



# ICLG

The International Comparative Legal Guide to:

## **Alternative Investment Funds 2014**

**2nd Edition**

A practical cross-border insight into Alternative Investment Funds work

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## Published by

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## GLG Cover Design

F&F Studio Design

## GLG Cover Image Source

iStockphoto

## Printed by

Ashford Colour Press Ltd  
June 2014

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ISBN 978-1-910083-00-0

ISSN 2051-9613

## Strategic Partners



## General Chapters:

1	<b>Long-Term Reasons to be Cheerful</b> – Stephen G. Sims, Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates	1
2	<b>Engaging with the Regulation of Alternative Investment Fund Managers</b> – Kirstene Baillie & Nicholas Noble, Field Fisher Waterhouse LLP	3

## Country Question and Answer Chapters:

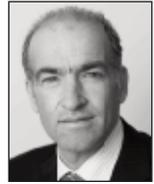
3	<b>Australia</b>	Johnson Winter & Slattery: Shelley Hemmings & Rod Cox	9
4	<b>Austria</b>	Norbert Wiesinger, Stephan Zinterhof Law Offices: Dr. Norbert Wiesinger & Mag. Stephan Zinterhof	17
5	<b>Bermuda</b>	MJM Limited: Peter D. A. Martin & Jeremy Leese	22
6	<b>British Virgin Islands</b>	Maples and Calder: Tim Clipstone	29
7	<b>Canada</b>	McCarthy Tétrault LLP: Sean D. Sadler & Nigel P.J. Johnston	36
8	<b>Cayman Islands</b>	Maples and Calder: Grant Dixon & Andrew Keast	43
9	<b>Cyprus</b>	Papacharalambous & Angelides LLC: Coralia Papacharalambous	49
10	<b>Denmark</b>	Horten Advokatpartnerselskab: Claus Bennetsen	55
11	<b>England &amp; Wales</b>	Travers Smith LLP: Jeremy Elmore & Sam Kay	62
12	<b>Guernsey</b>	Ogier: Caroline Chan	69
13	<b>Hungary</b>	Oppenheim Law Firm: Peter Horvai-Hillenbrand & Mihaly Barcza	75
14	<b>India</b>	J. Sagar Associates, Advocates and Solicitors: Dina Wadia & Jay Gandhi	81
15	<b>Indonesia</b>	Ali Budiardjo, Nugroho, Reksodiputro Counsellors at Law: Freddy Karyadi & Christine Hakim	87
16	<b>Ireland</b>	Dillon Eustace: Brian Kelliher & Sean Murray	94
17	<b>Jersey</b>	Ogier: Tim Morgan	102
18	<b>Liechtenstein</b>	Batliner Gasser Attorneys at Law: Helene Rebholz & Felicitas Bleckenwegner	108
19	<b>Luxembourg</b>	Bonn & Schmitt: Marcus Peter & Aisling Whelan	114
20	<b>Malta</b>	Camilleri Preziosi: Louis de Gabriele & Rachel Muscat	120
21	<b>Mexico</b>	Jones Day: Silvia Malagón Soberanes & Rodrigo Gómez Ballina	126
22	<b>Norway</b>	Steenstrup Stordrange: Klaus Henrik Wiese-Hansen & Christina Riisnes	130
23	<b>Scotland</b>	Brodies LLP: Andrew Akintewe & Alistair Campbell	136
24	<b>Spain</b>	Garrigues: Luis de la Peña & Juan Ignacio González	142
25	<b>Switzerland</b>	Lenz & Staehelin: François Rayroux & Patrick Schleiffer	149
26	<b>USA</b>	Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates: Heather Cruz & Aubry Smith	156

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# Ireland



Brian Kelliher



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## 1 Regulatory Framework

### 1.1 What legislation governs the establishment and operation of Alternative Investment Funds?

Where an AIF is a collective investment scheme authorised and supervised by the Central Bank of Ireland (the “Central Bank”), Irish legislation that governs the establishment and operation of the collective investment scheme applies, as further detailed in question 1.3.

However, all Irish AIFs are impacted operationally by:

- the European Communities (Alternative Investment Fund Managers) Regulations 2013 (S.I. 257 of 2013) (the “**Irish AIFM Regulations**”) which transposed Directive 2011/61/EU (the “**AIFM Directive**”) into Irish law; and
- Commission Delegated Regulations and Commission Implementing Regulations adopted by the EU Commission in specified areas in order to ensure that the AIFM Directive is implemented consistently across the EU, the principal one of which is the Commission Delegated Regulation (EU) No 231/2013 supplementing the AIFM Directive with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision (the “**Commission Delegated Regulation**”).

