



How to set up  
an AIFM  
in Ireland

DILLON  EUSTACE

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## Introduction

Since mid-2013, EU law has provided that an entity which either *manages* an EU based non-UCITS investment fund or which *markets* a non-UCITS investment fund within the EU requires an authorisation to do so.

Such an entity is known as an “**AIFM**” (an alternative investment fund manager) and the non-UCITS funds which it manages or markets are known as “**AIFs**” (alternative investment funds).

The authorisation that such an AIFM requires is one under Directive 2011/61/EU (the “**Directive**” or “**AIFMD**”) as implemented in local law via local domestic legislation which in Ireland is the European Union (Alternative Investment Fund Managers) Regulations, 2013 (the “**AIFM Regulations**”), and Delegated Regulation EU 231/2013 (the “**Level 2 Regulations**”). These are supplemented by the Irish Central Bank’s **AIF Rulebook** and related **Guidance**.

Ireland is not only one of Europe’s leading AIF domiciles but is also home to many AIFMs, MiFID firms, UCITS ManCos and the new breed of dual AIFM/UCITS ManCo now referred to as the “**Super ManCo**”.

In this short “*How to*” guide, we aim to give you an overview of what an AIFM can do, of who can be an AIFM and of the applicable Irish regulatory regime.

You are likely to be interested in this guide if you are:

- looking to set up and manage your own alternative funds in Europe; or
- looking to find a suitable EU jurisdiction from which to co-ordinate EU wide fund management activities; or
- considering your post-Brexit options, including for MiFID firms; or
- just looking to compare a stand-alone AIFM against third party AIFM or platform options.

If you have any questions, please contact us.

**Dillon Eustace Asset Management Team**  
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## 1. What is an AIFM and what can it do?

In the following sections we summarise what an AIFM is and what it can do.

Note that there are several different types of AIFMs, each with different capacities. In some cases, they are set up by alternative managers to manage specific fund products. In other cases, they are designed to also manage a range of non-fund clients. Others may be set up to provide AIF management solutions to those investment managers who do not wish to have their own AIFM, for cost or other reasons.

### 1.1 What is an AIFM?

At its most basic, an “AIFM” is a legal person whose regular business is “managing” one or more “AIFs”. In Ireland, the legal person will be a corporate entity in the form of either a limited company, a designated activity company, a PLC or an ICAV.

#### (i) *External v. Internal*

The AIFM can either be:

- an external manager appointed by the AIF (or on behalf of the AIF) which is responsible for managing the AIF (referred to as an “**external AIFM**”); or
- the AIF (i.e. the fund) itself (referred to as an “**internally managed AIF**”).

An internally managed AIF type AIFM can also be described as a self-managed fund. It manages itself and cannot manage other AIFs nor provide other services such as individual portfolio management.

An external AIFM has to perform core investment management functions but can also (depending on its authorisation) manage UCITS and / or to engage in managing / advising non-fund clients.

#### (ii) *Authorised v. Registered*

If you are an AIFM whose total AIF assets under management are below EUR 100 million or, in the case of closed-ended (5 year) unleveraged AIFs, EUR 500 million, then you can be a *registered* AIFM. That means that you are not subject to the full rigours of the AIFMD regime but it also means that you cannot avail of the cross-border management or marketing passports.

Only a fully *authorised* AIFM can avail of those passports.

An entity which could be a registered AIFM because it is below the relevant threshold can opt in to the full authorised AIFM regime.

## 1.2 What can an AIFM do?

In summary, an AIFM can *manage* AIFs and can *market* them to professional investors in the EU either using a marketing passport or, if available, a private placement regime. It can manage both EU based AIFs and non-EU AIFs.

### (i) *Managing AIFs*

The term “*managing AIFs*” is defined as “*performing at least investment management functions referred to in point 1(a) or (b) of Annex I of the Directive for one or more AIFs*”.

Those Annex I investment management services are:

- portfolio management; and
- risk management.

Although only one of these activities needs to be present in order to render an entity an AIFM, an AIFM cannot be authorised to carry out portfolio management without also providing risk management, and vice versa.

