

## **Cryptoasset Fund formation**

A brief guide for first time managers



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# Introduction

## Route to launch

The following guide offers a brief introduction to some of the key issues managers must be aware of when launching a crypto-assets fund. In this document, we consider the impact of regulatory compliance, fund structure, jurisdiction, documentation and service providers alongside the asset class. It is important to note at the outset that there are many more factors to bear in mind when establishing a new fund. Eversheds Sutherland is ideally placed to support first-time managers and can provide expert guidance in navigating when navigating this new terrain.

## A Roadmap for fund establishment

The route to setting up a fund will be relatively linear, however the various stages are interlinked and should not be considered in isolation. The procedure for establishing a fund will generally entail the following:

- characterising the fund's key features such as the investment objective/strategy and target returns
- raising the initial seed and capital and pre-marketing with key investors to determine interest in the fund
- determining the most suitable UK management business structure (LLP or Ltd)
- attracting more further eligible investors through further marketing of the fund
- identifying and selecting key advisers and service providers
- providing a credible and safe investment proposition through the setting up of a robust infrastructure, compliance and risk management function
- applying for the necessary authorisations from the relevant regulatory bodies
- choosing a jurisdiction best suited for the fund domicile based on relevant regulatory and tax considerations
- drafting and negotiating the relevant legal documentation for the fund
- determining key fund components: including different types of share classes and fees as well as agreeing upon acceptable market practice with regards to restrictions on redemption and use of side pockets
- managing any intellectual property issues that may arise in connection with the fund

# Regulatory compliance

## Regulating UK based Alternative Investment Fund Manager

### **Introduction to the AIFMD**

A primary consideration for UK based fund managers is how to ensure compliance with all relevant regulations. Funds investing in crypto-assets will, due to the nature of these assets and their ineligibility for UCITS, be classified as Alternative Investment Funds (AIFs) and managers of such funds are referred to as Alternative Investment Fund Managers (AIFMs). The Alternative Investment Fund Managers Directive (AIFMD) is the key piece of legislation which touches on all EU-based hedge fund managers (and will continue to apply to and be relevant in the UK post-Brexit) and all AIFS which are marketed in the UK.

### **Impact of the AIFMD**

AIFMD affects both the marketing and the management of AIFs. The extent to which AIFMD affects an AIFM depends on a number of factors, including the size of the AIFM's aggregate assets under management (AUM), the domicile of the AIF, and the identity of the potential investors to whom the fund will be marketed.

Managers whose total AUM do not exceed €500m (where no funds are leveraged and investors do not have a right of redemption within 5 years of their initial investment) or €100m (where funds are leveraged) are known as 'sub-threshold' AIFMs. These are subject to lighter touch regulation under AIFMD. Managers whose AUM exceed those levels, referred to as 'full-scope' AIFMs, are subject to the full requirements of AIFMD.

### **The full-scope regime**

UK managers who qualify as full-scope AIFMs must ensure that they comply with the AIFMD in full. Full compliance with AIFMD entails obligations regarding regulatory capital, conduct of business, remuneration, transparency and disclosure and the appointment of a depositary. A depositary acts as custodian of the fund's investments and has certain other regulatory duties including ensuring that the fund's cashflows are properly monitored.

### **Sub-threshold regime**

The costs associated with the sub-threshold regime described above are much lower than the cost of compliance with the full-scope regime.

### **Using an FCA umbrella**

To speed up the process of becoming fully authorised and regulated by the FCA (which can be a lengthy process) an FCA authorised umbrella can provide temporary regulatory coverage (under secondment arrangement with a host) until such a time as the fund manager is fully authorised.