### 1.2 Are managers or advisers to Alternative Investment Funds required to be licensed, authorised or regulated by a regulatory body?

#### AIFMs

Unless availing of transitional arrangements under Article 61 of the AIFM Directive or unless exempt from authorisation pursuant to Article 3 of the AIFM Directive:

- Irish AIFMs managing Irish AIFs are required to be authorised under the Irish AIFM Regulations; and
- non-Irish EU AIFMs managing Irish AIFs are required to be authorised in their home jurisdiction and to have availed of the passporting provisions pursuant to Article 33 of the AIFM Directive.

Although a non-EU AIFM has no passporting rights until it is fully authorised under the AIFM Directive (which will not be possible until at least 2015), a non-EU AIFM may avail of transition benefits allowed by the Central Bank for such entities and manage an Irish AIF constituting a collective investment scheme authorised and supervised by the Central Bank and marketed to qualifying investors (a “**QIAIF**”) provided it is designated by the QIAIF as the non-EU AIFM. Such transition benefits will vary depending on

when the QIAIF was authorised by the Central Bank. However, in such circumstances the non-EU AIFM must be approved by the Central Bank to act as an investment manager of Irish authorised collective investment schemes (see below).

An Irish AIF constituting a collective investment scheme authorised and supervised by the Central Bank and marketed to retail investors (a “**RIAIF**”) must have an authorised AIFM. Consequently a non-EU AIFM cannot avail of the transition benefits allowed by the Central Bank as referred to above and manage a RIAIF on the basis it is designated by the RIAIF as the non-EU AIFM.

#### Non-AIFM Irish Management Companies/General Partners

RIAIFs and QIAIFs, depending on their legal form, may be required to appoint a management company/general partner to carry out the management of those AIFs. Where such a management company/general partner is not the AIFM, it must be approved by the Central Bank and meet the requirements relating to such entities as set out in the Central Bank’s AIF Rulebook (the “**AIF Rulebook**”), e.g.:

- minimum capital requirement of at least EUR 125,000 or one quarter of its total expenditure taken from the most recent audited accounts (whichever is higher);
- organisational requirements such as the appointment of a compliance officer who must be located in the State, policies and systems to identify, control and monitor risk, accounting policies and procedures, maintenance of records, etc.; and
- adequate management resources.

#### Investment Managers

Investment managers or sub-investment managers which are one of the following entities will not usually be subject to an additional regulatory review process by the Central Bank:

- UCITS management companies;
- MiFID investment firms;
- EU credit institutions; and
- externally appointed AIFMs.

Investment managers which are not one of the entities listed above may only be appointed where (i) an MOU is in place between the Central Bank and the competent authority in the home jurisdiction of the investment manager, and (ii) the Central Bank has approved the investment manager following receipt of a completed Investment Manager Clearance Form.

#### Investment Advisors

The Central Bank does not apply an approval process to investment advisors in order for such entities to provide investment advice in relation to a RIAIF/QIAIF provided that the manager/directors of the RIAIF/QIAIF confirm that the advisors in question will act in

an advisory capacity only and will have no discretionary powers over any of the assets of the RIAIF/QIAIF.

### 1.3 Are Alternative Investment Funds themselves required to be licensed, authorised or regulated by a regulatory body?

RIAIFs/QIAIFs (depending on the legal form) are authorised by the Central Bank under the following Irish legislation:

- (a) unit trusts under the Unit Trusts Act 1990;
- (b) investment companies under Part XIII of the Companies Act 1990;
- (c) investment limited partnerships (“ILPs”) under the Investment Limited Partnerships Act 1994; and
- (d) common contractual funds (“CCFs”) under the Investment Funds, Companies and Miscellaneous Provisions Act 2005,

(collectively referred to as the “Irish Funds Legislation”).

Under the Irish Funds Legislation, the Central Bank is responsible for the authorisation and supervision of these AIFs and has the power to impose conditions on them. The current conditions which the Central Bank imposes are contained in the AIF Rulebook.

### 1.4 Does the regulatory regime distinguish between open-ended and closed-ended Alternative Investment Funds (or otherwise differentiate between different types of funds) and if so how?

