

GUERNSEY STATUTORY INSTRUMENT NO. 126



## THE AIFMD RULES, 2021

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The Guernsey Financial Services Commission ("the Commission"), in exercise of the powers conferred on it by sections 12, 13, 14, 15 and 19 of The Protection of Investors (Bailiwick of Guernsey) Law 2020<sup>1</sup> ("the Law") makes the following Rules.

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<sup>1</sup> Order In Council No. XVIII of 2020.

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## PART 1 INTRODUCTION

### 1.1 Application

- (1) The AIFMD Rules 2021 replace The AIFMD Rules, 2013<sup>2</sup>.
- (2) These Rules apply to –
  - (a) all Guernsey AIFMs in respect of those AIFs which they manage and propose to market to professional or retail investors in one or more Member States where they opt to comply with the requirements of these Rules;
  - (b) all Guernsey depositaries of AIFs where they opt to comply with the requirements of these Rules; and
  - (c) all Non-Financial Asset AIF Depositaries where they opt to comply with the requirements of these Rules as are applicable.
- (3) Guernsey AIFMs which have opted to comply with these Rules must continue to comply with both them and The AIFMD (Marketing) Rules, 2021. Where there is any inconsistency between these Rules and any other rules to which the licensee is subject to, these Rules take precedence in the case of AIFs.
- (4) The Commission may in its absolute discretion, by written notice, exclude or modify the application of any provision of these Rules.
- (5) The Commission may issue supplementary guidance regarding the standards of conduct and practice expected in relation to any aspect of the regulatory framework. Such guidance will not constitute rules of the Commission.

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<sup>2</sup> G.S.I. No. 70 of 2013.

## PART 2 ARTICLE 6 AIFMD

### 2.1 Conditions for acting as a Guernsey AIFM

- (1) Any Guernsey AIFM who has opted-in to compliance with these Rules need only do so in relation to those AIFs it proposes to market in the EU and to those EU AIFs which it manages.
- (2) Guernsey AIFMs, who are external AIFMs, must not engage in activities other than those set out in Schedule 1 and the additional management of UCITS, subject to the appropriate authorisation.
- (3) Guernsey AIFMs, who are internal AIFMs, must not engage in activities other than the internal management of that AIF in accordance with Schedule 1.
- (4) Guernsey AIFMs, who are external AIFMs, may, if their licence permits, provide the following services –
  - (a) management of portfolios of investments, including those owned by pension funds and institutions for occupational retirement provision, in accordance with Article 19(1) of Directive 2003/41/EC, in accordance with mandates given by investors on a discretionary client-by-client basis;
  - (b) non-core services including –
    - (i) investment advice;
    - (ii) safe-keeping and administration in relation to shares or units of collective investment undertakings; and
    - (iii) reception and transmission of orders in relation to financial instruments.
- (5) A Guernsey AIFM must not provide –

- (a) only the services referred to in (4);
  - (b) non-core services referred to in (4)(b) without also being authorised in their licence to provide the services under (4)(a);
  - (c) only the activities referred to in paragraph 2 of Schedule 1; or
  - (d) the services referred to in paragraph 1(a) of Schedule 1 without also providing the services referred to in paragraph 1(b) of Schedule 1.
- (6) The Commission may request any information from the Guernsey AIFM, which it requires to monitor compliance with these Rules, at any time and the Guernsey AIFM must comply with such a request.

## PART 3 ARTICLES 7 AND 8 AIFMD

### 3.1 Guernsey AIFM Application

- (1) The relevant Guernsey AIFM, or in the case of an applicant for an authorisation, registration, or licence who wishes to opt into these Rules, must notify the Commission of the same in writing and in such form as the Commission may require. The notification must include, at a minimum, the following –
  - (a) a statement confirming whether the applicant is an external or internal AIFM;
  - (b) a description of the organisational structure of the applicant including information on how the applicant intends to comply with its obligations under relevant provisions of these Rules; including information on the remuneration policies and practices of the Guernsey AIFM adopted pursuant to these Rules;
  - (c) information about the investment strategies, including –
    - (i) the types of underlying funds if the AIF is a fund of funds;
    - (ii) the proposed Guernsey AIFM's policy as regards the use of leverage; and
    - (iii) the risk profiles and other characteristics of the AIFs the proposed Guernsey AIFM manages, or intends to manage, including information about the Member States or third countries in which AIFs are established or are expected to be established;
  - (d) information on where the master AIF is established if the AIF is a feeder AIF;

- (e) information on arrangements made for the delegation and sub-delegation to third parties of functions referred to in these Rules;
- (f) evidence in support of the applicant's Minimum Capital Requirement;
- (g) information on the risk management systems employed by the applicant; and
- (h) certification, by the Guernsey AIFM, that –
  - (i) the proposed Guernsey AIFM is a legal person;
  - (ii) the proposed Guernsey AIFM will be the only AIFM of each AIF it will manage;
  - (iii) the Guernsey AIFM will comply with these Rules;
  - (iv) the proposed Guernsey AIFM has sufficient initial capital and own funds, in accordance with these Rules; and
  - (v) there are at least two persons conducting the business of the proposed Guernsey AIFM, in accordance with Schedule 4 of the Law, and their names have been given to the Commission.

### **3.2 Notification of marketing**

- (1) This rule does not apply if a notification has been made in accordance with the AIFMD (Marketing) Rules 2021.
- (2) Within fourteen calendar days of the commencement of any marketing in a country or territory within the EU the Guernsey AIFM must notify the Commission of the same in such form as the Commission may require and must include –
  - (a) notification of the Member State where marketing is to be conducted;

- (b) identification of the competent authorities, in those Member States, to whom the Guernsey AIFM must report;
- (c) the name and address of the Guernsey AIFM in respect of each Guernsey AIF or AIF;
- (d) the name and address of each Guernsey AIF or AIF which the Guernsey AIFM intends to market from within the Bailiwick and the manner in which they intend to market the Guernsey AIF or AIF; and
- (e) certification that they are permitted to market each Guernsey AIF or AIF in that manner in the Member State concerned.

## PART 4 ARTICLE 10 AIFMD

### 4.1 Notification of any changes

- (1) In the event of any proposed changes to any of the information set out in rule 3 the Guernsey AIFM must notify the Commission, in writing and in advance, of any material changes and prior to engaging in any significant new activities or establishing new branches, offices, or subsidiaries.
- (2) The Guernsey AIFM must notify the Commission of its Member State of Reference, where applicable.

## PART 5 ARTICLE 12 AIFMD

### 5.1 General principles

- (1) Articles 16 to 29 of AIFMD Level 2 are applicable.
- (2) A Guernsey AIFM must, at all times –
  - (a) act honestly, with due skill, care, and diligence, and fairly in conducting all of its activities;
  - (b) act in the best interests of the AIFs and the investors of the AIFs it manages and the integrity of the market;
  - (c) have, and employ effectively, the resources and procedures that are necessary for the proper performance of its 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 in order to prevent them from adversely affecting the interest of the AIFs and their investors and ensure that the AIFs it manages are fairly treated;
  - (e) comply with all regulatory requirements applicable to the conduct of its business activities so as to promote the best interests of the AIFs and the investors of the AIFs it manages and the integrity of the market;
  - (f) treat all AIF investors fairly; and
  - (g) ensure that no investor in an AIF obtains preferential treatment unless such preferential treatment is disclosed in the relevant AIF constitutional document.

## PART 6 ARTICLE 13 AIFMD

### 6.1 Remuneration

- (1) Guernsey AIFMs must have remuneration policies and practices in place for those members of staff whose professional activities have a material impact on the risk profiles of the AIFMs, or AIFs, they manage including –
  - (a) senior management;
  - (b) risk takers;
  - (c) those holding control functions; and
  - (d) any employees receiving total remuneration that takes them into the same remuneration bracket as senior management or risk takers.
- (2) Policies and practices must be consistent with, and promote, sound and effective risk management and not encourage risk-taking which is inconsistent with the risk profiles or AIF constitutional documents of the AIFs they manage.

## PART 7 ARTICLE 18 AIFMD

### 7.1 Organisational requirements

- (1) A Guernsey AIFM must use, at all times, adequate and appropriate human and technical resources that are necessary for the proper management of the AIFs which it manages.
- (2) A Guernsey AIFM, having regard to the nature of the AIFs under management, must have –
  - (a) sound administrative and accounting procedures;
  - (b) control and safeguard arrangements for electronic data processing; and
  - (c) adequate internal control mechanisms including, at a minimum –
    - (i) rules for personal transactions by its employees; and
    - (ii) rules for the holding or management of investments in order to invest on its own account

ensuring, at least, that each transaction involving the AIFs may be reconstructed according to its origin, the parties to it, its nature, and the time and place at which it was affected, and that the assets of the AIFs managed by the Guernsey AIFM are invested in accordance with the AIF constitutional documents and the legal provision in force.