### (ii) *Additional Annex I Functions*

An authorised AIFM may also perform the following additional Annex I functions, provided that it is doing so in the course of its collective management of an AIF:

- administration:
  - (i) legal and fund management accounting services;
  - (ii) customer inquiries;
  - (iii) valuation and pricing, including tax returns;
  - (iv) regulatory compliance monitoring;

- (v) maintenance of unit/shareholder register;
  - (vi) distribution of income;
  - (vii) unit/shares issues and redemptions;
  - (viii) contract settlements, including certificate dispatch;
  - (ix) record keeping;
  - marketing;
  - 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.
- (iii) *Other Services*

Most importantly, if it seeks and obtains an extended authorisation to do so, an AIFM can also:

- act as a UCITS management company, and
- provide individual portfolio management in accordance with mandates given by investors on a discretionary client-by-client basis, and
- provide “non-core” services of investment advice; safe-keeping and administration in relation to units of collective investment undertakings; or reception and transmission of orders in relation to financial instruments.

Non-core services can only be provided where the AIFM is authorised to provide individual portfolio management.

In each case, the AIFM would need to be authorised for these additional activities either under AIFMD or under the UCITS Directive. An entity with dual AIFM and UCITS authorisations is generally referred to as a “Super ManCo”.

(iv) “Marketing”

The activity of “marketing” is defined as “a direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares in an AIF it manages to or with investors domiciled or with a registered office in the [European] Union”.

As it says, it covers both direct and indirect offerings or placements and not only covers activities of the AIFM but also those of others such as intermediaries or placement agents acting “on behalf of the AIFM”.

### 1.3 Dual AIFM/UCITS Authorisation

As noted above, an AIFM can also act as a UCITS management company if it also holds an authorisation under the UCITS Directive. Such an entity is known as a “Super ManCo”.

A UCITS management company which manages an AIF will not be subject to the UCITS Regulations for that activity but will instead be required to obtain an additional authorisation under the AIFM Regulations and vice versa.

There are real benefits to such an approach as the single legal entity can manage both types of funds:

- within a single legal entity;
- with one board of directors and a single executive team;
- with one capital requirement;
- with one audit;
- with one set of policies and procedures (albeit having to address both regimes and there are differences).

The Super ManCo can also expand its lines of business into individual portfolio management, investment advice, etc. and all with a full EEA passport.

Given that these – UCITS and AIFM – are two independent authorisations, it does mean that there is some element of duplication, one example of which is that the directors and senior managers need to be approved under both regimes so each need to submit a second individual questionnaire (i.e. the Central Bank required form for the approval of directors).

Note also that, to get a UCITS ManCo authorisation, you have to actually manage a UCITS.

## 1.4 MiFID Investment Firms

We have already seen several MiFID firms give up their MiFID authorisations and convert to AIFM or Super ManCo status. Most MiFID firms whose business is focused on asset management do not utilise the whole range of MiFID investment services but before considering any conversion, it would be wise to assess what you might be giving up by comparing the list of permitted MiFID investment services with the AIFM permitted activities.

It is of note that a MiFID firm in Ireland cannot be an AIFM and cannot hold a dual MiFID / AIFM authorisation.

An additional point of note is that when originally introduced the AIFM passport for individual portfolio management was defective. That deficiency has subsequently been corrected by way of an amendment (through Directive 2014/65/EU (so-called “MiFID II”) but MiFID II has not yet been transposed across the EU. It has an expected implementation date of 3 January 2018.

Individual EU Member State regulators are, however, in practice agreeing to facilitate the cross-border provision of these additional services using on an *ad hoc* basis. The Central Bank is one such Member State regulator and the UK’s FCA is another.

## 1.5 Summary

In summary, the capacity to manage or market AIFs on a cross-border basis within the EU will depend on whether the AIFM is:

- an EU AIFM or a non-EU AIFM;
- authorised or registered;
- the types and domiciles of the AIFs it manages or markets; and
- when certain of the capacities under the Directive – particularly relevant for non-EU AIFMs – are “switched on”.