The Central Bank allows RIAIFs/QIAIFs to be structured as follows:

#### (a) Open-Ended

An AIF is considered open-ended by the Central Bank where it:

- provides redemption facilities on at least a (i) monthly basis in the case of a RIAIF, and (ii) quarterly basis in the case of a QIAIF;
- redeems when requested at least (i) 10% of net assets in the case of a RIAIF/QIAIF that redeems on a monthly basis or more frequently, or (ii) 25% in the case of a QIAIF that redeems on a quarterly basis; and
- does not impose a redemption fee in excess of (i) 3% of the net asset value per unit in the case of a RIAIF, or (ii) 5% in the case of a QIAIF.

An AIF, which provides for a period of greater than 30 days in the case of a RIAIF and 90 days in the case of a QIAIF between the dealing deadline and the payment of redemption proceeds, will not be subject to the above requirements provided it classifies itself as open-ended with limited liquidity.

#### (b) Open-Ended with Limited Liquidity

A RIAIF/QIAIF is classified as open-ended with limited liquidity if it does not meet one or more of the requirements for an open-ended AIF but does permit the redemption of units throughout the life of the AIF.

#### (c) Closed-Ended

The Central Bank considers a closed-ended RIAIF/QIAIF to be one which does not facilitate the redemption of units at the request of the unitholders during the life of the AIF.

### 1.5 What does the authorisation process involve?

#### RIAIFs/QIAIFs

The application for authorisation of a RIAIF/QIAIF must be made by (i) the AIFM together with (ii) the corporate AIF or management

company/general partner in the case of a non-corporate AIF and (iii) the depositary, in the case of a unit trust or CCF.

All parties to a RIAIF/QIAIF must have been authorised or otherwise deemed acceptable to the Central Bank prior to the application for authorisation (e.g. the management company, general partner, AIFM, directors in the case of a corporate AIF, depositary, other service providers such as the fund administrator, investment manager, etc.).

The directors of any entity authorised by the Central Bank (including *inter alia* the directors of a corporate RIAIF/QIAIF) are required to meet certain standards of fitness and probity. As part of the Central Bank’s fitness and probity requirements, any director proposed to be appointed must be pre-approved by the Central Bank. In this regard, an individual online questionnaire must be completed by the proposed director and validated and submitted on behalf of the appointing entity by a certain time period in advance of the proposed authorisation date for the RIAIF/QIAIF (i.e. at least 20 working days in the case of a RIAIF and at least 5 working days in the case of a QIAIF).

A RIAIF/QIAIF is not subject to any minimum capital requirements unless it is internally managed and constitutes the AIFM.

In relation to the authorisation of QIAIFs, there is no prior filing of QIAIF documentation with, or review by, the Central Bank. Instead, there is a self-certification regime (i.e. certification has to be given that the Central Bank’s disclosure requirements relating to the QIAIF documentation are met). Because there is no prior review by the Central Bank, the timeframe for authorisation of a QIAIF is within the control of the relevant parties based on the length of time it takes to negotiate and agree the QIAIF documents (subject to the pre-clearance of any persons or parties required by the Central Bank). Once the documentation is filed by 3pm on the business day prior to the date for which authorisation is sought, a QIAIF will be authorised on the requested date without a prior review. The Central Bank may carry out a “spot check” post-authorisation review.

This contrasts with the authorisation process for RIAIFs as the Central Bank requires certain documents (e.g. the prospectus and agreement/deed appointing the depositary) to be submitted for review and cleared of comment by the Central Bank in advance of the formal application for authorisation being submitted.

#### Internally Managed RIAIF/QIAIF Constituting the AIFM

Where it is proposed that a RIAIF or QIAIF will be internally managed and constitute the AIFM, a separate application for authorisation of an AIFM must be submitted to the Central Bank (together with other supporting documentation including *inter alia* a programme of activity) and such authorisation must be obtained before formal application for authorisation of the RIAIF/QIAIF may be submitted to the Central Bank.

Any such RIAIF/QIAIF is required to meet the minimum capital requirements of an AIFM as set out in Regulation 10 of the Irish AIFM Regulations (equivalent to Article 9 of the AIFM Directive).

The Central Bank is obliged to inform the AIFM in writing as to whether or not authorisation has been granted, within three months of a complete application. However, the Central Bank may extend this period for another three months where it considers it necessary because of the specific circumstances of the case.

### 1.6 Are there local residence or other local qualification requirements?

#### Directors

A minimum of two directors in a corporate RIAIF/QIAIF, or in any entity which is authorised by the Central Bank and provides management or other services to such an AIF (e.g. an AIFM,

management company, general partner, fund administrator or depositary), must be Irish resident.