## PART 8 ARTICLE 20 AIFMD

### 8.1 Delegation of AIFM functions

- (1) Guernsey AIFMs which intend to delegate, to third parties, the task of carrying out functions on their behalf must notify the Commission before the delegation arrangements become effective. The following conditions must be met –
  - (a) the Guernsey AIFM must be able to justify its entire delegation structure on objective reasons;
  - (b) the delegate must be appropriately resourced to perform the respective tasks and the persons who effectively conduct the business of the delegate must be of good repute and sufficiently experienced;
  - (c) where the delegation concerns portfolio management or risk management, it must be conferred only on undertakings which are authorised or registered for the purpose of asset management and subject to supervision or, where that condition cannot be met, only subject to prior approval by the Commission;
  - (d) the delegation must not prevent the effectiveness of supervision of the Guernsey AIFM and, in particular, must not prevent them from acting, or the AIF from being managed, in the best interests of its investors;
  - (e) the Guernsey AIFM must be able to demonstrate that the delegate is qualified and capable of undertaking the functions in question, that it was selected with all due care, and that the AIFM is in a position to monitor effectively, at any time, the delegated activity in order to give further instructions to the delegate and to withdraw the delegation with immediate effect when it is in the interests of investors;

- (f) the Guernsey AIFM must review the services provided by each delegate on an on-going basis;
  - (g) the Guernsey AIFM must not delegate portfolio management or risk management to the depositary, or a delegate of the depositary, or any other entity whose interests may conflict with those of the AIFM or the investors of the AIF, unless such entity has functionally and hierarchically separated the performance of its portfolio management, or risk management, from its other potentially conflicting tasks and the potential conflicts of interest are properly identified, managed, monitored, and disclosed to the investors of the AIF.
- (2) A Guernsey AIFM must not delegate functions to the extent that it can no longer be considered the manager of the AIF.
- (3) The liability of a Guernsey AIFM, to the AIF and its investors, must not be affected by any delegation.
- (4) The third party may sub-delegate any of the functions delegated to it provided that –
- (a) prior consent of the Guernsey AIFM is obtained;
  - (b) the Guernsey AIFM notifies the Commission before the sub-delegation arrangements become effective;
  - (c) the conditions set out in these Rules, with regards to delegates, are met;
  - (d) no sub-delegation of portfolio management or risk management, may be conferred on the depositary, or a delegate of the depositary, or any other entity whose interests may conflict with those of the Guernsey AIFM, or the investors of the AIF unless such entity had functionally and hierarchically separated the performance of its portfolio management, or risk management tasks, from its other potentially conflicting tasks and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF; and

- (e) the relevant delegate must review the services provided by each sub-delegate on an on-going basis.
- (5) Where the sub-delegate further delegates any of the functions delegated to it, the conditions set out in this rule apply.

## PART 9 ARTICLE 9 AIFMD

### 9.1 Initial capital and own funds

- (1) A Guernsey AIFM, which is an internal AIFM, must have initial capital of at least €300,000.
- (2) A Guernsey AIFM, which is an external AIFM, must have an initial capital, the Minimum Capital Requirement, which is the higher of –
  - (a) the Initial Capital Requirement which must be at least €125,000 plus, where applicable, the additional amount set out in (3); or
  - (b) the Expenditure Based Requirement which must be one quarter of its total expenditure taken from the most recent annual accounts. The Commission will reserve the right to increase this amount should it be deemed not to reasonably reflect the current position of the Guernsey AIFM.
- (3) Where the value of the portfolios of AIFs managed by the Guernsey AIFM exceeds €250,000,000, a Guernsey AIFM must provide an additional amount of own funds. That additional amount of own funds must be equal to 0.02% of the amount by which the value of the portfolios of the AIFM exceeds €250,000,000. A Guernsey AIFM need not provide up to 50% of the additional amount if it benefits from a guarantee of the same amount given by a credit institution or insurance undertaking which has its registered office in Guernsey, or in the EU, or in a third country where it is subject to prudential rules considered by the Commission as equivalent to those laid down in EU law, and the form of guarantee approved by the Commission.

Portfolios of the AIF include those for which the AIFM has delegated functions for but do not include those that the AIFM is managing under delegation.

- (4) The total of the Initial Capital Requirement and the additional amount held by a Guernsey AIFM is not required to exceed €10,000,000.

- (5) All Guernsey AIFMs, whether internal or external, must have additional own funds which are appropriate to cover potential liability risks arising from professional negligence or hold professional indemnity insurance against liability arising from professional negligence which is appropriate to the risks covered.
- (6) The Minimum Capital Requirement, including any additional amounts under these Rules, must be invested in liquid assets or assets readily convertible to cash in the short term and must not include speculative positions.
- (7) A Guernsey AIFM must be able to demonstrate its compliance with the Minimum Capital Requirement throughout the reporting period.
- (8) Any Subordinated Loan Capital incorporated in the calculation of the Minimum Capital Requirement, including repayment, is subject to prior approval of the Commission.
- (9) A Guernsey AIFM must notify the Commission immediately where they have reason to believe that –
  - (a) it is in breach of its Minimum Capital Requirement or anticipates being in breach within a period of one month. Such notice must set out the steps which are being taken to remedy the breach;
  - (b) the Guernsey AIFM's auditor intends to qualify the accounts;
  - (c) the liabilities of a subsidiary of the Guernsey AIFM exceed the subsidiary's assets; or
  - (d) the liabilities of the parent company of the Guernsey AIFM exceeds the parent company's assets.

## PART 10 ARTICLE 15 AIFMD

### 10.1 Risk management

- (1) A Guernsey AIFM must implement adequate risk management systems in order to identify, measure, manage, and monitor appropriately all risks relevant to each AIF investment strategy and to which each AIF is or may be exposed.
- (2) A Guernsey AIFM must review the risk management systems with appropriate frequency, at least annually, and adapt them whenever necessary.
- (3) A Guernsey AIFM must functionally and hierarchically separate the functions of risk management from the operating units, including from the functions of portfolio management, by satisfying the conditions set out in Article 42 of the AIFMD Level 2.
- (4) A Guernsey AIFM must at least –
  - (a) implement an appropriate, documented, and regularly updated due diligence process when investing on behalf of the AIF which accords to the investment strategy, the objectives, and risk profile of the AIF;
  - (b) ensure that the risks associated with each investment position of the AIF, and their overall effect on the AIF's portfolio, can be properly identified, measured, managed, and monitored on an on-going basis, including through the use of appropriate stress testing procedures; and
  - (c) ensure that the risk profile of the AIF corresponds to the size, portfolio structure, and investment strategies and objectives of the AIF as laid down in the AIF constitutional documents.

- (5) A Guernsey AIFM must set a maximum level of leverage which it may employ on behalf of each AIF it manages as well as the extent of the right to re-use collateral, or guarantee, that could be granted under the leveraging agreement taking into account –
- (a) the type of AIF;
  - (b) the investment strategy of the AIF;
  - (c) the sources of leverage of the AIF;
  - (d) any other interlinkage or relevant relationships, with other financial services institutions, which could pose systemic risk;
  - (e) the need to limit the exposure to any single counterparty;
  - (f) the extent to which leverage is collateralised;
  - (g) the asset-liability ratio; and
  - (h) the scale, nature, and extent of the activity of the AIFM on the markets concerned.

## PART 11 ARTICLE 16 AIFMD

### 11.1 Liquidity risk management

- (1) A Guernsey AIFM must, for each AIF that it manages which is not an unleveraged closed-ended AIF, employ an appropriate liquidity management system and adopt procedures which enable it to monitor the liquidity risk of the AIF and to ensure that the liquidity profile of the investments of the AIF complies with its underlying obligations.
- (2) A Guernsey AIFM must regularly conduct stress tests, under normal and exceptional liquidity conditions, which enable it to assess and monitor the liquidity risk of the AIFs accordingly.
- (3) A Guernsey AIFM must ensure that, for each AIF that it manages, the investment strategy, the liquidity profile, and the redemption policy are consistent.

