

Chapter 3

Requirements for alternative investment fund managers

3.11 Depositories

Application

3.11.1 **R** This section applies in accordance with the table in **FUND 3.11.2 R** and **FUND 3.11.3 R**.

3.11.2 **R** This table belongs to **FUND 3.11.1 R**.

Rule	Full-scope UK AIFM of a UK AIF (other than a non-UK feeder AIF which is marketed in the UK)	Full-scope UK AIFM of a non-UK AIF or a non-UK feeder AIF which is marketed in the UK	UK depositary of a UK AIF (other than a non-UK feeder AIF which is marketed in the UK) managed by a full-scope UK AIFM or an EEA AIFM	UK depositary of a non-UK AIF or a non-UK feeder AIF which is marketed in the UK
3.11.4R	x			
3.11.5R	x		x	
3.11.7R	x			
3.11.9R			x	
3.11.10R	x			
3.11.12R	x			
3.11.14R	x			
3.11.16R			x	
3.11.19R	x		x	
3.11.20R			x	x
3.11.21R			x	x
3.11.23R			x	x
3.11.24R			x	
3.11.25R			x	x
3.11.26R			x	
3.11.28R			x	
3.11.29R			x	
3.11.30R			x	
3.11.33R		x		

Note: "x" means "applies".

3.11.3 **R** A UK depositary of a non-UK AIF or a non-UK feeder AIF which is marketed in the UK that does not perform all of the functions of cash monitoring, safekeeping and oversight for the AIF need only comply with the following rules that are applicable to the functions it performs:

- (1) ■ FUND 3.11.20 R if it performs only the cash monitoring function;
- (2) ■ FUND 3.11.21 R and ■ FUND 3.11.23 R if it performs only the safekeeping function;
- (3) ■ FUND 3.11.25 R if it performs only the oversight function;
- (4) ■ FUND 3.11.20 R, ■ FUND 3.11.21 R and ■ FUND 3.11.23 R if it performs only the cash monitoring and safekeeping functions;
- (5) ■ FUND 3.11.20 R and ■ FUND 3.11.25 R if it performs only the cash monitoring and oversight functions; and
- (6) ■ FUND 3.11.21 R, ■ FUND 3.11.23 R and ■ FUND 3.11.25 R if it performs only the safekeeping and oversight functions.

Appointment of a single depositary

3.11.4 **R** An AIFM must, for each UK AIF it manages, ensure that:

- (1) a single depositary is appointed; and
- (2) the assets of the AIF are entrusted to the depositary for safekeeping in accordance with ■ FUND 3.11.21R and ■ FUND 3.11.23R.

[Note: article 21(1) and (8) of AIFMD]

General obligations

3.11.5 **R** An AIFM and a depositary must, in the context of their respective roles, act honestly, fairly, professionally, independently and in the interest of the AIF and its investors.

[Note: article 21(10) first paragraph of AIFMD]

3.11.6 **G** The Act specifies that the trustee of an AUT and the depositary of an ACS must be independent of its authorised fund manager, and the OEIC Regulations specify that the depositary of an ICVC must be independent of the ICVC and its directors. However, these requirements do not apply to AIFs which are not authorised funds, and, therefore, an AIFM and a depositary of an unauthorised AIF may be from within the same group, but only if conflicts of interest are avoided and there is sufficient organisational separation between the two entities.

Conflicts of interest: AIFM

3.11.7 **R** To avoid conflicts of interest between the *depository*, the *AIFM*, the *AIF* and its investors, an *AIFM* must ensure that:

- (1) it does not act as a *depository* or a delegate of a *depository*; and
- (2) a *prime brokerage firm* acting as counterparty to an *AIF* does not act as the *depository* for that *AIF*, unless:
 - (a) the *prime brokerage firm* has functionally and hierarchically separated the performance of its depository functions from its tasks as a *prime brokerage firm*; and
 - (b) potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the *AIF* by the *AIFM*.