As part of the Central Bank's fitness and probity requirements, a proposed director is required to confirm (in the individual questionnaire referred to in question 1.5) his/her time commitment in days that will be provided per year in respect of that directorship. In addition the appointing entity, in validating the questionnaire, is required to confirm its expectation regarding the proposed director's time commitment per year.

#### Corporate Governance Code

Corporate RIAIFs/QIAIFs or the management companies / general partners of non-corporate RIAIFs/QIAIFs are recommended to adhere to a voluntary corporate governance code for funds put in place by the Irish Funds Industry Association at the request of the Central Bank. Such code provides *inter alia* for a majority of non-executive directors and at least one independent non-executive director.

#### Non-Irish Parties

Local requirements regarding the appointment of a non-Irish AIFM, investment manager or investment advisor are detailed in question 1.2 above.

### **1.7 What service providers are required?**

The service providers involved in a RIAIF/QIAIF will depend on:

- the legal structure of the AIF as detailed in question 1.3 (e.g. a management company/general partner will be required to be appointed in the case of a non-corporate AIF);
- whether an external valuer, distributor and/or prime broker will be appointed; and
- whether a fund administrator authorised by the Central Bank will be appointed (as is customary) to calculate the net asset value of the AIF and to provide fund accounting and transfer agency services.

The appointment of a depositary is required under the Irish AIFM Regulations.

A RIAIF/QIAIF must appoint auditors and a money laundering reporting officer and, if a corporate AIF, will need to appoint a company secretary. In addition, if it is intended to list the units of the AIF on the Irish Stock Exchange, it will be necessary to appoint an Irish listing sponsor. It is also customary for Irish legal advisers to be appointed.

### **1.8 What co-operation or information sharing agreements have been entered into with other governments or regulators?**

As at 20 February 2014, the European Securities and Markets Authority approved co-operation agreements between EU securities regulators and 45 non-EU authorities. See the ESMA website at <http://www.esma.europa.eu/content/AIFMD-MoUs-signed-EU-authorities-updated> for the full list. The Central Bank has signed all of these agreements other than those with the competent authorities in the Maldives and Turkey.

## **2 Fund Structures**

### **2.1 What are the principal legal structures used for Alternative Investment Funds?**

The principal legal structures of RIAIFs/QIAIFs are set out in question 1.3, the principal features of which are set out below:

- (a) Unit trusts are contractual arrangements created under a trust deed made between a management company and a depositary. Unit trusts do not have their own legal personality and contracts are entered into by the management company and, in certain cases, by the trustee. A unit represents an undivided beneficial interest in the assets of the unit trust.
- (b) Investment companies are public limited liability companies incorporated with variable capital, i.e. the actual value of the paid-up share capital is equal at all times to the value of the net asset value of the company. Shares issued do not represent a legal or beneficial interest in the company's assets.
- (c) ILPs are partnerships between one or more general partners and one or more limited partners, constituted by written agreements between the parties known as partnership agreements. A general partner is personally liable for the debts and obligations of the partnership and a limited partner contributes or undertakes to contribute a stated amount to the capital of the partnership.
- (d) CCFs are funds constituted under contract law by means of a deed of constitution executed under seal by a management company. The CCF is an unincorporated body and does not have a legal personality and therefore may act only through the management company. Participants in the CCF hold their participation as co-owners and each participant holds an undivided co-ownership interest as a "tenant in common" with other participants.

Each of the above-referenced AIFs may be established as an umbrella fund with separate sub-funds.

### **2.2 Please describe the limited liability of investors.**

In investment companies, the liability of the shareholders is limited by the memorandum to the amount, if any, unpaid on the shares held by them.

In unit trusts, the limited liability of the unitholders under the trust deed will depend on the contractual provisions in the trust deed.

In ILPs, the liability of the limited partners is limited to the stated amount of capital they have contributed or undertaken to contribute and, except in limited circumstances set down in the Investment Limited Partnerships Act 1994, does not extend to the debts of the partnership beyond the amount contributed.

In CCFs, the liability of a unitholder is limited to the amount agreed to be contributed for the subscription of units.

### **2.3 What are the principal legal structures used for managers and advisers of Alternative Investment Funds?**

The principal legal structure used for managers and advisers of RIAIFs/QIAIFs is a private company incorporated with limited liability.

