SECTION 2

General criteria for assessing the prudential regulation and supervision applicable to depositaries in third countries
(Article 21(6)(b) of Directive 2011/61/EU)

Article 84

Criteria for assessing prudential regulation and supervision applicable to a depositary in a third country

For the purposes of point (b) of Article 21(6) of Directive 2011/61/EU, the effectiveness of prudential regulation and supervision applicable to a depositary in a third country whether it has the same effect as that provided for under Union law and its effective enforcement shall be assessed against the following criteria:

(a) the depositary is subject to authorisation and ongoing supervision by a public competent authority with adequate resources to fulfil its tasks;

(b) the law of the third country lay down criteria for authorisation as a depositary that have the same effect as those laid down for access to the business of credit institutions or investment firms within the Union;

(c) the capital requirements imposed on the depositary in the third country have the same effect as those applicable in the Union depending on whether the depositary is of the same nature as an Union credit institution or investment firm;

(d) the operating conditions applicable to a depositary in the third country have the same effect as those laid down for credit institutions or investment firms within the Union;

(e) the requirements regarding the performance of the specific duties as AIF depositary established in the law of the third country have the same effect as those provided for in Article 21(7) to (15) of Directive 2011/61/EU and its implementing measures and the relevant national law;

(f) the law of the third country provides for the application of sufficiently dissuasive enforcement actions in the event of breach by the depositary of the requirements and conditions referred to points (a) to (e).

SECTION 3

Depositary functions, due diligence duties and segregation obligation
(Articles 21(7)-(9) and 21(11)(c) and (d)(iii) of Directive 2011/61/EU)

Article 85

Cash monitoring — general requirements

1. Where a cash account is maintained or opened at an entity referred to in Article 21(7) of Directive 2011/61/EU in the name of the AIF, in the name of the AIFM acting on behalf of the AIF or in the name of the depositary acting on behalf of the AIF, an AIFM shall ensure that the depositary is provided, upon commencement of its duties and on an ongoing basis, with all relevant information it needs to comply with its obligations.

2. In order to have access to all information regarding the AIF’s cash accounts and have a clear overview of all the AIF’s cash flows, a depositary shall at least:

(a) be informed, upon its appointment, of all existing cash accounts opened in the name of the AIF, or in the name of the AIFM acting on behalf of the AIF;

(b) be informed at the opening of any new cash account by the AIF or by the AIFM acting on behalf of the AIF;

(c) be provided with all information related to the cash accounts opened at a third party entity, directly by those third parties.

Article 86

Monitoring of the AIF’s cash flows

A depositary shall ensure effective and proper monitoring of the AIF’s cash flows and in particular it shall at least:

(a) ensure that all cash of the AIF is booked in accounts opened with entities referred to in points (a), (b) and (c) of Article 18(1) of Directive 2006/73/EC in the relevant markets where cash accounts are required for the purposes of the AIF’s operations and which are subject to prudential regulation and supervision that has the same effect as Union law, is effectively enforced and is in accordance with the principles laid down in Article 16 of Directive 2006/73/EC;

(b) implement effective and proper procedures to reconcile all cash flow movements and perform such reconciliations on a daily basis or, in case of infrequent cash movements, when such cash flow movements occur;

(c) implement appropriate procedures to identify at the close of business day significant cash flows and in particular those which could be inconsistent with the AIF’s operations;

(d) review periodically the adequacy of those procedures including through a full review of the reconciliation process at least once a year and ensuring that the cash accounts opened in the name of the AIF, in the name of the AIFM acting on behalf of the AIF or in the name of the depositary acting on behalf of the AIF are included in the reconciliation process;
(e) monitor on an ongoing basis the outcomes of the reconciliations and actions taken as a result of any discrepancies identified by the reconciliation procedures and notify the AIFM if an irregularity has not been rectified without undue delay and also the competent authorities if the situation cannot be clarified and, as the case may be, or corrected;

(f) check the consistency of its own records of cash positions with those of the AIFM. The AIFM shall ensure that all instructions and information related to a cash account opened with a third party are sent to the depositary, so that the depositary is able to perform its own reconciliation procedure.

Article 87

Duties regarding subscriptions

An AIFM shall ensure that the depositary is provided with information about payments made by or on behalf of investors upon the subscription of units or shares of an AIF at the close of each business day when the AIFM, the AIF or a party acting on behalf of it, such as a transfer agent receives such payments or an order from the investor. The AIFM shall ensure that the depositary receives all other relevant information it needs to make sure that the payments are then booked in cash accounts opened in the name of the AIF or in the name of the AIFM acting on behalf of the AIF or in the name of the depositary in accordance with the provisions of Article 21(7) of Directive 2011/61/EU.

Article 88

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 depositary shall be included in the scope of the custody duties of the depositary where all of the following requirements are met:

(a) they are transferable securities including those which embed derivatives as referred to in the last subparagraph of Article 51(3) of Directive 2009/65/EC and Article 10 of Commission Directive 2007/16/EC (1), 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 depositary.

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 depositary shall always be included in the scope of the custody duties of the depositary.

Article 89

Safekeeping duties with regard to assets held in custody

1. In order to comply with the obligations laid down in point (a) of Article 21(8) of Directive 2011/61/EU with respect to financial instruments to be held in custody, a depositary shall ensure at least that:

(a) the financial instruments are properly registered in accordance with Article 21(8)(a)(ii) of Directive 2011/61/EU;

(b) records and segregated accounts are maintained in a way that ensures their accuracy, and in particular record the correspondence with the financial instruments and cash held for AIFs;

(c) reconciliations are conducted on a regular basis between the depositary’s internal accounts and records and those of any third party to whom custody functions are delegated in accordance with Article 21(11) of Directive 2011/61/EU;

(d) due care is exercised in relation to the financial instruments held in custody in order to ensure a high standard of investor protection;

(e) all relevant custody risks throughout the custody chain are assessed and monitored and the AIFM is informed of any material risk identified;

(f) adequate organisational arrangements are introduced to minimise the risk of loss or diminution of the financial instruments, or of rights in connection with those financial instruments as a result of fraud, poor administration, inadequate registering or negligence;

(g) the AIF’s ownership right or the ownership right of the AIFM acting on behalf of the AIF over the assets is verified.

2. Where a depositary has delegated its custody functions to a third party in accordance with Article 21(11) of Directive 2011/61/EU, it shall remain subject to the requirements of points (b) to (e) of paragraph 1 of this Article. It shall also ensure that the third party complies with the requirements of points (b) to (g) of paragraph 1 of this Article and the segregation obligations laid down in Article 99.