## PART 12 ARTICLE 14 AIFMD

### 12.1 Conflicts of interest

- (1) A Guernsey AIFM must take all reasonable steps to identify conflicts of interest that arise, in the course of managing AIFs, between –
  - (a) the Guernsey AIFM; including its managers, employees, or any person directly or indirectly linked to the Guernsey AIFM by control; and the AIF managed by the Guernsey AIFM, or the investors in that AIF;
  - (b) the AIF, or the investors in that AIF, and another AIF or the investors in that AIF;
  - (c) the AIF, or the investors in that AIF, and another client of the AIFM;
  - (d) the AIF, or the investors in that AIF, and a UCITS managed by the AIFM or the unit holders in that UCITS; or
  - (e) two clients of the Guernsey AIFM.
- (2) A Guernsey AIFM must maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to identify, prevent, manage, and monitor conflicts of interest in order to prevent them from adversely affecting the interests of the AIFs and their investors.
- (3) A Guernsey AIFM must segregate, within its own operating environment, tasks and responsibilities which may be regarded as incompatible with each other or which may potentially generate systemic conflicts of interest. A Guernsey AIFM must assess whether its operating conditions may involve any other material conflicts of interest and disclose them to the investors of the AIFs.

- (4) Where organisational arrangements made by a Guernsey AIFM to identify, prevent, manage, and monitor conflicts of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to investor's interests will be prevented the Guernsey AIFM must clearly disclose the general nature, or sources, of conflicts of interest to the investors, before undertaking business on their behalf, and develop appropriate policies and procedures.
- (5) Where a Guernsey AIFM, on behalf of an AIF, uses the services of a prime broker the terms must be set out in a written contract. Any possibility of transfer and re-use of AIF assets must be provided for in that contract and must comply with any applicable national legislation or the AIF constitutional document. The contract must provide that the depositary be informed of the contract.
- (6) A Guernsey AIFM must exercise due skill, care, and diligence in the selection and appointment of prime brokers with whom a contract is to be concluded.

## PART 13 ARTICLE 17 AIFMD

### 13.1 Investment in securitisation positions

- (1) Investment by a Guernsey AIFM, on behalf of AIF, in securitisation or other financial instruments is subject to Articles 50 to 56 of AIFMD Level 2.

## PART 14 ARTICLE 19 AIFMD

### 14.1 Valuation

- (1) A Guernsey AIFM is responsible for the proper valuation of AIF assets, the calculation of the net asset value, and the publication of the net asset value. The Guernsey AIFM's liability towards the AIF and its investors is not affected by the fact that the Guernsey AIFM has appointed an external valuer.
- (2) A Guernsey AIFM must ensure that, for each AIF that it manages, appropriate and consistent procedures are established so that a proper and independent valuation of the assets of the AIF can be performed in accordance with these Rules and the AIF's prospectus.
- (3) The rules applicable to the valuation of assets and the calculation of the net asset value per unit of the AIF must be set down in the AIF's prospectus.
- (4) A Guernsey AIFM must ensure that the net asset value per unit of AIFs is calculated and disclosed to investors in accordance with these Rules and the AIF's prospectus.
- (5) The valuation procedures used must ensure that the assets valued and the net asset value per unit is calculated at least once a year.
- (6) If the AIF is open-ended, valuations and calculations must be carried out at a frequency which is both appropriate to the assets held by the AIF and its issuance and redemption frequency.
- (7) If the AIF is closed-ended, valuations and calculations must be carried out in the case of an increase or decrease of the capital by the relevant AIF.
- (8) Investors must be informed of the valuations and calculations as set out in these Rules and the AIF's prospectus.

- (9) Valuations may be performed by an external valuer or by the Guernsey AIFM. The valuation must be performed impartially and with all due care, skill, and diligence.
- (10) An external valuer, being a legal or natural person, must be independent from the AIF, the Guernsey AIFM, and any other persons with close links to the AIF or the Guernsey AIFM.
- (11) Where an external valuer performs the valuation function the Guernsey AIFM must demonstrate that –
- (a) the external valuer is subject to mandatory professional registration recognised by law, or to legal or regulatory provisions, or rules of professional conduct;
  - (b) the external valuer can provide sufficient professional guarantees to be able to perform effectively the relevant valuation function in accordance with this rule; and
  - (c) the appointment of the external valuer complies with the requirements of these Rules and of Article 73 AIFMD Level 2.
- (12) The appointed external valuer must not delegate the valuation function to a third party.
- (13) The external valuer will be liable, to the Guernsey AIFM, for any losses suffered as a result of its negligence or intentional failure to perform its tasks regardless of any contractual arrangements providing otherwise.
- (14) Where the valuation is performed by the Guernsey AIFM the task must be functionally independent from the portfolio management. The remuneration policy and other measures must ensure that conflicts of interest are mitigated and that undue influence on employees is prevented.
- (15) Where the valuation is performed by an external valuer the appointment of the external valuer must be notified to the Commission, which may require that another external valuer be appointed if the conditions set out in this rule are not met.

- (16) Where the valuation function is not performed by an independent external valuer the Commission may require the Guernsey AIFM to have valuation procedures and valuations verified by an external valuer or by an auditor.
  
- (17) The depositary appointed for the AIF must not be appointed as external valuer of that AIF, unless it has functionally and hierarchically separated the performance of its depositary functions from its tasks as external valuer and the potential conflicts of interest are properly identified, managed, monitored, and disclosed to the investors of the AIF.

## PART 15 ARTICLES 19 AND 21

### 15.1 Depositary

- (1) For each AIF it manages the AIFM must ensure that a single depositary is appointed in accordance with these Rules.
- (2) The appointment of the depositary must be evidenced by written contract. The contract must regulate the flow of information deemed necessary to allow the depositary to perform its functions, for the AIF, for which it has been appointed.
- (3) The depositary must be established in one of the following locations –
  - (a) in respect of authorised or registered open-ended Guernsey AIFs, in the Bailiwick; or
  - (b) in respect of authorised or registered closed-ended Guernsey AIFs, in the Bailiwick, or in the home Member State of the AIFM managing the AIF, or in the Member State of Reference of the AIFM managing the AIF.

### 15.2 Eligibility criteria

- (1) Entities eligible to act as depositary are –
  - (a) a credit institution having its registered office in the EU and authorised in accordance with Directive 2006/48/EC;

- (b) an investment firm having its registered office in the EU, subject to capital adequacy requirements in accordance with Article 20(1) of Directive 2006/49/EC including capital requirements for operational risks, and authorised in accordance with Directive 2004/39/EC and which also provides the ancillary service of safe-keeping and administration of financial instruments for the account of clients in accordance with point (1) of Section B of Annex I to Directive 2004/39/EC; such investment firms must have own funds of not less than the amount of initial capital referred to in Article 9 of Directive 2006/49/EC;
  - (c) another category of institution that is subject to prudential regulation and ongoing supervision and which, on 21 July 2011, fell within the categories of institution determined by Member States to be eligible to be a depositary under Article 23(3) of Directive 2009/65/EC; or
  - (d) an entity which is licensed by the Commission under section 4 of the Law to carry out the restricted activity of custody in relation to category 1 and 2 controlled investments.
- (2) In respect of Guernsey AIFs the appointment of a depositary established in a third country, for the purposes of AIFMD, may be permissible if the depositary is a credit institution or any other entity of the same nature as those set out in (1)(a) and (b) provided that they are subject to effective prudential regulation, including minimum capital requirements, and supervision which has the same effect as EU law and are effectively enforced.
- (3) For certain types of closed-ended AIFs, such as private equity or venture capital funds and real estate funds, a wider range of entities than those specified in this rule, such as administrators, may be able to perform the relevant depositary functions. The Commission requires such entities to obtain a licence, under section 4 of the Law, to carry out the restricted activity of custody in relation to category 1 and 2 controlled investments and be subject to these Rules, in order to demonstrate that they can meet the commitments inherent in those functions, but imposes a lower level of capital requirements in the recognition of the different nature of the duties implied by the characteristics of the AIF, especially in relation to the custody risk.

### 15.3 Non-financial asset AIF depositaries

- (1) In respect of AIFs which –
  - (a) have no redemption rights exercisable during the period of five years from the date of the initial investments; and
  - (b) which –
    - (i) in accordance with their core investment policy, and these Rules, generally do not invest in assets that must be held in custody; or
    - (ii) generally invest in issuers or non-listed companies in order to potentially acquire control over such companies in accordance with these Rules,

the AIFM may appoint an entity to act as a depositary.

- (2) An AIFM must ensure that a depositary appointed, under (1), –
  - (a) is licensed by the Commission, under section 4 of the Law, to carry out the restricted activity in relation to category 1 and category 2 controlled investments, as applicable; or
  - (b) carries out depositary functions as part of its professional or business activities and is subject to prudential regulation and on-going supervision within any Member State to provide such services.