### **2.4 Are there any limits on the manager's ability to restrict redemptions in open-ended funds or transfers in open-ended or closed-ended funds?**

Although RIAIFs/QIAIFs may apply redemption gates if provided for in the applicable fund documentation, the Central Bank currently imposes limits on an AIF's ability to restrict redemptions on any one dealing day in the context of open-ended funds. These limits are detailed in question 1.4.

## 2.5 Are there any legislative restrictions on transfers of investors' interests in Alternative Investment Funds?

There are no legislative restrictions on transfers of investors' interests in RIAIFs/QIAIFs other than in ILPs. A limited partner may only assign his partnership interest subject to the consent of all general partners to the assignee being admitted to the partnership as a limited partner.

## 3 Marketing

### 3.1 What legislation governs the production and offering of marketing materials?

The Irish Funds Legislation and AIF Rulebook govern the production and offering of a prospectus by a RIAIF/QIAIF but do not extend to other marketing materials.

### 3.2 What are the key content requirements for marketing materials, whether due to legal requirements or customary practice?

There are prescriptive requirements relating to the content of a prospectus issued by or on behalf of a RIAIF/QIAIF. These are set out in the AIF Rulebook.

The prospectus of a closed-ended AIF must comply with the content requirements in the Irish Prospectus Directive Regulations (where applicable).

The European Communities (Market in Financial Instruments) Regulations 2007 as amended (the “**Irish MiFID Regulations**”), which transposed the MiFID Directive into Irish law, require Irish “investment firms” providing “investment services” (including *inter alia* investment advice and certain distribution services) to ensure that information provided to potential clients about *inter alia* “financial instruments” (such as units in an AIF) meets certain prescribed requirements.

### 3.3 Do the marketing or legal documents need to be registered with or approved by the local regulator?

In relation to RIAIFs/QIAIFs, a dated prospectus must be submitted to the Central Bank for its noting prior to its issue.

The prospectus of a closed-ended AIF must be submitted to the Central Bank for approval in accordance with the Irish Prospectus Directive Regulations (where applicable).

### 3.4 What restrictions are there on marketing Alternative Investment Funds?

#### Marketing in Ireland to Retail Investors

A non-Irish AIF which has been approved by the Central Bank to market in Ireland to retail investors (see question 3.5 below) must comply with the Consumer Protection Code of the Central Bank. In addition, certain wording prescribed by the Central Bank must be included in the AIF's prospectus and in any marketing material distributed in Ireland for the purposes of promoting the AIF to retail investors.

#### Marketing in Ireland to Professional Investors

Notification to the Central Bank pursuant to the Irish AIFM Regulations is required in advance of any marketing in Ireland to professional investors of:

- EU AIFs by Irish AIFMs;
- non-EU AIFs by EU AIFMs; and
- AIFs by Non-EU AIFMs.

Marketing may only commence once the Central Bank has informed the AIFM that it may commence marketing.

## 3.5 Can Alternative Investment Funds be marketed to retail investors?

#### RIAIFs/QIAIFs

QIAIFs may only be marketed to qualifying investors as detailed in question 3.6. However, RIAIFs may be marketed to retail investors.

#### Non-Irish AIFs

Non-Irish AIFs which propose to market their units in Ireland to retail investors must be authorised by a supervisory authority set up in order to ensure the protection of unitholders and which, in the opinion of the Central Bank, provides an equivalent level of investor protection to that provided under Irish laws, regulations and conditions governing RIAIFs.

A non-Irish AIF which proposes to market its units in Ireland to retail investors must make an application to the Central Bank in writing, enclosing certain prescribed information.

AIFs established in:

- Guernsey and authorised as Class A schemes;
- Jersey and authorised as recognised funds; and
- the Isle of Man as authorised schemes,

will receive approval to market their units in Ireland to retail investors on completion of the information and documentation requirements. Other AIFs must demonstrate an equivalent level of investor protection to that provided under Irish laws, regulations and conditions governing RIAIFs.

The marketing of units in Ireland to retail investors may not take place until the AIF has received a letter of approval from the Central Bank.

## 3.6 What qualification requirements must be carried out in relation to prospective investors?

#### RIAIFs

A RIAIF has no regulatory minimum subscription requirement and no investor qualification requirements.