What you need to know is that depending on the level of authorisation obtained (*authorised v. registered; core v core plus ancillary*) an Irish domiciled AIFM can, for example:

- manage an Irish QIAIF; and

- act as investment manager to an Italian UCITS; and
- manage a Luxembourg SICAV and market it in Germany; and
- provide investment advice to a French pension fund; and
- privately place Cayman fund into the UK; and
- run an AIF's or UCITS stocklending programme.

## 2 How does the AIFM authorisation process work?

This section summarises the practical steps involved in applying to the Irish Central Bank for authorisation as an AIFM.

### 2.1 Who can apply?

The applicant must be a body corporate which has its registered and head office in Ireland.

If an *external AIFM*, it will be set up as either a limited company or as a designated activity company. If it is an *internally managed AIF*, it will be set up as either an ICAV or as a PLC.

It must comply with the capital requirements set out below (see para 3.1) and its shareholders (other than in the case of internally managed AIF), its directors and its managers must comply with Irish fitness and probity requirements.

### 2.2 Application process

The applicant must submit an application for authorisation to the Central Bank containing information and documentation regarding its ownership, management, organisational structure and additional information as to how it intends to comply with the various obligations imposed on AIFMs.

In particular, the applicant must submit the following to the Central Bank:

- (i) a completed Application Form signed by 2 directors of the applicant;
- (ii) completed Individual Questionnaires (“IQ”) online in respect of each proposed director and senior manager of the applicant. IQs must also be filed in respect of any individual with a direct or indirect shareholding or other interest representing 10% or more of the capital or voting rights in the AIFM (other than an internally managed AIFM) and for any other individual in a position to exercise significant influence over its management;
- (iii) a Programme of Activity which sets out the AIFM’s organisational structure, as well as giving information as to how the AIFM intends to comply with the various obligations imposed under the AIFM Regulations, including:

- operating conditions (governance, risk management, the management and valuation of assets, and custody obligations);
  - transparency requirements;
  - obligations imposed on AIFMs who manage leveraged AIFs and those which seek to acquire control of non-listed companies;
  - how it intends to manage and market EU AIFs and marketing generally.
- (iv) information on its proposed remuneration policies and practices, its delegation and sub-delegation arrangements and on the AIFs it intends to manage.
- (v) A statement of responsibility will also be required of the AIFM addressing internal managerial controls.

## 2.3 Directors

Central Bank approval is required prior to the appointment of directors.

A minimum of two directors must be Irish resident, the AIFM board must not have any directors in common with the board of the depository and the AIFM's board must also appoint a chairperson on a permanent basis.

As noted previously, directors are also subject to obligations under the Irish fitness and probity regime.

## 2.4 Authorisation Timing

The normal timeframe for getting authorised as an AIFM is 4 to 6 months from the submission of a complete application to the Central Bank. The overall timing is dependent on the response times of the Central Bank, whether any material issues arise during the application process, as well as the response times of the parties involved. Care needs to be taken that your application is complete. Incomplete applications will be rejected and this will lead to delays.

## 2.5 Staffing Requirements

The Central Bank does not set down any specific number as a minimum staff complement. Rather it looks at what activities are to be performed and the business model, projections to

qualitatively determine what staffing is required as part of the overall application. Depending on any delegation model being employed, the Central Bank would typically expect there to be at least three staff members *in situ* in the Irish AIFM including a Chief Executive Officer, Chief Investment Officer and a Risk Compliance Director/Manager. Applicants need to understand that, however, if they intend expanding into individual portfolio management or acting as a Super ManCo, for example, they are likely to be subject to greater staffing requirements.

In assessing staffing requirements, regard must also be given to general governance obligations also, the allocation and performance of “managerial functions” and the role of “designated persons”. (See para 3.4 below). Additional requirements and criteria need to be taken into account when an AIFM – internally managed AIF or external AIFM – delegates investment management functions, with the principal requirement being that the AIFM cannot delegate the performance of investment management functions to an extent that exceeds by a substantial margin the investment management functions performed by the AIFM itself, thus causing it to be deemed to be a “*letter box entity*”.

Criteria which regulators are required to take into account in this regard include:

- the assets under delegation;
- types of assets;
- risk profile;
- strategies; and
- the types of tasks delegated in relation to those retained.

