** AIFMs should report this information in euro.

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#### Section IV: Notification of AIFMs

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**Question 1 [date of last update 27 June 2014]:** May an AIFM manage an AIF in a host MS under Article 33 of the AIFMD without having identified any existing AIF in that host MS beforehand?

**Answer 1 [date of last update 27 June 2014]:** Yes. The fact that an AIFM cannot identify a pre-existing AIF in the host MS does not prevent an AIFM from managing an AIF in that host MS under Article 33 of the AIFMD. In practice, the creation of the first AIF in the host MS is usually conditional on the AIFM having previously notified the host MS's national competent authority under Article 33 of the AIFMD. Therefore, it may be necessary for an AIFM to first notify its wish to make use of the management passport under Article 33 in order to subsequently be in a position to create and manage AIFs in that host MS.

**Question 2 [date of last update 27 June 2014]:** When an AIFM wishes to manage an AIF in a host MS for the first time, but has not yet set up any AIF in that host MS, how should it comply with the requirement of Article 33(2)(b) of the AIFMD to identify the AIFs it intends to manage?

**Answer 2 [date of last update 27 June 2014]:** If the AIFM has no prior presence in the host MS it is sufficient for the AIFM to specify the types of strategy of the AIFs it intends to manage in the host MS. However, this is without prejudice to the obligation for the AIFM to communicate a programme of operations stating the services it intends to perform in the host MS.

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#### Section V: MiFID services under Article 6(4) of the AIFMD

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**Question 1 [last update 27 June 2014]:** Can competent authorities in a Member State other than the home Member State of an AIFM accept passport notifications for the activities of the AIFM authorised under Article 6(4) of the AIFMD?

**Answer 1:** Yes. Article 92 of Directive 2014/65/EU (MiFID 2) modifies the provisions of the AIFMD in order to establish that an AIFM authorised to provide the MiFID investment services mentioned under Article 6(4) of the AIFMD has the right to provide these services on a cross-border basis under the authorisation granted by the competent authorities of its home Member State.

Member States must apply the measures referred to in Article 92 of MiFID 2 from 3 July 2015. However, the principle of sincere cooperation set out in Article 4(3) TFEU requires the Member States to facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment

of the Union's objectives. It is therefore recommended that competent authorities accept passport notifications for the activities of the AIFM authorised under Article 6(4) of the AIFMD even before 3 July 2015.

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## Section VI: Depositaries

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**\*\*\*New\*\*\* Question 1 [last update 18 July 2014]:** Do the cash monitoring duties apply on a look-through basis to cash accounts which are not opened in the name of the AIF/AIFM, but in the name of financial and/ or legal structures established by the AIF or by the AIFM acting on behalf of the AIF for the purposes of investing in the underlying assets and which are controlled directly or indirectly by the AIF or by the AIFM acting on behalf of the AIF?

**\*\*\*New\*\*\* Answer 1:** No, the cash monitoring requirements under Articles 85 and 86 of Commission Regulation (EU) No 231/2013 (the AIFMD Level 2 Regulation) do not apply to cash accounts opened in the name of companies in which the AIF/AIFM holds investments.

**\*\*\*New\*\*\* Question 2 [last update 18 July 2014]:** Is it possible for the depositary to delegate to a third party (e.g. an administrator which is not an affiliate of the depositary) the cash flow reconciliation duties?

**\*\*\*New\*\*\* Answer 2:** No. According to the provisions of Article 21(11) of the AIFMD, the monitoring of the cash flow is an activity which cannot be delegated. For example, the depositary should not rely exclusively on the reconciliation processes performed by a third party, even where the depositary performs due diligence on those processes.

In line with the provisions of recital 42 of the AIFMD, the only delegation which is permitted in relation to the monitoring of the cash flow is that of the depositary's supporting tasks, such as administrative or technical functions performed by the depositary as a part of its depositary tasks.

**\*\*\*New\*\*\* Question 3 [last update 18 July 2014]:** How far down the distribution chain is the depositary to reconcile subscription flows?

**\*\*\*New\*\*\* Answer 3:** The cash monitoring duties relate to any of the cash accounts – including accounts used for subscriptions and redemptions – referred to in Article 21(7) of the AIFMD (as implemented by Articles 85 to 87 of the AIFMD Level 2 Regulation): accounts opened in the name of the AIF, in the name of the AIFM acting on behalf of the AIF or in the name of the depositary acting on behalf of the AIF. The rules on reconciliations linked to subscriptions are further detailed in Article 93 of the AIFMD Level 2 Regulation.

**\*\*\*New\*\*\* Question 4 [last update 18 July 2014]:** Does the obligation to verify that the AIF and AIFM comply with applicable laws and regulations in Article 95 (a) of the AIFMD Level 2 Regulation cover anti-money laundering rules, labour law and contracts of the AIF/AIFM with third parties which do not relate to the asset or risk management activities?

**\*\*\*New\*\*\* Answer 4:** In general, the obligation to set up and implement appropriate procedures for the verifications required under Article 95(a) of the AIFMD Level 2 Regulation should be linked to the requirement in Article 21(9) of the AIFMD for the depositary to ensure oversight of the AIF's operations. The verifications required under Article 95(a) of the AIFMD Level 2 Regulation are meant to ensure that the AIF and/or the AIFM acting on behalf of the AIF comply with the applicable laws and regulations applying

to the AIF including fund rules, instruments of incorporation (e.g. investment restrictions, leverage limits, etc.). They do not relate to the laws and regulations applying to these entities that do not have any direct relation with the instructions of the AIFM to the depositary (e.g. the application of the remuneration rules by the AIFM). This is without prejudice to the depositary voluntarily (or in agreement with the AIF/AIFM) performing more extensive verifications.