### 15.4 Depositary Application

- (1) Where an entity, licensed under the Law to provide custody services, intends to provide such services in respect of AIFs and Non-Financial Asset AIFs it must notify the Commission, in such form as the Commission may require, and must include –

- (a) a description of the organisational structure of the applicant including information on how the applicant intends to comply with these Rules;
  - (b) information on arrangements for the delegation and sub-delegation of functions to third parties;
  - (c) evidence in support of the applicant's Minimum Capital Requirement;
  - (d) a description of how the AIF's cash flows will be monitored;
  - (e) information on the safekeeping arrangements to be employed; and
  - (f) a description of how the depositary will ensure that the sale, issue, repurchase, redemption, and cancellation of unit of AIFs are carried out and that the AIFs' incomes are applied.
- (2) In the case of an applicant for a licence to provide custody services who wishes to opt in to these Rules, the applicant may notify the Commission at the time of such application if it intends to be a Guernsey depositary.

**15.5 The appointment of a depositary in respect of a Guernsey AIF to be marketed in one or more Member States**

- (1) The appointment of a depositary with its registered office in a third country, for the purposes of AIFMD in respect of a Guernsey AIF, is subject to the following conditions –
- (a) the competent authorities of the Member States in which the units of the Guernsey AIF are intended to be marketed have signed co-operation and exchange of information arrangements with the Commission;
  - (b) the depositary is subject to effective prudential regulation, including minimum capital requirements and supervision, which have the same effect as EU law and are effectively enforced;

- (c) the relevant third country, for the purposes of AIFMD, where the depositary is established is not listed as a Non-Cooperative Country and Territory by the Financial Action Task Force ("FATF");
- (d) the Member States in which the units of the Guernsey AIF are intended to be marketed and, if different, the home Member State of the AIFM have signed an agreement with the tax authorities of the Bailiwick which fully complies with the standards laid down in Article 26 of the Organisation for Economic Co-operation and Development's Model Tax Convention on Income and on Capital and ensures an effective exchange of information on tax matters including any multilateral tax agreements; and
- (e) the depositary must, by contract, be liable to the AIF or to the investors of the AIF, consistently with these Rules and must expressly agree to comply with rule 15.11 (Delegation).

#### **15.6 Conflicts of interest and who may act as a depositary**

- (1) To avoid conflicts of interest between the depositary, the AIFM, and the AIF and its investors –
  - (a) an AIFM must not act as depositary; and
  - (b) a prime broker, acting as counterparty to an AIF, must not act as depositary for that AIF unless it has functionally and hierarchically separated the performance of its depositary functions from its tasks as prime broker and the potential conflicts of interest are properly identified, managed, monitored, and disclosed to the investors of the AIF. Delegation, by the depositary, to a prime broker of its custody tasks is allowed if the relevant conditions set out in these Rules are met.

### **15.7 Minimum capital requirement of a Guernsey depositary**

- (1) A Guernsey depositary of an AIF must have, at all times, own funds of at least £4,000,000, the Minimum Capital Requirement.

### **15.8 Conditions applicable to depositaries which are non-financial asset AIF depositaries**

- (1) A Guernsey depositary which is a non-financial asset AIF depositary must comply with the following conditions –
  - (a) the firm must have, at all times, a Minimum Capital Requirement which is the higher of –
    - (i) initial capital of at least €125,000; or
    - (ii) one quarter of its total expenditure taken from the most recent annual accounts. The Commission has the right to increase this amount if it is deemed to not reasonably reflect the current position of the depositary;
  - (b) the firm must be able to demonstrate its compliance with the Minimum Capital Requirement throughout the reporting period; and
  - (c) any subordinated loan incorporated in the calculation of the Minimum Capital Requirement, including repayment, is subject to prior approval of the Commission.

### **15.9 Depositary tasks**

- (1) The depositary must ensure that the AIFs' cash flows are properly monitored and must ensure that –

- (a) all payments made by, or on behalf of investors upon the subscription of units of an AIF have been received; and
  - (b) that all cash of the AIF has been booked in to cash accounts opened –
    - (i) in the name of either –
      - (A) the AIF;
      - (B) the AIFM acting on behalf of the AIF; or
      - (C) the depositary acting on behalf of the AIF; and
    - (ii) at either –
      - (A) an entity referred to in points (a), (b) and (c) of Article 18(1) of Directive 2006/73/EC; or
      - (B) another entity of the same nature, in the relevant market where cash accounts are required, provided that such entity is subject to effective prudential regulation and supervision which has the same effect as EU law and is effectively enforced; and in accordance with the principles set out in Article 16 of Directive 2006/73/EC, safeguarding of financial instruments and funds, of the MiFID Implementing Directive; and
  - (c) where the cash accounts are opened in the name of the depositary acting on behalf of the AIF, cash of the AIFM, and the depositary's own cash, must not be booked on such accounts.
- (2) The assets of the AIF, or AIFM acting on behalf of the AIF, must be entrusted to the depositary for safe-keeping and –
- (a) for financial instruments that can be held in custody –

- (i) the depositary must hold all financial instruments, that can be registered in a financial instruments account opened in the depositary's books, and all financial instruments that can be physically delivered to the depositary; and
  - (ii) for that purpose the depositary must ensure that all those financial instruments that can be registered in a financial instruments account opened in the depositary's books are registered in the depositary's books, within segregated accounts, in accordance with the principles set out in Article 16 of Directive 2006/73/EC, are opened in the name of the AIF, or the AIFM acting its behalf, so that they can be clearly identified as belonging to the AIF in accordance with applicable laws at all times;
- (b) for all other assets –
  - (i) the depositary must verify the ownership of the AIF, or the AIFM acting on its behalf, of such assets and must maintain a record of those assets;
  - (ii) the assessment whether the AIF, or the AIFM acting on its behalf, holds the ownership must be based on information or documents, provided by the AIF or the AIFM and, where available, on external evidence; and
  - (iii) the depositary must keep its records up to date.
- (3) In addition to the tasks referred to in these Rules the depositary must –
  - (a) ensure that the sale, issue, re-purchase, redemption, and cancellation of units of the AIF are carried out in accordance with the AIF's prospectus;
  - (b) ensure that the value of the units of the AIF is calculated in accordance with the procedures laid down in these Rules and the AIF's prospectus;

- (c) carry out the instructions of the AIFM; unless they conflict with these Rules and the AIF's prospectus;
- (d) ensure that, in transactions involving the AIF's assets, any consideration is remitted to the AIF within the usual time limits; and
- (e) ensure that an AIF's income is applied in accordance with these Rules and the AIF's prospectus.

### **15.10 Operating conditions**

- (1) The depositary must act honestly, fairly, professionally, independently, and in the interest of the AIF and the investors of the AIF.
- (2) A depositary must not carry out activities with regard to the AIF, or the AIFM on behalf of the AIF, that may create conflicts of interest between the AIF, the investors in the AIF, the AIFM, and itself unless the depositary has functionally and hierarchically separated the performance of its depositary tasks from its other potentially conflicting tasks and the potential conflicts of interest are properly identified, managed, monitored, and disclosed to the investors of the AIF.
- (3) The assets referred to in rule 15.9(2)(a) must not be re-used by the depositary unless it has obtained the prior consent of the AIF or the AIFM acting on behalf of the AIF.
- (4) The depositary appointed for an AIF must not be appointed as external valuer of that AIF unless it has functionally and hierarchically separated the performance of its depositary functions from its tasks as external valuer and the potential conflicts of interest are properly identified, managed, monitored, and disclosed to the investors of the AIF.