There are also specific rules around the monitoring of delegates.

As you would imagine, a delegate of the AIFM may in turn sub-delegate subject to the prior consent of the AIFM, prior notification to the Central Bank and the usual conditions under AIFMD applicable to delegates.

## 2.6 Irish Regulatory Levies

Irish AIFMs are subject to annual regulatory levies similar to UCITS management companies and MiFID firms where a tiered levy will depend on aggregate assets under management and number of AIFs managed (by number of sub-funds).

### 3 AIFM Requirements

Below is a broad summary of the key requirements applicable to Irish AIFMs.

#### 3.1 Capital Requirements

AIFMs are subject to regulatory capital requirements as set out below (although these requirements will not apply to the funds managed).

The minimum regulatory capital required for an AIFM is the greater of:

- (i) €125,000 plus the greater plus 0.02% of AUM over €250m; and
- (ii) one quarter of fixed annual overheads.

The overall amount is subject to a maximum of €10m – or €5m where the firm is subject to a suitable guarantee.

Additional professional indemnity cover is also required for AIFs managed.

In the case of an internally managed AIF (such as a self-managed QIAIF investment company), the minimum initial capital requirement is €300,000. This is not subject to any additional expenditure or additional amount requirements but is subject to the requirement to have additional own funds or professional indemnity cover.

#### 3.2 Operating Conditions

AIFMs are subject to conduct of business type operating conditions similar to obligations imposed on MiFID firms and on UCITS management companies. While these are set out in the Directive and deal with matters such as the requirement to act honestly, with due skill, care and diligence and fairly in conducting their activities; acting in the best interests of the AIFs or the investors of the AIFs they manage and the integrity of the market and to treat all AIF investors fairly, the Level 2 Regulation expands upon each of the above general principles in considerable detail.

The Level 2 Regulation also applies MiFID like rules relating to inducements paid or received, including disclosure obligations; order handling rules; reporting obligations in respect of execution of investor subscription and redemption orders; best execution obligations and rules; rules regarding the placement of orders to deal on behalf of AIFs with

other entities for execution; as well as rules relating to trading orders aggregation and allocation.

In addition, the Directive states that no investor in an AIF can obtain preferential treatment, unless such preferential treatment is disclosed in the relevant AIF's rules or constitutional document.

### 3.3 Organisational Requirements

AIFMs are also subject to a series of organisational requirements which require an AIFM to use, at all times, adequate and appropriate human and technical resources necessary for the proper management of the AIFs it manages.

### 3.4 Managerial Functions

For Irish authorised AIFMs, the Central Bank requires that, in accordance with good corporate governance principles, the board of directors of an AIFM is responsible for the following functions:

- (i) regulatory compliance;
- (ii) fund risk management;
- (iii) operational risk management;
- (iv) investment management;
- (v) capital and financial management; and
- (vi) distribution.

Delegates to be appointed by the AIFM must be approved by the board of the AIFM and where an AIFM delegates activities, its programme of activity (a 'business plan' type document for AIFMs) shall identify the board member or other individual ("**designated persons**") who will, on a day-to-day basis, monitor and control each of the individual activities identified above.

### 3.5 Conflicts of Interest

An AIFM must take all reasonable steps to identify conflicts of interest that arise in the

course of managing AIFs.

### 3.6 Due Diligence

An AIFM must also have and implement an appropriate, documented and regularly updated due diligence process when investing on behalf of an AIF consistent with the investment strategy and the objectives and risk profile of the AIF.

### 3.7 Risk Management

AIFMs are required to implement adequate risk management systems 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.

### 3.8 Leverage

A maximum level of leverage which an AIFM may employ on behalf of each AIF it manages should be set by the AIFM as well as the extent of the right to reuse collateral or guarantee that could be granted under the leveraging arrangement. Where an AIF is leveraged it must be able to demonstrate to the Central Bank that the leverage limit set by it for each AIF which it manages is reasonable and that it complies with that limit at all times. The leverage of an AIF must be expressed as the ratio between the exposure of the AIF and its net asset value and must be calculated using two different methods – the “gross” method and the “commitment” method.