[Note: article 21(4) of *AIFMD*]

3.11.8 **G** A *depository* may delegate custody tasks to one or more *prime brokerage firms* provided the *depository* complies with **FUND 3.11.26 R** to **FUND 3.11.30 R**. In addition to the delegated custody tasks, *prime brokerage firms* are allowed to provide *prime brokerage services* to the *AIF*. Those *prime brokerage services* do not form part of the delegation arrangement.

[Note: recital 43 of *AIFMD*]

Conflicts of interest: depositories

3.11.9 **R** A *depository* 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:

- (1) the *depository* has properly identified any such potential conflicts of interest;
- (2) the *depository* has functionally and hierarchically separated the performance of its *depository* tasks from its other potentially conflicting tasks; and
- (3) the potential conflicts of interest are properly managed, monitored and disclosed to the investors of the *AIF*.

[Note: article 21(10) second paragraph of *AIFMD*]

Eligible depositories for UK AIFs

3.11.10 **R** Subject to **FUND 3.11.12 R**, an *AIFM* must, for each *UK AIF* it manages, ensure the appointment of a *depository* which is a *firm established* in the *UK* that has the *Part 4A permission of acting as trustee or depository of an AIF* and which is one of the following:

- (1) a *credit institution*; or
- (2) a *MiFID investment firm* or an *EEA MiFID investment firm* which provides the *ancillary service* of safe-keeping and administration of *financial instruments* for the account of clients; or

- (3) 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 eligible to be a *trustee* of an *AUT* or a *depository* of an *ICVC*.

[Note: article 21(3)(a) to (c) and (5)(a) of *AIFMD*]

- 3.11.10A** G (1) The capital requirements for a *MiFID investment firm* appointed as a *depository* in accordance with ■ FUND 3.11.10R(2) are contained in *MIFIDPRU*.
- (2) An *EEA MiFID investment firm* appointed as a *depository* in accordance with ■ FUND 3.11.10R(2) should refer to ■ MIFIDPRU 1.1.3G and ■ 1.1.4G, which explain the *FCA*'s general approach to its prudential regulation.

- 3.11.11** G (1) For a *depository* of a *fund* to be established in the *UK*, it must have:
- (a) its registered office in the *UK*, where the *fund* is an *authorised fund*; or
- (b) its registered office or *branch* in the *UK*, where the *fund* is an *unauthorised fund*.
- (2) [deleted]

- 3.11.12** R An *AIFM* that manages a *UK AIF* which:
- (1) has no redemption rights exercisable during the period of five years from the date of the initial investments; and
- (2) in accordance with its core investment policy:
- (a) does not generally invest in *AIF custodial assets*; or
- (b) generally invests in issuers or non-listed companies in order to potentially acquire *control* over such companies in accordance with regulation 35 of the *AIFMD UK regulation*

may appoint, as its *depository*, a firm which is established in the *UK* and which complies with ■ FUND 3.11.14 R.

- 3.11.13** G For the purposes of ■ FUND 3.11.12R (2)(a), an *AIF* does not generally invest in *AIF custodial assets* if it invests in such assets on a temporary basis or if those assets do not constitute a significant proportion of its overall assets. However, in line with ■ FUND 3.11.12R (2)(b), an *AIF* may invest in *AIF custodial assets* if it invests in issuers to acquire *control* of such companies in accordance with regulation 35 of the *AIFMD UK regulation* or if it is in the process of divesting its investment in an issuer which it controls or previously controlled.

- 3.11.14** R An *AIFM* must ensure that a *depository* appointed in line with ■ FUND 3.11.12 R is a *firm*:

- (1) which has the *Part 4A permission* of acting as trustee or depositary of an AIF; and
- (2) which has *own funds* of at least €125,000.

[Note: article 21(3) second paragraph after (c) and (5)(a) of AIFMD]

3.11.15 G For certain types of closed-ended AIFs (such as private equity, venture capital and real estate funds) a wider range of entities than those specified in ■ FUND 3.11.10 R may perform the relevant *depository* functions. The FCA requires such entities to obtain authorisation as a *depository* to demonstrate that they can meet the commitments inherent in those functions, but imposes a lower level of capital requirements in recognition of the different degree of risk implied by the characteristics of the AIF. The capital requirements of such *firms* are contained in ■ IPRU-INV 5 (particularly ■ IPRU-INV 5.4.3R (Own funds requirement)) but if the *firm* also undertakes *MiFID business*, its capital requirements will be contained in MIFIDPRU.