### **15.11 Delegation**

- (1) The depositary must not delegate its functions to third parties except for those referred to in rule 15.9(2). In this case the following conditions must be satisfied -
  - (a) the tasks are not delegated with the intention of avoiding the requirements of these Rules or AIFMD Level 2;
  - (b) the depositary can demonstrate that there is an objective reason for the delegation;
  - (c) the depositary has exercised all due skill, care, and diligence in the selection and the appointment of any third party to whom it wants to delegate parts of its tasks and keeps exercising all due skill, care, and diligence in the periodic review and ongoing monitoring of any third party to whom it has delegated parts of its tasks and of the arrangements of the third party in respect of the matters delegated to it; and
  - (d) the depositary ensures that the third party always meets the following conditions during the performance of the tasks delegated to it –
    - (i) the third party has the structures and the expertise that are adequate and proportionate to the nature and complexity of the assets of the AIF, or the AIFM acting on behalf of the AIF, which have been entrusted to it;
    - (ii) for custody tasks referred to in rule 15.9 (2)(a) the third party is subject to effective prudential regulation, including minimum capital requirements, and supervision in the jurisdiction concerned and the third party is subject to an external periodic audit to ensure that the financial instruments are in its possession;
    - (iii) the third party segregates the assets of the depositary’s clients from its own assets and from the assets of the depositary in such a way that they can be clearly identified as belonging to clients of a particular depositary;

- (iv) the third party does not make use of the assets without the prior consent of the AIF, or the AIFM acting on behalf of the AIF, and prior notification to the depositary; and
  - (v) the third party complies with the relevant general obligations and prohibitions set out in rule 15.9(2)(a) and rule 15.10(1), (2) and (3).
- (2) Where the law of a third country requires that certain financial instruments be held in custody by a local entity, and no local entities satisfy the delegation requirements set out in (1), the depositary may delegate its functions to such a local entity only to the extent required by the law of the third country and only for as long as there are no local entities that satisfy the delegation requirements, subject to the following requirements –
- (a) the investors of the relevant AIF must be duly informed that such delegation is required due to legal constraints in the law of a third country and of the circumstances justifying the delegation, prior to their investment;
  - (b) the AIF, or the AIFM on behalf of the AIF, must instruct the depositary to delegate the custody of such financial instruments to such local entity;
  - (c) the third party may, in turn, sub-delegate those functions subject to the same requirements. In such a case, (5) applies to all relevant parties;
  - (d) the provision of services, as specified by Directive 98/26/EC, by securities settlement systems as designated for the purposes of that Directive, or the provision of similar services by third-country securities settlement systems, must not be considered a delegation of its custody functions.
- (3) A depositary may delegate the safe keeping of assets to a third party that maintains a common account for multiple AIFs provided it is a segregated account.

## 15.12 Liability

- (1) The depositary will be liable to the AIF, or to the investors of the AIF, for the loss, by the depositary or a third party to whom custody has been delegated, of financial instruments.
- (2) In the case of such a loss the depositary must return a financial instrument of identical type or corresponding amount to the AIF, or the AIFM acting on behalf of the AIF, without delay.
- (3) The depositary will not be liable if it can prove that the loss has arisen as a result of an external event beyond its reasonable control; the consequences of which would have been unavoidable despite all reasonable efforts to the contrary.
- (4) The depositary will also be liable to the AIF, or to the investors of the AIF, for all other losses suffered by them as a result of the depositary's negligent or intentional failure to properly fulfil its obligations pursuant to these Rules and AIFMD Level 2.
- (5) The depositary's liability is not affected by any delegation. Where a financial instrument is held in custody by a third-party the depositary may discharge itself of liability of the loss of that financial instrument if it can prove that –
  - (a) all requirements for delegation of its custody tasks, as set out in these Rules, are met;
  - (b) a written contract between the depositary and the third party expressly transfers the liability of the depositary to that third party and makes it possible for 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 financial instruments, or for the depositary to make such a claim on their behalf; and
  - (c) a written contract between the depositary and the AIF, or the AIFM acting on behalf of the AIF, expressly allows a discharge of the depositary's liability and establishes the objective reason to contract such a discharge.

- (6) Where the law of a third country requires that certain financial instruments are held in custody by a local entity, and there are no local entities that satisfy the delegation requirements set out in these Rules, the depositary can discharge itself of liability provided that –
- (a) the AIF constitutional documents expressly allows for such a discharge under the conditions set out in this rule;
  - (b) the investors of the relevant AIF have been informed of that 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 such financial instruments to a local entity;
  - (d) there is a written contract between the depositary and the AIF, or the AIFM acting on behalf of the AIF, which expressly allows such a discharge; and
  - (e) there is a written contract between the depositary and the third party that expressly transfers the liability of the depositary to that local entity and makes it possible for the AIF, or the AIFM acting on behalf of the AIF, to make a claim against that local entity in respect of the loss of financial instruments or for the depositary to make such a claim on their behalf.
- (7) Liability to the investors of the AIF may be invoked directly or indirectly through the AIFM, depending on the legal nature of the relationship between the depositary, the AIFM, and the investors.

### **15.13 Guernsey depositary's relationship with the Commission**

- (1) Guernsey depositaries providing depositary services to an AIF not authorised or registered by the Commission must be satisfied that the prospectus issued by the AIF does not imply that the AIF is regulated by the Commission.

- (2) The Guernsey depositary must submit a quarterly return, containing the following aggregate information, for all AIFs to which services are provided within each base currency category –
- (a) name of each AIF;
  - (b) domicile of each AIF;
  - (c) number of investors in each AIF; and
  - (d) total net asset value for each AIF.
- (3) A Guernsey depositary must notify the Commission immediately when it has reason to believe –
- (a) it is in breach of its Minimum Capital Requirement or anticipates being in breach of such within a period of one month; such notice must specify the steps which the Guernsey Depositary is taking or has taken to remedy the breach and must be confirmed in writing;
  - (b) the Guernsey depositary's auditor intends to qualify the accounts;
  - (c) the liabilities of a subsidiary of the Guernsey depositary exceed the subsidiaries assets; or
  - (d) the liabilities of the parent company of the Guernsey depositary exceeds the parent company's assets.

## PART 16 ARTICLES 22 AND 23 AIFMD

### 16.1 Annual report

- (1) A Guernsey AIFM must, for each of the EU AIFs it manages and for each of the AIFs it markets to the EU, make available an annual report for each financial year no later than six months following the end of the financial year.
- (2) The annual report must be provided to investors, and to the public, on request.
- (3) The annual report must be submitted to the Commission and, where applicable, the home Member State of the AIF.
- (4) Where the AIF is required to make public an annual report, in accordance with Directive 2004/109/EC, the following information must be provided to investors on request and no later than four months following the end of the financial year, either separately or as an additional part to the annual financial report –
  - (a) a balance-sheet or statement of assets and liabilities;
  - (b) an income and expenditure account for the financial year;
  - (c) a report on the activities of the financial year;
  - (d) any material changes in the information listed in rule 16.2 during the financial year covered by the report;
  - (e) the total amount of remuneration for the financial year, split into fixed and variable remuneration, paid by the Guernsey AIFM to its staff, and number of beneficiaries, and, where relevant, carried interest paid by the AIF; and

- (f) the aggregate amount of remuneration broken down by senior management and members of staff of the Guernsey AIFM whose actions have a material impact on the risk profile of the AIF.
  
- (5) The accounting information set out in the annual report must be prepared in accordance with the accounting standards, and with the accounting rules in force in the country where the AIF is established, or the AIF constitutional document.
  
- (6) The accounting information given in the annual report must be audited by one or more persons empowered by law to audit accounts in accordance with Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts.
  
- (7) The auditor's report, including any qualifications, must be reproduced in full in the annual report.

## 16.2 Disclosure to investors

- (1) Guernsey AIFMs must, for each of the EU AIFs that they manage and for each of the AIFs that they market in Member States, make available to prospective investors, in accordance with national law or the AIF constitutional document, the following information before they invest in the AIF, and when any material changes occur to –
  - (a) a description of –
    - (i) the investment strategy and objectives of the AIF;
    - (ii) information on where any master AIF is established and where the underlying funds are established if the AIF is a fund of funds;
    - (iii) the types of assets in which the AIF may invest, the techniques it may employ, and all associated risks;

- (iv) any applicable investment restrictions;
  - (v) the circumstances in which the AIF may use leverage, the types and sources of leverage permitted, and the associated risks, any restrictions on the use of leverage and any collateral and asset re-use arrangements, and the maximum level of leverage which the Guernsey AIFM is entitled to employ on behalf of the AIF;
- 
- (b) a description of the procedures by which the AIF may change its investment strategy or investment policy, or both;
  - (c) a description of the main legal implications of the contractual relationship entered into for the purpose of investment, including information on the jurisdiction, on the applicable law, and on the existence or not of any legal instruments providing for the recognition and enforcement of judgments in the territory where the AIF is established;
  - (d) the identity of the Guernsey AIFM, the AIF's depositary, auditor, and any other service providers and a description of their duties and the investor's rights;
  - (e) a description of how the Guernsey AIFM is complying with the requirement to hold its own funds sufficient to cover liability in accordance with these Rules;
  - (f) a description of any delegated management function, as referred to in Schedule 1, by the Guernsey AIFM and of any safe-keeping function delegated by the depositary; the identification of the delegate and any conflicts of interest that may arise from such delegations;
  - (g) a description of the AIF's valuation procedure and of the pricing methodology for valuing assets, including the methods used in valuing hard-to-value assets in accordance with these Rules;

- (h) a description of the AIF's liquidity risk management, including the redemption rights both in normal and in exceptional circumstances, and the existing redemption arrangements with investors;
  - (i) a description of all fees, charges, and expenses and of the maximum amounts which are directly or indirectly borne by investors;
  - (j) a description of how the Guernsey AIFM ensures fair treatment of investors and, whenever an investor obtains preferential treatment or the right to obtain preferential treatment, the type of investors who obtain such preferential treatment and any legal or economic links with the AIF or the AIFM;
  - (k) the latest annual report;
  - (l) the procedure and conditions for the issue and sale of units;
  - (m) the latest net asset value of the AIF or the latest market prices of the unit of the AIF, in accordance with these Rules;
  - (n) where available, the historical performance of the AIF;
  - (o) the identity of the prime broker, and a description of any material arrangements of the AIF with its prime brokers, and the way the conflicts of interest are managed, and the provision in the contract with the depositary on the possibility of transfer and re-use of AIF assets, and information about any transfer of liability to the prime broker that may exist; and
  - (p) a description of how and when the information required in (4) and (5) will be disclosed.
- (2) The Guernsey AIFM must inform the investors, before they invest in the AIF, of any arrangement made by the depositary to contractually discharge itself of liability in accordance with these Rules. The AIFM must also inform investors of any changes with respect to depositary liability without delay.