# Fund structure

## Selecting the most appropriate fund structure

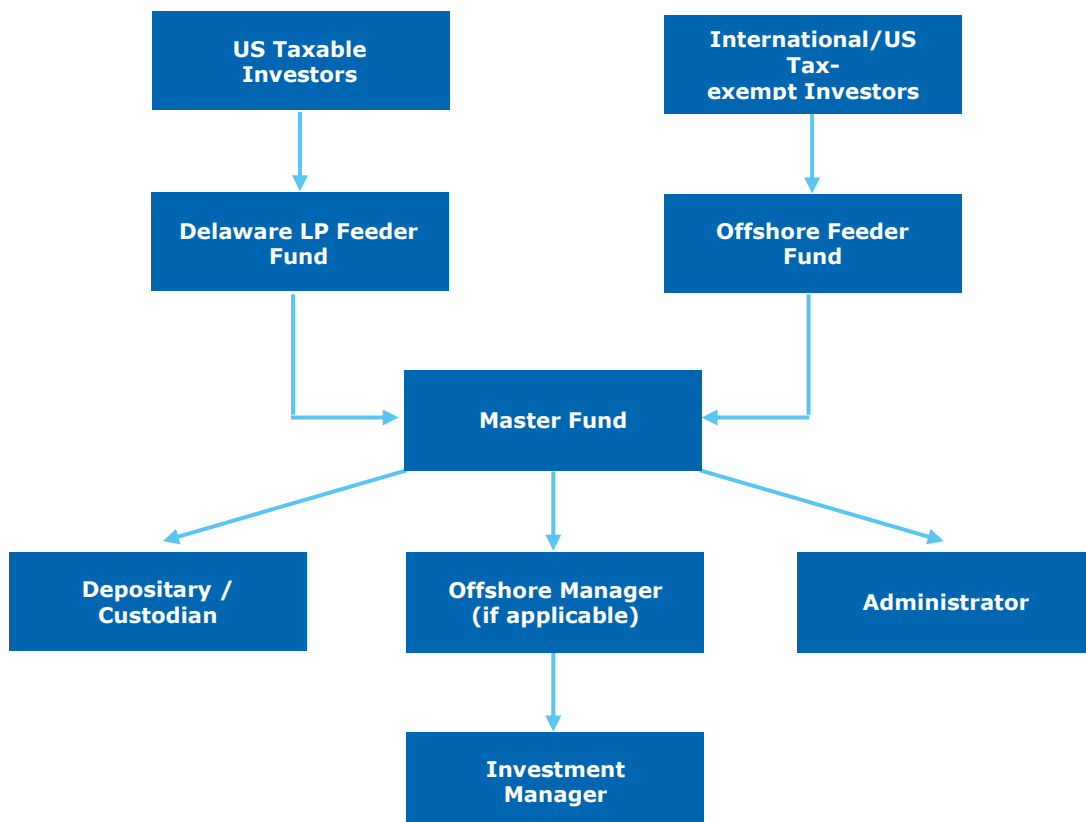
A crucial part of setting up a successful cryptoasset fund is choosing how to structure the fund. There are a number of different structures available, from the simplest stand-alone fund to more complex segregated portfolio companies and umbrella funds. Below we have outlined one of the most widely used fund structures: the Master-Feeder. Please see page [ ] for information on jurisdictions in which the fund may be set up.

### The Master-Feeder

A common dilemma for first-time managers is how to ensure that the different interests of US taxable investors are accommodated alongside those of international or US tax-exempt investors, as many funds will intend to attract both groups. The Master-Feeder structure offers an attractive solution to this problem by combining investment efficiency for the investment manager with tax and regulatory efficiency for the investors.

### What is a Master-Feeder?

In its most basic form a fund consists of one vehicle into which investors place their money. This is known as a 'stand-alone fund'. The Master-Feeder structure builds on this by inserting additional 'Feeder' funds between investors and the main operational vehicle (the 'Master' fund). This allows the fund to cater to the tax needs of different investors, while still enabling the investment manager to benefit from managing investments on behalf of only one investment vehicle. The diagram below illustrates this type of set up.



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The Master can combine assets from multiple Feeders. Investors will invest into the Feeder funds rather than into the Master directly. The Feeders will typically be the only shareholders of the Master, which can be established as either a corporate or a partnership. Typically open ended funds use a corporate vehicle.

The legal form of the Feeder funds may vary. For example, US-taxable investors typically invest into a Feeder taking the form of a limited partnership domiciled in Delaware, whereas US tax-exempt investors and other international investors will commonly invest into an offshore corporate Feeder. This variation is down to investor preference and their tax or regulatory obligations.

### How to set up a Master-Feeder

Timing	To do
Assuming optimal timing, 12 weeks before launch	<ul style="list-style-type: none"><li>■ engage Eversheds Sutherland and offshore counsel</li><li>■ set up UK manager entity (LLP or Ltd)</li><li>■ finalise term sheet</li><li>■ tax analysis to confirm appropriate structure and jurisdiction</li><li>■ start work on the Offering Memorandum (OM) or Private Placement Memorandum (PPM)</li><li>■ engage service providers (including administrator, custodian/depositary), offshore board members, auditors and tax advisers (Eversheds Sutherland can introduce these)</li></ul>
Launch minus 10 weeks	<ul style="list-style-type: none"><li>■ agree draft OM/PPM and provide to service providers</li><li>■ start to negotiate service provider agreements</li><li>■ decide on board members of the fund</li></ul>
Launch minus 6 weeks	<ul style="list-style-type: none"><li>■ incorporate offshore fund</li><li>■ obtain sign off on constitutional documents</li><li>■ open offshore bank accounts</li></ul>
Launch minus 3-6 weeks	<ul style="list-style-type: none"><li>■ seek consent from administrator and auditor</li><li>■ begin regulatory sign-off process</li></ul>
Launch minus 1 week	<ul style="list-style-type: none"><li>■ finalise documents</li><li>■ hold launch board meeting</li><li>■ arrange execution of documents</li></ul>
Launch	

# Key parties

Having a team of well-connected, direct and focused service providers to help structure a fund is vital. Set out below are some of the key parties involved in establishing and operating a successful fund.