[Note: recital 34 of AIFMD]

Additional requirements for depositaries of authorised AIFs

3.11.16 R [deleted]
 [Editor's note: this requirement has been moved to ■ MIFIDPRU 4.4.6R.]

3.11.17 G [deleted]

3.11.18 R [deleted]

Written contract

3.11.19 R An AIFM and a *depository* must ensure that the appointment of the *depository* is evidenced by a written contract. The contract must regulate the flow of information deemed necessary to allow the *depository* to perform its functions for the AIF for which it has been appointed as *depository*.

[Note: article 21(2) of AIFMD]

Depository functions: cash monitoring

3.11.20 R A *depository* must ensure that the AIF's cash flows are properly monitored and that:

- (1) all payments made by, or on behalf of, investors upon the subscription of *units* or *shares* of an AIF have been received;
- (2) all cash of the AIF has been booked in cash accounts opened:
 - (a) in the name of:
 - (i) the AIF; or
 - (ii) the AIFM acting on behalf of the AIF; or

- (iii) the *depository* acting on behalf of the *AIF*; and
- (b) at:
 - (i) a central bank; or
 - (ii) a *CRD credit institution*; or
 - (iii) a bank authorised in a non-*EEA* country; or
 - (iv) another entity of the same nature, in the relevant market where cash accounts are required, provided such an entity is subject to effective prudential regulation and supervision which have the same effect as *UK* law and are effectively enforced and in accordance with the principles set out in article 2 (safeguarding of client financial instruments and funds) of the *MiFID Delegated Directive*; and
- (3) where cash accounts are opened in the name of the *depository* acting on behalf of the *AIF* in accordance with (2)(a)(iii), the *depository* must ensure that no cash of the entity referred to in (2)(b), and none of the *depository's* own cash, is booked on such accounts.

[Note: article 21(7) of *AIFMD*]

Depository functions: safekeeping of financial instruments

3.11.21

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- (1) A *depository* must hold in custody all *AIF custodial assets*.
- (2) The *depository* must ensure that all *AIF custodial assets* that can be registered in a *financial instruments* account are registered in the *depository's* books within segregated accounts opened in the name of the *AIF*, or the *AIFM* acting on behalf of the *AIF*, so that they can be clearly identified as belonging to the *AIF* at all times in accordance with the applicable law and ■ CASS 6.1.16IA R (Depositories of AIFs).

[Note: article 21(8)(a) of *AIFMD*]

3.11.22

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Financial instruments to be held in custody

1. Financial instruments belonging to the *AIF* or to the *AIFM* acting on behalf of the *AIF* which are not able to be physically delivered to the *depository* shall be included in the scope of the custody duties of the *depository* where all of the following requirements are met:
 - (a) they are transferable securities including those which embed derivatives as referred to in [COLL 5.2.19R(3) and (3A)], money market instruments or units of collective investment undertakings;
 - (b) they are capable of being registered or held in an account directly or indirectly in the name of the *depository*.
2. Financial instruments which, in accordance with applicable national law, are only directly registered in the name of the *AIF* with the issuer itself or its agent, such as a registrar or a transfer agent, shall not be held in custody.
3. Financial instruments belonging to the *AIF* or the *AIFM* acting on behalf of the *AIF* which are able to be physically delivered to the *depository* shall always be included in the scope of the custody duties of the *depository*.

[Note: Article 88 of the *AIFMD level 2 regulation*]

Depository functions: safekeeping of other assets

3.11.23 **R** For assets of the *AIF* that are not *AIF custodial assets*, a *depository* must:

- (1) verify that the *AIF*, or the *AIFM* acting on behalf of the *AIF*, is the owner of the assets based on information or documents provided by the *AIF* or the *AIFM* and, where available, on external evidence; and
- (2) maintain, and keep up to date a record of those assets for which it is satisfied that the *AIF*, or the *AIFM* acting on behalf of the *AIF*, is the owner.