Therefore, the obligation to verify that the AIF and AIFM comply with applicable laws and regulations does not cover labour law or contracts with third parties unrelated to asset or risk management activities.

As for the compliance with the relevant anti-money laundering rules, the contract by which the depositary is appointed shall include information on the tasks and responsibilities of the parties to the contract in respect of obligations relating to the prevention of money laundering and the financing of terrorism (Article 83(1)(m)) of the AIFMD Level 2 Regulation. This is without prejudice to the relevant anti-money laundering obligations applying to the depositary, AIF and AIFM under the EU legislation on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

**\*\*\*New\*\*\* Question 5 [last update 18 July 2014]:** Is it correct to say that where derivative contracts contain a netting clause, derivatives should fall exclusively under the cash flow monitoring obligation of the depositary and that it is only in the absence of a netting clause – where the AIF/AIFM gets an ownership claim for the underlying – that the depositary is in a position to verify whether the AIF/AIFM has acquired ownership of the underlying asset according to Article 90(2)(c) of Commission Regulation (EU) No 231/2013?

**\*\*\*New\*\*\* Answer 5:** No. Recital 103 of the AIFMD Level 2 Regulation gives examples of assets that are not financial instruments to be held in custody and specifically includes '*financial contracts such as derivatives*' among these examples. Therefore, these assets are subject to the obligation to verify the ownership and maintain a record according to the provisions of Article 90(2)(c) of the AIFMD Level 2 Regulation. This duty involves, inter alia, looking at the contract to assess what the AIF/AIFM is entitled to.

**\*\*\*New\*\*\* Question 6 [last update 18 July 2014]:** Are holdings in collective investment undertakings to be held in custody or subject to record keeping?

**\*\*\*New\*\*\* Answer 6:** Unless, in accordance with applicable national law, they are only directly registered with the issuer itself or its agent, in the name of the AIF or the AIFM acting on behalf of the AIF (in which case the provisions of Article 88(2) of the AIFMD Level 2 Regulation apply), units of collective investment undertakings (CIUs) should be held in custody and subject to the relevant provisions of the AIFMD.

**\*\*\*New\*\*\* Question 7 [last update 18 July 2014]:** Within the cash monitoring duties of a depositary, what is the meaning of "close of business day"?

**\*\*\*New\*\*\* Answer 7:** Given that the requirements relating to the monitoring of the AIF's cash flows apply to the depositary (Article 86 of the AIFMD Level 2 Regulation), the "close of business day" should be determined in relation to the jurisdiction where the depositary is established which, for EU AIFs, is also the home Member State of the AIF. This means that the identification of significant cash flows referred to under Article 86(c) of the AIFMD Level 2 Regulation should be made with reference to the close of business day in the jurisdiction where the depositary is established, but the relevant checks may be carried out after the close of business in the depositary's jurisdiction, typically the following business day.

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## Section VII: Calculation of leverage

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**\*\*\*New\*\*\* Question 1 [last update 18 July 2014]:** An AIF that is a private equity fund as referred to in recital 78 of the AIFMD, controls a financial structure that is used to acquire non-listed companies or issuers. The financial structure raises debt to finance the acquisition of those assets. When calculating the exposure of the AIF, shall the AIFM include the debt raised at the level of the financial structure?

**Answer 1:** According to Article 6(3) of Regulation 231/2013, exposure contained in any financial or legal structures controlled by an AIF shall be included in the calculation of the exposure where those structures are specifically set up to directly or indirectly increase the exposure at the level of the AIF. Therefore, debt raised by such a financial structure to finance the acquisition of assets shall be included in the calculation of the exposure where those structures are: (1) specifically set up to directly or indirectly increase the exposure at the level of the AIF and (2) the AIF controls such a structure. If these two conditions are fulfilled, the debt raised by the financial structure is to be included in the calculation of the exposure of the AIF.

Where the AIF does not have to bear losses beyond its investment in a financial structure that is used to acquire non-listed companies or issuers, the financial structure should not be considered as having been set up to directly or indirectly increase the exposure at the level of the AIF. In any case, these structures should not be used as a means to circumvent the provisions of the AIFMD on leverage.

**\*\*\*New\*\*\* Question 2 [last update 18 July 2014]:** An AIF controls a financial structure that is used to acquire non-listed companies or issuers. When calculating the exposure of the AIF, shall the AIFM include the debt raised at the level of the non-listed companies or issuers?

**\*\*\*New\*\*\* Answer 2:** No, provided that the AIF does not have to bear potential losses beyond its investment in the non-listed companies or issuers.

However, if the debt at the level of the non-listed companies or issuers exposes the AIF to potential losses beyond its investment in those non-listed companies or issuers, the debt shall be included in the calculation of the exposure of the AIF.

**\*\*\*New\*\*\* Question 3 [date of last update 18 July 2014]:** An AIF controls a financial structure that acquires non-listed companies or issuers by raising debt. At the time of the acquisition, the non-listed companies or issuers were not leveraged. Subsequently, the non-listed companies or issuers raise debt to finance a dividend distribution enabling the financial structure to reimburse entirely its acquisition debt. When calculating the exposure of the AIF, shall the AIFM include the debt raised at the level of the non-listed companies or issuers?

**\*\*\*New\*\*\* Answer 3:** No, provided that the AIF does not have to bear potential losses beyond its investment in the non-listed companies or issuers.