#### QIAIFs

A QIAIF may only be sold to qualifying investors and a minimum subscription of EUR 100,000 applies. A qualifying investor is:

- (i) an investor who is a professional client within the meaning of MiFID;
- (ii) an investor who receives an appraisal from an EU credit institution, a MiFID firm or a UCITS management company to the effect that the investor has the appropriate expertise, experience and knowledge to adequately understand the investment in the QIAIF; or
- (iii) an investor who certifies that they are an informed investor by providing the following:
  - confirmation (in writing) that the investor has such knowledge of, and experience in, financial and business matters as would enable the investor to properly evaluate the merits and risks of the prospective investment; or
  - confirmation (in writing) that the investor's business involves, whether for its own account or the account of

others, the management, acquisition or disposal of property of the same kind as the property of the QIAIF.

Qualifying investors must self-certify in writing to the QIAIF that they: (i) meet the minimum initial investment per investor and appropriate expertise/understanding tests; and (ii) are aware of the risk involved in the proposed investment and of the fact that inherent in such investments is the potential to lose all of the sum invested.

### 3.7 Are there additional restrictions on marketing to public bodies such as government pension funds?

No, there are not.

### 3.8 Are there any restrictions on the use of intermediaries to assist in the fundraising process?

No, there are no such restrictions.

### 3.9 Are there any restrictions on the participation by financial institutions in Alternative Investment Funds (whether as sponsors or investors) arising from the 2008 financial crisis?

There are none, in the context of RIAIFs/QIAIFs.

## 4 Investments

### 4.1 Are there any restrictions on the types of activities that can be performed by Alternative Investment Funds?

RIAIFs/QIAIFs may not raise capital from the public through the issue of debt securities. However, this restriction does not operate to prevent the issue of notes by QIAIFs, on a private basis, to a lending institution to facilitate financing arrangements.

RIAIFs/QIAIFs may not grant loans or act as a guarantor on behalf of third parties. This is without prejudice to the right of the AIF to acquire debt securities and it does not prevent AIFs from acquiring securities which are not fully paid. It will also not prevent a QIAIF in certain circumstances from entering into bridge financing arrangements.

A RIAIF/QIAIF may not acquire any shares carrying voting rights which would enable it to exercise significant influence over the management of an issuing body. This requirement does not apply to investments in other investment funds or where the AIF is a venture capital, development capital or private equity AIF, provided its prospectus indicates its intention regarding the exercise of legal and management control over underlying investments.

### 4.2 Are there any limitations on the types of investments that can be included in an Alternative Investment Fund's portfolio whether for diversification reasons or otherwise?

Although a retail product, the RIAIF is a higher risk option than an Irish UCITS fund authorised by the Central Bank and therefore, although concentration limits are imposed by the Central Bank on RIAIFs (e.g. 20% of the NAV issuer limit, 30% of the NAV limit on deposits with an acceptable credit institution, 30% of the NAV limit in any one open-ended fund, etc.), such limits are generally more flexible than those applicable to UCITS funds.

In relation to QIAIFs, the Central Bank does not impose any limits on the investment objectives, the investment policies or on the

degree of leverage which may be employed. However for corporate QIAIFs, there is a statutory requirement to spread investment risk.

### 4.3 Are there any restrictions on borrowing by the Alternative Investment Fund?

RIAIFs may not borrow in excess of 25 per cent of their net assets at any time.

QIAIFs are not subject to any regulatory borrowing limits.

## 5 Disclosure of Information

### 5.1 What public disclosure must the Alternative Investment Fund make?

Except as set out below, RIAIFs/QIAIFs are not required to make public their annual reports or the identity of their investors:

- certain documents in relation to ILPs required to be filed and maintained with the Central Bank are a matter of public record (e.g. the partnership agreement and annual report); and
- where the securities of a closed-ended RIAIF or QIAIF are admitted to listing on a regulated market, the AIF is required to make its annual and half-yearly reports public in accordance with the EU Transparency Directive. Such an AIF must also make public other information including *inter alia* any change in the rights attaching to the various classes of shares.

### 5.2 What are the reporting requirements in relation to Alternative Investment Funds?

#### Annual and Half-Yearly Reports

#### (a) RIAIFs/QIAIFs

A newly established RIAIF/QIAIF must submit to the Central Bank a set of accounts (whether an interim report or an annual report) within a certain period of the launch date (i.e. within nine months for a RIAIF and 12 months for a QIAIF) and publish it within two months if an interim report or six months if an annual report. The first annual reports must be within 18 months of incorporation/establishment and published within six months.

On an ongoing basis, a RIAIF/QIAIF must publish an annual report within six months of the end of the financial year. In addition, a RIAIF/QIAIF (established as a unit trust or CCF) must publish, within two months of the reporting period, a half-yearly report covering the first six months of the financial year.