[Note: article 21(8)(b) of *AIFMD*]

Reuse of assets

3.11.24 **R** A *depository* must not reuse the assets of the *AIF* without the prior consent of the *AIF* or the *AIFM* acting on behalf of the *AIF*.

[Note: article 21(10) third paragraph of *AIFMD*]

Depository functions: oversight

3.11.25 **R** A *depository* must:

- (1) ensure that the sale, issue, repurchase, redemption and cancellation of *units* or *shares* of the *AIF* are carried out in accordance with the applicable national law and the *instrument constituting the fund*;
- (2) ensure that the value of the *units* or *shares* of the *AIF* is calculated in accordance with the applicable national law, the *instrument constituting the fund* and ■ FUND 3.9 (Valuation);
- (3) carry out the instructions of the *AIFM*, unless they conflict with the applicable national law or the *instrument constituting the fund*;
- (4) ensure that in transactions involving the *AIF's* assets, any consideration is remitted to the *AIF* within the usual time limits; and
- (5) ensure that an *AIF's* income is applied in accordance with the applicable national law and the *instrument constituting the fund*.

[Note: article 21(9) of *AIFMD*]

Delegation: general prohibition

3.11.26 **R**

- (1) A *depository* must not delegate its functions to third parties, except as permitted by ■ FUND 3.11.28R.
- (2) The prohibition in (1) does not apply to the delegation by the *depository* of supporting administrative or technical tasks that are linked to its depository functions.

[Note: recital 42 and article 21(11) first paragraph of *AIFMD*]

3.11.27 **G** The use of services provided by securities settlement systems, as specified in the Financial Markets and Insolvency (Settlement Finality) Regulations 1999, or similar services provided by third-country securities settlement systems in other countries, does not constitute a delegation by the *depository* of its functions.

[Note: article 21(11) fifth paragraph of *AIFMD*]

3.11.27A **G**

- (1) (a) If a *depository* performs part of its functions through a *branch* in an *EEA State* this is not a delegation by the *depository* of its functions to a third party.
- (b) This is because ‘third party’ in **■ FUND 3.11.26R** means any party that is not part of the same legal entity as the *depository*.
- (2) Paragraph (1) also applies where the *depository* is the *UK branch* of an *EEA firm* and it performs part of its functions:
 - (a) through a *branch* in an *EEA State*; or
 - (b) from the *EEA State* where it has its registered office.
- (a) A *depository* that performs part of its functions through a *branch* or registered office in an *EEA State* should ensure that those arrangements do not impede the *depository’s* ability to meet the *threshold conditions*.
- (b) (i) In particular, the arrangements should not impede the *FCA’s* ability to supervise the *depository* effectively.
- (ii) For example, the *FCA’s* ability to supervise the *depository* might be impeded if the *depository* performed tasks other than administrative and supporting tasks from its *branch* or registered office in an *EEA State*.

Delegation: safekeeping.....

3.11.28 **R** A *depository* may delegate the functions in **■ FUND 3.11.21 R** and **■ FUND 3.11.23 R** to third parties, subject to the following conditions:

- (1) the tasks are not delegated with the intention of avoiding the requirements of those *rules* or the *AIFMD level 2 regulation*;;
- (2) the *depository* can demonstrate that there is an objective reason for the delegation;
- (3) the *depository*:
 - (a) has exercised all due skill, care and diligence in the selection and appointment of any third party to whom it wants to delegate parts of its tasks; and
 - (b) continues to exercise all due skill, care and diligence in the periodic review and ongoing monitoring:
 - (i) of any third party to whom it has delegated parts of its tasks; and
 - (ii) of the arrangements of that third party in respect of the matters delegated to it;