- (3) Where the AIF is required to publish a prospectus in accordance with Directive 2003/71/EC or in accordance with national law only the information set out in (1) and (2), which is in addition to that contained in the prospectus, needs to be disclosed separately or as additional information in the prospectus.
- (4) Guernsey AIFMs must, for each of the EU AIFs that they manage and for each of the AIFs that they market in the EU, periodically disclose to investors –
  - (a) the percentage of the AIF's assets which are subject to special arrangements arising from their illiquid nature;
  - (b) any new arrangements for managing the liquidity of the AIF; and
  - (c) the current risk profile of the AIF and the risk management systems employed by the AIFM to manage those risks.
- (5) AIFMs managing EU AIFs employing leverage or marketing in the EU must, for each such AIF, disclose on regular basis –
  - (a) any changes to the maximum level of leverage which the AIFM may employ on behalf of the AIF, as well as any right of the re-use of collateral, or any guarantee granted under the leveraging arrangement; and
  - (b) the total amount of leverage employed by the AIF.

## PART 17 ARTICLES 24 AND 25 AIFMD

### 17.1 Reporting obligations to the Commission

- (1) A Guernsey AIFM must report, to the Commission, on the principal markets and instruments in which it trades on behalf of the AIFs it manages, providing information on –
  - (a) the main instruments in which it is trading;
  - (b) any market of which it is a member or where it actively trades; and
  - (c) the principal exposures and most important concentrations of each of the AIFs it manages; and

this information must be provided at a frequency determined on the basis set out under Article 110(3) of AIFMD Level 2.

- (2) A Guernsey AIFM must, for each of the EU AIFs it manages and for each of the AIFs it markets in the EU, provide the following to the Commission –
  - (a) the percentage of the AIF's assets which are subject to special arrangements arising from their illiquid nature;
  - (b) any new arrangements for managing the liquidity of the AIF;
  - (c) the current risk profile of the AIF and the risk management systems employed by the AIFM to manage the market risk, liquidity risk, counterparty risk, and other risks including operational risk;
  - (d) information on the main categories of assets in which the AIF invested;
  - (e) the results of the stress tests performed in accordance with these Rules; and

this information must be reported at a frequency determined by the bases set out under Article 110(3) of AIFMD Level 2.

- (3) The Guernsey AIFM must provide the following documents to the Commission –
  - (a) an annual report of each EU AIF managed by the AIFM and of each AIF marketed by it in the EU, for each financial year, in accordance with these Rules and no later than six months following the end of each financial year;
  - (b) for the end of each quarter, a return containing the following aggregate information for all AIF's managed by the Guernsey AIFM within each base currency category –
    - (i) the name of each AIF;
    - (ii) the domicile of each AIF;
    - (iii) the number of investors in each AIF; and
    - (iv) the total net asset value for each AIF.
- (4) A Guernsey AIFM managing AIF's employing leverage on a substantial basis must make available information about the overall level of leverage employed by each AIF it manages; a breakdown between the leverage arising from borrowing of cash or securities and leverage embedded in financial derivatives; and the extent to which the AIF's assets have been re-used under leveraging arrangements to the Commission. Information must include –
  - (a) the identity of the five largest sources of borrowed cash or securities for each of the AIFs; and
  - (b) the amounts of leverage received from each of those sources for each of those AIFs,

but only for the EU AIFs managed by them and non-EU AIFs marketed by them in the EU.

- (5) Where necessary, for the effective monitoring of systemic risk, the Commission may require information in addition to that set out in these Rules.

## PART 18 ARTICLE 25 AIFMD

### 18.1 AIFMs managing leveraged AIFs

- (1) A Guernsey AIFM must demonstrate that the leverage limit set by it, for each AIF it manages, are reasonable and that it complies with those limits at all times.
  
- (2) The Commission may impose limits on the level of leverage that an AIFM is entitled to employ, or other restrictions on the management of the AIF with respect to the AIFs under its management, to limit the extent to which the use of leverage constitutes to the build-up of a systematic risk in the financial system or to the risk of disorderly markets.

## PART 19 APPLICATION OF PARTS 20 TO 23

### 19.1 Obligations for AIFMs managing AIFs which acquire control of non-listed companies and issuers

- (1) Parts 19 to 23 apply to the following –
  - (a) Guernsey AIFMs managing one or more AIFs which either individually or jointly, on the basis of an agreement aimed at acquiring control, acquire control of a non-listed company in accordance with (5);
  - (b) Guernsey AIFMs co-operating with one or more other AIFMs based on an agreement under which the AIFs, managed by those AIFMs jointly, acquire control of a non-listed company in accordance with (5).
- (2) Parts 19 to 23 do not apply where the non-listed companies concerned are –
  - (a) small to medium-sized enterprises within the meaning of Article 2(1) of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small, and medium-sized enterprises; or
  - (b) special purpose vehicles with the purpose of purchasing, holding, or administering real estate.
- (3) Rule 20.2(1) also applies to AIFMs managing AIFs that acquire a non-controlling participation in a non-listed company.
- (4) Rules 21.2(1)-(3) and rule 23 also apply to AIFMs managing AIFs that acquire control over issuers.
- (5) In rules 20 to 23, for non-listed companies, control means more than 50% of the voting rights of the companies where –

- (a) the percentage of voting rights, held by the relevant AIF, is calculated by combining –
    - (i) those voting rights, in the company, held directly; and
    - (ii) any undertakings, of the AIF, where voting rights held in the company, represent more than 50%; and
    - (iii) any natural or legal person holding voting rights, representing 50% or more in the company, on behalf of the AIF or on behalf of an undertaking controlled by the AIF; and
  - (b) the percentage of voting rights must be calculated on the basis of all the shares to which voting rights are attached even if they are suspended.
- (6) Parts 19 to 23 apply subject to the conditions and restrictions set out in Article 6 of Directive 2002/14/EC.

## PART 20 ARTICLE 27 AIFMD

### 20.1 Application

- (1) This Part only applies to AIFs and AIFMs in accordance with Part 19.

### 20.2 Notification of the acquisition of major holdings and control of non-listed companies

- (1) When an AIF acquires, disposes of, or holds shares of a non-listed company the Guernsey AIFM managing such an AIF must notify the Commission of the proportion of voting rights of the non-listed company held by the AIF when that proportion reaches, exceeds, or falls below the thresholds of 10%, 20%, 30%, 50%, and 75%.
- (2) When an AIF acquires, individually or jointly, control over a non-listed company the Guernsey AIFM managing the AIF must notify the following of the acquisition of control by the AIF –
  - (a) the non-listed company;
  - (b) the shareholders of the non-listed company of which the identities and addresses are available to the AIFM or can be made available by the non-listed company or through a register to which the AIFM has or can obtain access; and
  - (c) the Commission.
- (3) The notifications required must contain –
  - (a) the resulting situation in terms of voting rights;

- (b) the conditions subject to which control was acquired; including information about the identity of the different shareholders involved, any natural person or legal entity entitled to exercise voting rights on their behalf and, if applicable, the chain of undertakings through which voting rights are effectively held; and
  - (c) the date on which control was acquired.
- (4) In its notification to the non-listed company the AIFM must request the board of directors of the company to inform the employees' representatives or, where there are none, the employees themselves, without delay, of the acquisition of control by the AIF, managed by the AIFM, and of the information set out in (3).
- (5) The notifications referred to in this rule must be made as soon as possible and no later than ten working days after the date on which the AIF has reached, exceeded, or fallen below the relevant threshold or has acquired control over the non-listed company.

## PART 21 ARTICLE 28 AIFMD

### 21.1 Application

- (1) This Part only applies to AIFs and AIFMs in accordance with Part 19.

