

## AFM publishes best practices for AIFMs

On 23 January 2018, the Dutch supervisor Autoriteit Financiële Markten (AFM) published the outcome of the review of compliance with the Alternative Investment Fund Management Directive (AIFMD) by Alternative Investment Fund Managers (AIFMs) who were granted an [AIFMD licence by operation of law back in 2014](#).

---

|                       |   |
|-----------------------|---|
| <b>Submitted</b>      | 31 January 2018   |
| <b>Applicable Law</b> | Netherlands   |
| <b>Topic</b>          | <a href="#">Asset Management</a><br><a href="#">Investment Bank Regulatory</a><br><a href="#">Private Funds</a> |
| <b>Sector Focus</b>   | <a href="#">Asset Management and Investment Funds</a>   |
| <b>Contact</b>        | <a href="#">Marline Hillen</a>  |

---

Although the review included a handful of AIFMs only, the AFM made it clear that the best practices that were formulated as a result of this review, are relevant and should - on a comply or explain basis - be adhered to by all licensed (and registered) AIFMs. As is often the case with guidance and best practices issued by the AFM, market parties are legally not bound by such guidelines but in practice get ample ability to disregard them. The below contains a summary of the findings and best practices for AIFMs and is relevant for all AIFMs in scope of AFM supervision.

### Best practices

#### Proportionality and neutralisation

- application of proportionality and neutralisation should be properly motivated and requires an AIFM to properly assess the size, nature and complexity of the organisation and the nature and goal of the relevant requirement(s) to be disapplied, and
- the AIFM should periodically, at least once a year or every time when circumstances arise which trigger the need for evaluation, monitor and evaluate the application of proportionality and neutralisation which evaluation should be documented (in an AO/IC).

#### Governance

- the AIFM should appoint natural persons as (statutory) directors and all statutory directors should be daily policy makers
- organisational set up should safeguard clear separation of management and advisory tasks and (internal) supervision
- the internal supervisory function should as much as possible mirror the supervisory board function of legal liability companies (of Book 2 Dutch Civil Code) and if this is not the case, clear internal regulations (huishoudelijk

reglement) should be drafted describing the tasks and responsibilities including appointment and dismissal and remuneration, of the internal supervisory function, and

- participation, for example voting or veto rights, of (retail) investors or other stakeholders should be clearly documented and governed by internal regulations (huishoudelijk reglement) describing the tasks and responsibilities including appointment and dismissal rights and remuneration, and should not influence or limit the AIFMD compliance responsibility and obligations of the AIFM.

## Outsourcing

- Outsourcing agreements, including depositaries, should by definition arrange for an approval right for AIFMs regarding sub-delegation to ensure control and monitoring by the AIFM of integrity and expertise of the (sub-) delegate at all times.

## Summary of principal findings

### 1. The AFM expects AIFMs to carefully investigate and evaluate whether their (anticipated) activities require an AIFMD licence

The AFM applies the AIFMD in a strict manner and only supervises AIFMs that indeed are obligated to have a licence. By this rule, the AFM wishes to ensure that parties do not continue operating under a licence because they deem it useful, for example for marketing purposes, while they do not actually need a licence under the AIFMD. As a result of the review, the AFM will revoke a certain amount of AIFMD licences.

### 2. Risk management framework should be properly set up and documented

AIFMs need to implement and operate a risk management framework that appropriately addresses, measures and manages the risks relevant to the AIFs under management of the AIFM (article 15 AIFMD and article 41 and 44 AIFM Regulation). Such risk management framework should in any event include:

- clear (market and counterparty) risk limits for each AIF
- adequate risk management procedures
- periodic (at least once a year) monitoring and evaluation of the risk framework, and
- a clear functional and hierarchical separation between risk and portfolio management.

The AFM expects AIFMs to set concrete risk limits for risks relevant for each AIF managed and to design and follow up on such risk management measures in case required. For example, the risk limit for market risk could be a standard deviation, the risk limit for currency risk could be a certain exposure to specific foreign currencies and the risk limit for liquidity risk could be a certain percentage of assets under management. A concrete follow up on infringements of risk limits is as important as the limits itself and should be properly executed and documented. Monitoring of the risk framework should occur at least once a year and should also be properly documented.