- (4) the *depository* ensures that the third party delegate meets the following conditions at all times:
 - (a) the third party has structures and 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*, that have been entrusted to it;
 - (b) (subject to ■ FUND 3.11.29 R) for custody tasks in relation to *AIF custodial assets*, the third party is subject to:
 - (i) effective prudential regulation, including minimum capital requirements, and supervision in the jurisdiction concerned; and
 - (ii) an external periodic audit to ensure that the *financial instruments* remain in its custody;
 - (c) the third party segregates the assets of the *depository's* clients from its own assets and from the assets of the *depository* in such a way that they can, at any time, be clearly identified as belonging to clients of a particular *depository*;
 - (d) the third party does not make use of the assets unless it has:
 - (i) obtained the prior consent of the *AIF*, or the *AIFM* acting on behalf of the *AIF*; and
 - (ii) given prior notification to the *depository*; and
 - (e) the third party complies with the general obligations and prohibitions relating to the *depository* in ■ FUND 3.11.5 R, ■ FUND 3.11.5 G, ■ FUND 3.11.9 R, ■ FUND 3.11.21 R, ■ FUND 3.11.23 R and ■ FUND 3.11.24 R.

[Note: article 21(11) second paragraph of *AIFMD*]

Delegation: countries other than the UK

3.11.29

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A *depository* may delegate custody tasks in relation to *AIF custodial assets* to an entity in a other than the *UK* that does not satisfy the conditions in ■ FUND 3.11.28R (4)(b), provided that:

- (1) the law of that third country requires those *AIF custodial assets* to be held in custody by a local entity;
- (2) no local entity satisfies the conditions in ■ FUND 3.11.28R (4)(b);
- (3) the *depository* delegates its functions to such a local entity only to the extent required by the law of that country and only for as long as there is no local entity that satisfies the delegation conditions in ■ FUND 3.11.28R (4)(b);
- (4) the investors of the relevant *AIF* are informed before their investment that such delegation is required due to legal constraints in that country and of the reasons as to why the delegation is necessary; and
- (5) the *AIF*, or the *AIFM* on behalf of the *AIF*, has consented to the delegation arrangements before they become effective.

[Note: article 21(11) third paragraph of *AIFMD*]

Delegation: sub-delegation

3.11.30 **R** A *depository* must ensure that a third party to whom the *depository* has delegated functions does not, in turn, sub-delegate those functions unless the delegate complies with the same requirements that apply to the *depository*, with any necessary changes, in relation to the delegation by the *depository* of its functions in ■ FUND 3.11.26 R to ■ FUND 3.11.29 R.

[Note: article 21(11) fourth paragraph of AIFMD]

Delegation: omnibus account

3.11.31 **G** A *depository* may delegate the safe-keeping of assets to a third party that maintains a common account for multiple AIFs, a so-called 'omnibus account', provided it is a segregated common account that is segregated from the third party's own assets.

[Note: recital 40 of AIFMD]

Provision of information

3.11.32 **G** The requirements of ■ SUP 2 (Information gathering by the FCA or PRA on its own initiative) apply to the *depository*, under which it must enable the FCA to obtain, on request, all information that the *depository* has obtained while discharging its duties and that the FCA considers necessary.

[Note: article 21(16) of AIFMD]

AIFM of a non-UK AIF

3.11.33 **R** An AIFM of a non-UK AIF or a non-UK feeder AIF which is marketed in the UK must:

- (1) ensure that the duties referred to in ■ FUND 3.11.20 R, ■ FUND 3.11.21 R, ■ FUND 3.11.23 R and ■ FUND 3.11.25 R are carried out in relation to that AIF by one or more:
 - (a) firms that:
 - (i) are established in the UK; and
 - (ii) which have the Part 4A permission of acting as trustee or depository of an AIF; and
 - (iii) which have own funds of at least €125,000, where the duties are carried out in the UK; or
 - (b) entities that are not established in the UK, where the duties are not carried out in the UK; or
 - (c) firms that are established in the UK and which are carrying out the duties from a non-UK branch;
- (2) not perform the duties referred to in (1) itself; and

(3) provide the *FCA* with information about the identity of those entities responsible for carrying out the duties referred to in (1).

[Note: article 36(1)(a) of *AIFMD*]

Subordinate measures

3.11.34

G

Articles 83 to 102 of the *AIFMD level 2 regulation* provide detailed rules supplementing this section.