#### (b) AIFMs/Non-AIFM Management Companies/Administrators/Depositories

Where an AIFM, a non-AIFM management company, administrator or depository is authorised by the Central Bank, such entity must publish and file with the Central Bank (i) an annual report within four months of the end of the financial year, and (ii) a half-yearly report, covering the first six months of the financial year, within two months of the reporting period.

However, where an AIFM is an internally managed RIAIF/QIAIF, the annual audited accounts must be published within six months (as opposed to four months) of the year end. Furthermore, internally managed QIAIF investment companies are not required to produce half-yearly financial accounts.

#### Prudential Reports

#### (a) RIAIFs/QIAIFs

A RIAIF/QIAIF is obliged to file the following prudential reports with the Central Bank:

- a monthly return setting out prescriptive information relating to the AIF;
- a quarterly Survey of Collective Investment Undertakings return within 10 working days of the end-quarter to which it refers; and
- a Funds Annual Survey of Liabilities return filed with the latter return.

A RIAIF or a QIAIF structured as a money market fund that meets the definition of a “monetary financial institution” in the Regulation of the European Central Bank (EU) No 883/2011 is also obliged to file statistical information on a monthly and quarterly basis with the European Central Bank.

- (b) AIFMs/Non-AIFM Management Companies/Administrators/Depositories

Where an AIFM, a non-AIFM management company, administrator or depository is authorised by the Central Bank, such entity must file with the Central Bank a minimum capital requirement report when filing its half-yearly and annual reports.

#### Other Reports

- (a) RIAIFs/QIAIFs

A RIAIF/QIAIF may be obliged to file reports on a periodic basis with the Central Bank depending on the composition of its portfolio, e.g. where the AIF has side pocket assets, an annual report is required confirming whether or not the Central Bank’s parameters continue to be respected and the prospects and/or plans for the side pocketed assets must be outlined.

- (b) Depository

A depository of a RIAIF/QIAIF must enquire into the conduct of the AIFM and the management company, investment company or general partner in each annual accounting period and report thereon to the unitholders via a depository report included in the annual report of the AIF.

- (c) Irish AIFMs

A non-EU AIFM marketing an AIF in Ireland without a passport and an Irish authorised AIFM are required to file reports with the Central Bank in accordance with Regulation 25 of the Irish AIFM Regulations, e.g. reports on the principal markets and instruments in which they trade on behalf of the AIFs they manage, etc.

### 5.3 Is the use of side letters restricted?

There is no express statutory or regulatory restriction on the use of side letters. However, a RIAIF/QIAIF is required, subject to certain exceptions as set out in the AIF Rulebook, to treat all unitholders in the same class equally and all unitholders in different classes fairly. Furthermore, an AIFM is subject to certain operating conditions including *inter alia* an obligation to treat all AIF unitholders fairly and to ensure that no unitholder in an AIF obtains preferential treatment unless such preferential treatment is disclosed in the relevant AIF’s constitutional document.

## 6 Taxation

### 6.1 What is the tax treatment of the principal forms of Alternative Investment Funds?

RIAIFs/QIAIFs are not subject to any taxes on their income (profits) or gains arising on their underlying investments. While dividends, interest and capital gains that an AIF receives with respect to its investments may be subject to taxes, including withholding taxes, in the countries in which the issuers of

investments are located, these foreign withholding taxes may, nevertheless, be reduced or eliminated under Ireland’s network of tax treaties to the extent applicable.

### 6.2 What is the tax treatment of the principal forms of investment manager/adviser?

Compensation paid to managers and advisors (such as management/advisory fees, as well as performance fees) of RIAIFs/QIAIFs is generally subject to corporation tax at the trading rate (i.e., 12.5 per cent).

### 6.3 Are there any establishment or transfer taxes levied in connection with an investor’s participation in an Alternative Investment Fund or the transfer of the investor’s interest?

There are no such establishment taxes. Furthermore, there are no transfer taxes payable in Ireland on the issue, transfer, repurchase or redemption of units in a RIAIF/QIAIF. Where any subscription for or redemption of units is satisfied by the *in specie* transfer of securities, property or other types of assets, Irish stamp duty may arise on the transfer of such assets.

### 6.4 What is the tax treatment of (a) resident and (b) non-resident investors in Alternative Investment Funds?

RIAIFs/QIAIFs are not subject to any taxes on their income (profits) or gains arising on their underlying investments.