### 21.2 Disclosure in case of acquisition of control

- (1) In this rule the definition of “control” regarding issuers control is determined in accordance with Article 5(3) of Directive 2004/25/EC.
- (2) When an AIF acquires, individually or jointly, control of a non-listed company or an issuer the Guernsey AIFM managing the AIF must make available to –

- (a) the company concerned;
- (b) the shareholders of the company of which identities and addresses are available to the AIFM or can be made available by the company or through a register to which the AIFM has or can obtain access; and
- (c) the Commission,

the following –

- (i) the identity of the AIFMs which either individually or in agreement with other AIFMs manage the AIFs that have acquired control;
- (ii) the policy for preventing and managing conflicts of interest, in particular between the Guernsey AIFM, the AIF, and the company; including information about the specific safeguards established to ensure that any agreement between the Guernsey AIFM and the AIF and the company is concluded at arms length; and

- (iii) the policy for external and internal communications relating to the company in particular as regards employees.
- (3) In its notification to the company the AIFM must request the board of directors of the company to inform the employees' representatives or, where there are none, the employees themselves, without delay, of the information set out in (1).
- (4) When an AIF acquires, individually or jointly, control of a non-listed company the Guernsey AIFM managing the AIF must ensure that the AIF, or the Guernsey AIFM acting on behalf of the AIF, discloses its intentions, with regard to the future of the business of the non-listed company, and the likely repercussions on employment, including any material change in the conditions of employment, to –
  - (a) the non-listed company;
  - (b) the shareholders of the non-listed company of which the identities and addresses are available to the AIFM or can be made available by the non-listed company or through a register to which the AIFM has or can obtain access; and
  - (c) the Commission.
- (5) In addition, the Guernsey AIFM managing the relevant AIF must request and use its best efforts to ensure that the board of directors of the non-listed company makes available the information, set out in (3), to the employees' representatives or, where there are none, the employees themselves.
- (6) When an AIF acquires control of a non-listed company the Guernsey AIFM managing such an AIF must provide the Commission and the AIF's investors with information on the financing of the acquisition.

## PART 22 ARTICLE 29 AIFMD

### 22.1 Application

- (1) This Part only applies to AIFs and AIFMs in accordance with Part 19.

### 22.2 Specific provisions regarding the annual report of AIFs exercising control of non-listed companies

- (1) When an AIF acquires, individually or jointly, control of a non-listed company the Guernsey AIFM managing such an AIF must –
  - (a) Request, and use its best efforts to ensure, that the annual report of the non-listed company, drawn up in accordance with these Rules, is made available by the board of directors of the company to the employees' representatives or, where there are none, to the employees themselves within the period such an annual report has to be drawn up in accordance with any applicable national legislation; or
  - (b) for each AIF, include in the annual report the information, set out below, relating to the relevant non-listed company.
- (2) The information to be included in the annual report of the non-listed company of the AIF must include at least a fair view of the development of the company's business representing the situation at the end of the period covered by the report. It must also give an indication of –
  - (a) any important events that have occurred since the end of the financial year;
  - (b) the company's likely future development; and
  - (c) information concerning acquisitions of own shares prescribed by Article 22(2) of Council Directive 77/91/EEC.

- (3) The Guernsey AIFM managing the relevant AIF must –
- (a) request and use its best efforts to ensure that the board of directors of the non-listed company makes available the information in (2) to the employees' representatives or, where there are none, to the employees themselves within the timescale set out at rule 16.1; or
  - (b) make available the information, set out in (1), to the investors of the AIF, in so far as already available, within the period referred to in rule 16.1 and no later than the date on which the annual report of the non-listed company is drawn up in accordance with applicable national legislation.

## PART 23 ARTICLE 30 AIFMD

### 23.1 Application

- (1) This Part only applies to AIFs and AIFMs in accordance with Part 19.

### 23.2 Asset stripping

- (1) In this rule the definition of "control" regarding issuers control is determined in accordance with Article 5(3) of Directive 2004/25/EC.
- (2) When an AIF, individually or jointly, acquires control of a non-listed company or an issuer the Guernsey AIFM managing the AIF must, for a period of 24 months following the acquisition of control of the company by the AIF –
  - (a) not be allowed to facilitate, support, or instruct any distribution, capital reduction, share redemption, or acquisition of own shares by the company as set out in (2);
  - (b) where the Guernsey AIFM is authorised to vote on behalf of the AIF at the meetings of the governing bodies of the company; not vote in favour of a distribution, capital reduction, share redemption, or acquisition of own shares by the company as set out in (2); and
  - (c) in any event use its best efforts to prevent distributions, capital reductions, share redemptions, or the acquisition of own shares by the company as set out in (2).
- (3) The obligations imposed on Guernsey AIFMs are as follows –

- (a) any distribution to shareholders made when, on the closing date of the last financial year the net assets as set out in the company's annual accounts are, or following such a distribution would become, lower than the amount of the subscribed capital plus those reserves which may not be distributed under the legislation, in the understanding that where the uncalled part of the subscribed capital is not included in the assets shown in the balance sheet, this amount must be deducted from the amount of subscribed capital;
- (b) any distributions to shareholders, the amount of which would exceed the amount of the profits at the end of the last financial year plus any profits brought forward and sums drawn from reserves available for this purpose; less any losses brought forward and sums placed to reserve in accordance with the legislation;
- (c) to the extent that acquisitions of own shares are permitted, the acquisitions by the company, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, that would have the effect of reducing the net assets below the amount set out in (1); and
- (d) in this section distribution includes –
  - (i) the payment of dividends and of interest relating to shares;
  - (ii) the provisions on capital reductions do not apply on a reduction in the subscribed capital, the purpose of which is to offset losses incurred or to include sums of money in a non-distributable reserve provided that, following the operation, the amount of such reserve is not more than 10% of the reduced subscribed capital; and
  - (iii) the restriction set out in (c) is subject to points (b) to (h) of Article 20(1) of Directive 77/91/EEC.

## PART 24 GENERAL PROVISION

### 24.1 Interpretation

- (1) In these Rules terms have their ordinary meaning unless specifically defined in the Law or in these Rules.
- (2) In these Rules the following definitions should be followed -

**“accounting reference date”** means the date to which an AIFM’s, AIF’s, or depositary’s accounts are prepared;

**“AIF”** means a collective investment undertaking, including investment components, which –

- (a) raises capital from a number of investors with a view to investing it in accordance with defined investment policy for the benefit of those investors; and
- (b) does not require authorisation either as a UKUCITS pursuant to the provisions of the Financial Services and Markets Act 2000 or pursuant to Article 5 of the UCITS Directive (Directive 2009/65/EC), whatever its legal form; including under contract, by means of a trust, or under statute and whether it is an open-ended or closed-ended scheme; unless it meets one or more of the exemptions provisions set out in AIFMD;

**“AIF constitutional document”** means the trust deed or instrument , the memorandum and articles of incorporation, or the partnership agreement, or other similar constitutional document, together with the relevant prospectus or information memorandum;

**“AIFM”** means legal persons whose regular business is managing one or more AIFs;

**“AIFMD”** means 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;

**“AIFMD Level 2”** means Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU;

**“annual accounts”** means the accounts which cover the twelve month period immediately preceding the accounting reference date or, in the case of a new business, from the date of incorporation;

**“authorisation”** means the authorisation of a collective investment scheme pursuant to section 8 of the Law;

**“carried interest”** means a share in the profits of the AIF accrued to the AIFM as compensation for the management of the AIF and excluding any share in the profits of the AIF accrued to the AIFM as a return on any investment by the AIFM into the AIF;

**“close links”** means a situation in which two or more persons are linked by –

- (a) participation, namely ownership, directly or by way of control, of 20% or more of the voting rights or capital of an undertaking; or
- (b) control, namely the relationship between a parent undertaking and a subsidiary, as referred to in Article 1 of the Seventh Council Directive, 83/346/EEC of 13 June 1983 on consolidated accounts, or a similar relationship between a person and an undertaking; for the purposes of this point a subsidiary undertaking of a subsidiary undertaking should also be considered to be a subsidiary of the parent undertaking of those subsidiaries.