Persons responsible for risk management should not, also, be responsible for portfolio management and/or report into the portfolio management function. Remuneration of the risk management function should be dependent on the risk management tasks performed only. This set up is a requirement for and safeguards the independence of the risk management function and should be applied to all layers of the organisation unless the AIFM is able to apply proportionality (ie the nature, size and complexity of the organisation does not justify such clear separation and set up).

### 3. Outsourcing agreements should adhere to the AIFMD outsourcing requirements

In line with the AIFMD, an AIFM can outsource certain of its (administrative) tasks. In accordance with (article 20 of) the AIFMD, there need to be objective criteria and arguments for such outsourcing (article 76 AIFM Regulation ) and the AIFM should continuously and properly monitor the outsourcing arrangement(s) in place. Adherence with these requirements would in any event obligate AIFMs to:

- establish whether the task(s) to be outsourced qualifies as critical to the AIFM and safeguard the "letter box entity" risk
- perform a proper due diligence prior to any outsourcing relationship being entered into
- periodically monitor the outsourcing relationship to ensure it is up to standard and in compliance with the AIFMD
- notify the AFM of any outsourcing relationship being entered into or terminated
- incorporate instruction, information and inspection rights of the AIFM as well as the right of the AIFM to terminate the agreement in the interest of the investors in any and all outsourcing agreements (article 83 AIFM Regulation), and
- incorporate the right to agree on sub-delegation on a case by case basis, ie never agree up front to sub-delegation.

#### **4. Depositary and custody tasks should be properly documented and exercised**

The depositary agreement should contain the required AIFMD provisions and the AIFM should take proper care in the selection and monitoring of the AIFMD depositary and custodian(s).

#### **5. AIFMs should ensure a permanent, effective and independent compliance function**

Compliance officers should in principle not be part of the business function they supervise to ensure their independence. When proportionality is applied, the AIFM should at all times be able to explain how the independence of the compliance function is safeguarded. Compliance officers as well as the (board) function they report into should be appropriately knowledgeable and experienced to fulfil their supervisory tasks effectively.

#### **6. AIFMs should appropriately assess and address conflicts of interests**

Conflict of interest policies and procedures should be sufficiently specific and contain appropriate follow up measures. Topics to be included in the analysis and procedure are outsourcing within the group and dual hatting arrangements.

#### **7. AIFMs are required to operate in compliance with anti money laundering legislation (Wwft)**

The Dutch act on the prevention of money laundering and [financing of terrorism](#) (Wet ter voorkoming van witwassen en financieren van terrorisme or Wwft) applies to AIFMs, regardless of whether in full scope of the AIFMD or in scope of the so called Dutch light regime. Compliance with the Wwft entails client due diligence and periodic monitoring, notification of unusual transactions (16 Wwft) and ongoing training and education of employees on Wwft requirements and compliance (35 Wwft). Client due diligence should not only include investors but also all other business relationships of the AIFM. Risk factors to be taken into account are: (i) the corporate structure of the client, (ii) presence of Politically Exposed Persons (PEP), (iii) level and quality of home state supervision, (iv) specific business related risks and (v) any other business or client specific risk(s) to be determined by the AIFM. Although certain due diligence and monitoring tasks can be outsourced (10 Wwft), it should at all times be clear who is performing and responsible for which Wwft verification and notification tasks. Procedures should furthermore clearly describe the "How, Why, When and What" of notification of unusual transactions to the authorities (FIU Nederland). Implementation of the fourth Anti Money Laundering Directive obligates AIFMs, furthermore, to properly identify and assess anti money laundering risks. In this respect, AIFMs should pay attention to the guidelines of the AFM regarding money laundering risks published in October 2017.

This document (and any information accessed through links in this document) is provided for information purposes only and does not constitute legal advice. Professional legal advice should be obtained before taking or refraining from any action as a result of the contents of this document.

---

© Simmons & Simmons LLP 2019. All rights reserved. Registered in England & Wales Registered Number OC352713

---

ellexica Limited, CityPoint, One Ropemaker Street, London EC2Y 9SS