### 3.9 Liquidity Risk Management

For each AIF that it manages which is not an unleveraged closed-ended AIF, the AIFM must employ an appropriate liquidity management system and adopt procedures which enables 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.

### 3.10 Financial Control and Management Information

The Central Bank’s AIF Rulebook sets out quite detailed rules in respect of the maintenance of records by an AIFM adequate for the purpose of financial control and management information.

### 3.11 Recordkeeping

An AIFM is required to retain, in a readily accessible form, for a period of at least six years, a full record of each transaction entered into by it

### 3.12 Valuation Obligations

AIFMs are obliged to establish appropriate and consistent procedures for proper and independent valuation of an AIF's assets.

### 3.13 Depositary

An AIFM is required to ensure that for each AIF which it manages, a single depositary has been appointed.

### 3.14 Transparency Obligations

Transparency obligations apply with respect to the activities of AIFMs and their AIFs in their dealings with investors and with competent authorities.

### 3.15 Obligations for AIFMs managing AIFs which acquire control of non-listed companies/issuers

When an AIF acquires, disposes of or holds shares of a non-listed company within the scope of the Directive at, above or below various thresholds, its AIFM will be obliged to make certain regulatory notifications.

### 3.16 Remuneration

AIFMs are also required to implement remuneration policies and practices under AIFMD.

At a high level, the remuneration policy is required to be consistent with and promote sound and effective risk management and not encourage risk taking inconsistent with the risk profiles, rules or instruments of incorporation of the AIFs managed.

The prescriptive requirements around how these remuneration requirements are to be implemented are set out in full in the Directive and the ESMA Remuneration Guidelines (ESMA 2013/201) but it is important to note that the requirements apply in respect of any type of remuneration paid by the AIFM or paid directly by the AIF, including carried interest, and to unit or share transfers made to those categories of AIFM staff known as "identified

staff”, including senior management, risk takers, control functions, and any employees receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on the risk profiles of the AIFMs or of the AIFs they manage.

### 3.17 Delegation

As noted above (see para 2.5), the Directive permits AIFMs to delegate activities such as portfolio management, risk management, administration, marketing and other activities related to management of fund assets subject to quite strict parameters which are expanded upon in detail by the Level 2 Regulations.

## 4 Taxation

Irish AIFMs are generally subject to corporation tax at 12.5% which positions Ireland well for the passporting of services by such companies across the EEA.

Ireland also has a "substance" focused transparent tax regime aligned to the OECD BEPS principles and is therefore robust from a European and Global Tax perspective.

### 4.1 Irish Corporate Tax Rates

Ireland offers a very attractive taxation regime for AIFMs with the AIFM being taxed at either 12.5% or 25% on its profits.

For AIFMs, typical profits qualifying for the 12.5% tax rate would be fee income and income arising from an investment of the AIFM's minimum regulatory capital requirements. An investment by the AIFM in an AIF which it manages may also qualify for the 12.5% tax rate.

Typically passive income (non-trading income) will be taxable at the higher corporate tax rate of 25% and non-trading capital gains taxable at 33%. Other incentives that may be relevant are our R&D regime, IP Regime, as well as an extensive double tax treaty network, with 72 signed treaties, 70 of which are currently in force.

### 4.2 Repatriation of After-Tax Profits

An AIFM can make dividend payments free of Irish dividend withholding tax ("**DWT**").

There are several exemptions from DWT provided that the recipient is resident in an EU Member State or in a country with which Ireland has concluded a double tax treaty (including the UK) or in a country which Ireland has signed but not yet ratified a double tax treaty ("**Qualifying Country**"), or in the case of a non-resident company, even where it is not resident in a Qualifying Country, an exemption will apply provided it is controlled by persons resident in a Qualifying Country, and in certain other cases.

With the exception of a subsidiary company relying on the EU Parent-Subsidiary Directive (when making a payment to an EU parent), in all of the cases the persons must make a declaration in a specific format laid down in the legislation in order to avail of the above exemptions (i.e. no declaration is required if a company is relying on the EU Parent-Subsidiary Directive). If there are no changes in circumstances the exemption should remain operative for five years. Please note that on the making of a relevant dividend to which one

of the above exemptions applies (including the EU Parent-Subsidiary Directive) it is still necessary to complete and file a nil Dividend Withholding Tax form with the Irish Revenue Commissioners by the 14<sup>th</sup> day of the month following the month in which the dividend is made (i.e. a return is required to be made with the Irish Revenue Commissioners even in the event where nil withholding tax applies).