A situation in which two or more natural or legal persons are permanently linked to the same person by a control relationship is also regarded as constituting a ‘close link’ between such persons;

**“competent authorities”** means either –

- (a) in relation to EU AIFMs, the national authorities of the Member States which are empowered by law or regulation to supervise AIFMs;
- (b) in relation to a depositary, if the depositary is –
  - (i) a credit institution authorised under Directive 2006/48/EC, the competent authorities as defined in point (4) of Article 4;
  - (ii) an investment firm authorised under Directive 2004/39/EC, the competent authorities as defined in point (22) of Article 4(1);
  - (iii) an entity referred to in rule 15.2(1), the national authorities of its home Member State which are empowered by law or regulation to supervise such categories of institution;
  - (iv) an entity referred to in rule 15.3, the national authorities of the Member State in which that entity has its registered office and which are empowered by legislation to supervise such entity or the official body competent to register or supervise such an entity pursuant to the rules of professional conduct applicable;
  - (v) appointed as a depositary for non-EU AIF in accordance with rule 15.1(3), and does not fall within the scope of (i) to (iv), the relevant national authorities of the third country where the depositary has its registered office;
- (c) in relation to EU AIFs means the national authorities of a Member State which are empowered by legislation to supervise AIFs;

**“control”** is as defined in Article 1 of Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts, however, in Part 21 and Part 23, and in regard to issuers, it is determined in accordance with Article 5(3) of Directive 2004/25/EC;

**“credit institution”** means a credit institution as defined in Directive 2006/48/EC on the capital adequacy of investment firms and credit institutions;

**“employees representatives”** are as defined in point (e) of Article 2 of Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community;

**“established”** means –

- (a) for AIFMs, having its registered office in;
- (b) for AIFs, being authorised or registered in, or, if the AIF is not authorised or registered, having its registered office in;
- (c) for depositaries, having its registered office or branch in;

**“EU AIF”** means –

- (a) an AIF which is authorised or registered in a Member State under the applicable national law; or
- (b) an AIF which is not authorised or registered in a Member State, but has its registered office or head office in a Member State;

**“EU AIFM”** means a legal person whose registered office is in a Member State and whose regular business is managing one or more AIFs;

**“external AIFM”** means an AIFM appointed by or on behalf of the AIF to manage the AIF;

**“feeder AIF”** means an AIF which –

- (a) invests at least 85% of its assets in units or shares in another AIF (the “master AIF”);
- (b) invests at least 85% of its assets in more than one master AIF where those master AIFs have identical investment strategies; or
- (c) has otherwise an exposure of at least 85% of its assets to such a master AIF;

**“financial instrument”** is as set out in Section C of Annex 1 to Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on Markets in Financial Instruments;

**“Guernsey AIF”** means an AIF established in the Bailiwick of Guernsey, including but not limited to, collective investment schemes declared in a registration or authorisation issued by the Commission under section 8 of the Law to be an authorised or registered collective investment scheme for the purposes of the Law;

**“Guernsey AIFM”** means –

- (a) a Licensee whose regular business is managing one or more AIFs, including Guernsey AIFs; or
- (b) a Guernsey AIF in the case of a self-managed AIF, which is notified, to the Commission, as the AIFM under rule 3 for the purposes of complying with these Rules;

**“Guernsey depositary”** means a depositary of an AIF with a licence to act as a custodian and which is subject to these Rules;

**“home Member State of the AIF”** means –

- (a) the Member State in which the AIF is authorised or registered under applicable national law or, in the case of multiple authorisations or registrations, the Member State in which the AIF has been authorised or registered for the first time; or
- (b) if the AIF is neither authorised or registered in a Member State, the Member State in which the AIF has its registered office or head office;

**“home Member State of the AIFM”** means –

- (a) for EU AIFMs, the Member State in which the AIFM has its registered office; or
- (b) for AIFMs established in Guernsey, the Member State of Reference determined in accordance with Article 37(4) of the AIFMD and supplemented by Commission Implementing Regulation (EU) No 448/2013 of May 2013;

**“initial capital”** is as set out in points (a) and (b) of the first paragraph of Article 57 of Directive 2006/48/EC on the capital adequacy of investment firms and credit institutions;

**“internal AIFM”** means a structure where the legal form of the AIF permits internal management and where the AIF’s governing body has chosen not to appoint an external AIFM;

**“issuer”** means a legal entity governed by private or public law, including a state whose securities are admitted to trading on a regulated market, the issuer being in the case of a depositary receipts representing securities the issuer of the securities represented, where that issuer has its registered office in the EU, and where its shares are admitted to trading on a regulated market;

**“leverage”** means any method by which the AIFM increases the exposure of an AIF it manages whether through borrowing of cash or securities, or leverage embedded in derivative positions, or by any other means;

**“managing AIFs”** means performing investment management functions comprising at least risk or portfolio management for one or more AIFs;

**“marketing”** means a direct or indirect offering or placement, at the initiative of the AIFM or on behalf of the AIFM, of units or shares of an AIF it manages to or with investors domiciled or with a registered office in the EU;

**“master AIF”** means an AIF in which another AIF invests or has an exposure in accordance with the definition of “feeder AIF”;

**“Member State”** includes the member states of the EU and any EEA state in which the AIFMD is implemented;

**“Member State of Reference”** is as set out in Article 37(4) of the AIFMD and supplemented by Commission Implementing Regulation (EU) No 448/2013 of 15 May 2013;

**“non-listed company”** means a company which has its registered office in the EU and the shares of which are not admitted to trading on a regulated market;

**“own funds”** is as set out in Articles 56 to 67 of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions;

**“parent undertaking”** is as set out in Articles 1 and 2 of Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts;

**“prime broker”** means a credit institution, a regulated investment firm, or another entity subject to prudential regulation and on-going supervision, offering services to professional investors primarily to finance or execute transactions in financial instruments as counterparty, and which may also provide other services such as clearing and settlement of trades, custodial services, securities lending, customised technology, and operational support facilities;

**“professional investor”** means an investor which is considered to be a professional client or may, on request, be treated as a professional client within the meaning of Annex II to Directive 2004/39/EC on Markets and Financial Instruments;

**“Prospectus Directive”** means Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading;

**“reporting period”** means the twelve month period immediately preceding the accounting reference date (or, in the case of new business, from the date of incorporation);

**“retail investor”** means an investor other than a professional investor;

**“third country”** means a non-EU territory, excluding the Bailiwick of Guernsey;

**“total expenditure”** means all expenditure incurred, minus the following -

- (a) depreciation;
- (b) profit shares, bonuses, etc.;
- (c) net losses arising in the translation of foreign currency balances;
- (d) shared commissions paid (other than to officers and staff of the Guernsey AIFM) that have been previously agreed in writing with the Commission; and
- (e) exceptional and extraordinary non-recurring expense items which have been previously agreed in writing with the Commission;

**“UCITS”** means an undertaking for collective investment in transferable securities authorised in accordance with the UCITS Directive;

**“UCITS Directive”** means Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009.

## PART 25 REVOCATIONS, CITATION AND COMMENCEMENT

### 25.1 Revocations

#### 25.1.1 Revocation of the AIFMD Rules, 2013

- (1) The AIFMD Rules, 2013 are revoked.

### 25.2 Citation and commencement

- (1) These rules may be cited as the AIFMD Rules 2021.
- (2) These rules come into force on 1<sup>st</sup> November 2021.

Dated this 29<sup>th</sup> day of October 2021



C.A. SCHRAUWERS

Chairman of the Guernsey Financial Services Commission

For and on behalf of the Commission

## **SCHEDULE 1**

### **AIFM Functions**

1. Investment functions which an AIFM must, at least, perform when managing an AIF include –
  - (a) portfolio management; and
  - (b) risk management.
  
2. Other functions that an AIFM may additionally perform in the course of the collective management of an AIF include –
  - (a) Administration –
    - (i) legal and fund management accounting services;
    - (ii) customer enquiries;
    - (iii) valuation and pricing, including tax returns;
    - (iv) regulatory compliance monitoring;
    - (v) maintenance of unit or shareholder register;
    - (vi) distribution of income;
    - (vii) units or shares issues and redemptions;
    - (viii) contract settlements, including certificate dispatch;
    - (ix) record keeping;
  - (b) Marketing;

- (c) activities related to the assets of AIFs; namely services necessary to meet the fiduciary duties of the AIFM, facilities management, real estate administration activities, advice to undertakings on capital structure, industrial strategy and related matters, advice and services relating to mergers and the purchase of undertakings, and other services connected to the management of the AIF and the companies and other assets in which it has invested.

## EXPLANATORY NOTE

These Rules have been re-drafted in line with the Commission's Revision of Laws Implementation Project.

In 2020 the Protection of Investor (Bailiwick of Guernsey), 1987, Law was replaced with the 2020 Law and the Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2020. All Rules made, under the earlier enactment, have been checked for validity and legality.

The Rules have been re-drafted, to bring them into line with the Commission's current legal drafting practice, and to ensure that all out-of-date references have been replaced.

Although these Rules have been re-drafted and re-formatted, the content and legal meaning remains the same as that under the previous Rules.