#### RIAIFs/QIAIFs (other than CCFs & ILPs)

##### Non-Residents

There are no Irish withholding taxes in respect of a distribution of payments by such AIFs to investors or in relation to any encashment, redemption, cancellation or transfer of units in respect of investors who are neither Irish resident nor ordinarily resident in Ireland, provided the AIF has satisfied and availed of certain equivalent measures or the investors have provided the AIF with the appropriate relevant declaration of non-Irish residence.

##### Irish Residents

*Exempt Investors* – Again, no Irish withholding taxes apply in respect of a distribution of payments by the AIF to such investors (which would include approved pension schemes, charities, other investment funds, etc.) or any encashment, redemption, cancellation or transfer of units in respect of investors that have provided the AIF with the appropriate relevant declaration.

*Non-Exempt Investors* – If an investor is an Irish resident and not an exempt Irish investor, tax at the rate of 41 per cent (25 per cent where the unitholder is a company and an appropriate declaration is in place) is required to be deducted by the AIF on distributions (where payments are made annually or at more frequent intervals). Similarly, tax at the rate of 41 per cent (25 per cent where the unitholder is a company and an appropriate declaration is in place) will have to be deducted by the AIF on any other distribution or gain arising to the investor on an encashment, redemption, etc. of units by an investor who is Irish resident or an ordinary resident in Ireland. While this tax will be a tax liability of the AIF, it is effectively incurred by investors out of their investment proceeds.

#### RIAIFs/QIAIFs (established as CCFs or ILPs)

For Irish tax purposes, a CCF and ILP (authorised on or after 13 February 2013) are treated as “tax transparent” which means that the income and gains arising or accruing to the AIF are treated as arising or accruing to its unitholders in proportion to the value of

the units beneficially owned by them as if such income and gains did not pass through the hands of the CCF or ILP. Consequently, for tax purposes, the profits that arise to this type of AIF are treated as being profits that arise to the unitholders themselves.

Currently natural persons cannot invest in a CCF without negatively affecting its Irish tax transparent status. This may change in the future.

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#### 6.5 Is it necessary or advisable to obtain a tax ruling from the tax or regulatory authorities prior to establishing an Alternative Investment Fund?

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No. Once a RIAIF/QIAIF has received its authorisation from the Central Bank and for so long as such authorisation remains in place, the taxation treatment detailed above applies.

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#### 6.6 What steps are being taken to implement the US Foreign Account and Tax Compliance Act 2010 (FATCA)?

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The Irish and US Governments signed an intergovernmental agreement (“**Irish IGA**”) on 21 December 2012 and provision was included in the Irish Finance Act 2013 for the implementation of the Irish IGA which permits regulations to be made by the Irish Revenue Commissioners (the “**Irish Revenue**”) with regard to reporting requirements arising from the Irish IGA. Currently there are discussions between the Irish Revenue and relevant industry groups with a view to finalising draft Regulations and Guidance Notes issued by the Revenue.

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#### 6.7 Are there any other material tax issues?

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Management fees are generally subject to VAT at the current rate of 23 per cent. However under the harmonised VAT legislation, an exemption applies to the management of investment funds as defined by the EU Member States which, in Ireland, includes all authorised investment funds. Therefore the VAT exemptions are wide-ranging with regard to the provision of services to funds (for example, fund administration, transfer agency, investment management, etc.).

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## 7 Reforms

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### 7.1 What reforms (if any) are proposed?

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In December 2013, the Minister for Finance published the General Scheme of the Irish Collective Asset-management Vehicle (ICAV) Bill which provides for a new corporate structure specifically for investment funds (the “**ICAV**”). It is intended that the ICAV will be structured so that it can “check the box” to be treated as a partnership or disregarded entity for US federal tax purposes and therefore will facilitate investment by US taxable investors and/or US taxable and tax-exempt investors in a master feeder fund structure. It is expected that the legislation for the ICAV will be finalised later this year.

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Brian Kelliher joined Dillon Eustace in 1994 and has been a partner in Dillon Eustace since 2000. He works in the Asset Management and Investment Funds team and specialises in the establishment and authorisation of UCITS and non-UCITS funds under Irish funds legislation and investment firms under MiFID and other domestic legislation. He advises on all regulatory/compliance aspects applicable to investment funds and investment firms. He is a former member and chairman of the Legal and Regulatory Committee of the Irish Funds Industry Association (the "IFIA") and is currently a member of the Company Law Review Group ("CLRG") acting on behalf of the IFIA. He has written several fund articles for leading industry journals and spoken at international fund events.

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