Where a shareholder receives a distribution on liquidation such a distribution is not regarded as a dividend and instead may be subject to capital gains tax in the hands of the shareholder. It is however very unlikely that such a distribution to a non-resident shareholder would attract a liability to Irish capital gains tax given the fact that a liability to such only arises on shares deriving their value from Irish minerals or mining rights or from Irish real property.

### 4.3 Transfer Pricing

Ireland introduced transfer pricing legislation in 2010. The legislation seeks to increase understated receipts and reduce overstated expenses of companies and branches in Ireland. The sole aim of the legislation is to increase profits which have been understated in Ireland (not normally a common occurrence with a corporate tax rate of 12.5%).

Small or medium - sized enterprises are exempt from the transfer pricing measures. For the purpose of this exemption a person is regarded as a “*small or medium-sized enterprise*” if they fall within the definition of “***micro, small and medium-sized enterprises***” as outlined in the Annex to Commission Recommendations of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises. This essentially excludes an enterprise which employs fewer than 250 persons and which has an annual turnover not exceeding EUR 50 million **and/or** an annual balance sheet total not exceeding EUR 43 million. These figures are assessed, where appropriate, on a worldwide group wide basis.

### 4.4 VAT

To the extent an AIFM is providing services to AIF's located outside of Ireland then it will have full VAT recovery in respect of any VAT input costs that incurs in respect of activities directly attributable to the provision of such services. To the extent an AIFM incurs VAT on input costs in respect of the provision of VAT exempt services to Irish AIF's then it can recover all or a percentage of such VAT input costs at the combined recovery rate of the underlying Irish AIF's it manages.

## 4.5 Personal tax regime for Executives of the AIFM

In very limited cases carried interest will be taxable at a 12.5% or 15% tax rate instead of the normal capital gains tax rate of 33%. Ireland like the UK also has the concept of non-doms and consequently it may be attractive for some investment managers to be tax resident in Ireland to the extent they have significant non-Irish income and gains. Likewise, non-doms can remit income and gains to Ireland tax-free which have been earned in the period before they move to Ireland.

There is also a special tax relief for individuals moving to Ireland known as the Special Assignee Relief Programme (SARP) which can considerably reduce an individual's effective tax rate for 5 consecutive tax years. SARP provides for income tax relief on a proportion of income earned by an employee who is assigned by his or her relevant employer to work in Ireland for that employer or for an associated company of that employer. In this regard, a relevant employer is a company that is incorporated and tax resident in a country with which Ireland has a double taxation agreement or a tax information exchange agreement. Where certain conditions are satisfied, an employee can make a claim to have a proportion of his/her earnings from the employment with the relevant employer or with an associated company disregarded for income tax purposes. In addition, an individual who qualifies for the relief may also benefit from an exemption from income tax on certain benefits-in-kind (which would otherwise be taxable) such as specific travel expenses and children's education fees.

## 5 How can Dillon Eustace assist you?

Dillon Eustace has a deep understanding and unrivalled experience of advising on the establishment, operation and passporting of Irish authorised AIFMs managing a broad range of product types.

We can advise you on all aspects of the AIFM set up process, including:

- examining your business needs to assess different stand alone, supported, third party platform solutions;
- providing you with a pro forma Programme of Activity, a full set of policies and procedures, compliance matrix/plan and ancillary documents and then working closely with you to tailor them to your circumstances;
- assisting you with the application process, filing of forms and the completion of individual questionnaires;
- assisting you with incorporation of the company, letting of premises, introductions to local directors and service providers, hiring of staff, tax registrations and bank account opening;
- preparing AIFM agreement and agreements with delegates, etc;
- providing a company secretary and carrying out fitness and probity checks.

For more details on how we can help you, to request copies of most recent newsletters, briefings or articles, or simply to be included on our mailing list going forward, please contact us.

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