Party	Description
Offshore Manager	Whilst not a legal requirement, it is standard practice for a fund to appoint an Offshore Manager. Typically an Offshore Manager will be established as an offshore private limited company. The Offshore Manager will be the AIFM for AIFMD purposes and will delegate management functions to an FCA authorised manager.
Investment Manager	Authorised by the FCA and subject to the overall supervision of the board, the Investment Manager implements the fund's investment strategy and subsequently manages its portfolio trading activities. Unless an Offshore Manager has been appointed, the Investment Manager will be the AIFM of the fund for AIFMD purposes.
Investment Adviser	Certain funds must have an Investment Adviser as well as an Investment Manager. This is usually the case where the Investment Adviser is not fully authorised by the FCA and must work under an Appointed Representative Agreement, making use of a third party's regulatory status.
Legal Counsel	The Legal Counsel's main responsibility is to advise the fund manager on selecting the most suitable structure and jurisdiction for the fund and on preparing all the fund documentation in compliance with the applicable law and regulation. They will also be expected to liaise with local legal counsel who will set up the fund in the chosen jurisdiction.
Fund Administrator	The Fund Administrator is responsible for calculating the fund's Net Asset Value ( <b>NAV</b> ), as well as the fund's subscriptions, redemptions and any relevant fees.
Custodian	The Custodian is a legally separate entity appointed to safeguard the fund's assets.
Depositary	The Depositary's principal duties under AIFMD are threefold: safeguarding of assets; cash monitoring; and general oversight of the fund. This means that the Depositary acts as both a Custodian of the fund's investments as well as monitoring the fund's activities. It is not uncommon for the role of the Depositary and of the Administrator to be provided the same organisation.
Fund Auditor	Audits the annual accounts of the fund once these have been prepared by the Fund Administrator and approved by the fund's board of directors or general partner.
Appointed Representative	To speed up the process of becoming fully authorised and regulated by the FCA (which can be a lengthy process) an Appointed Representative arrangement can enable an investment adviser to work under the temporary regulatory coverage of a principal.
Capital Introduction	Their principal role will be to source prospective investors and to subsequently introduce them to the fund manager.

# Key documents

Establishing any fund entails a number of important legal documents. Set out below are some of the most important and most commonly required documents.

Document	Description
Offering Memorandum/ Private Placement Memorandum	This is the fund's most important marketing document and contains absolutely all there is to know about the fund. It includes information on, among many other things, the fund's structure, its domicile, investment objectives and policy, any investment restrictions it might have, fees and risks, as well as information on the fund's management team and service providers.
Governing Document	A fund can take one of a variety of legal forms, such as a limited company or a limited partnership. The governing documents will differ depending on this legal form. For example, a limited company will entail Articles of Association, whereas a limited partnership will entail a Limited Partnership Agreement.
Management Agreement	This agreement, if applicable, is entered into between the fund and its offshore manager. The offshore manager will then delegate many of its powers and responsibilities to the Investment Manager through the Investment Management Agreement.
Investment Management Agreement ("IMA")	This agreement is entered into between the fund and the investment manager and, if applicable, the offshore manager. It details the investment manager's duties and responsibilities, their remuneration (usually through management fees and in some cases performance fees) and the circumstances that can lead to their termination.
Investment Advisory Agreement	This agreement, where applicable, is entered into between the investment manager and the investment adviser. It details any duties delegated to the investment adviser, their remuneration and the circumstances that can lead to their termination.
Administration Agreement	This agreement details the terms upon which the Fund Administrator will provide services to the fund.
Subscription Agreement	This agreement is entered into by the fund and the fund's investors and governs their relationship. Investors' confirm that they have understood all the risks of making an investment, agree to be bound by the fund's terms and provide key information about themselves.
Depository Agreement	This agreement details the terms upon which the depository will provide services to the fund.
Custodian Agreement	This agreement details the terms upon which the custodian will provide services to the fund.
Side Letter	A side letter is an agreement that is supplementary to/modifies the terms of the fund's prospectus, subscription agreement or constitutional documents. Usually a side letter will be used to grant certain key investors' more favourable terms. AIFMD requires fund managers to disclose details of side letters that have been entered into.



# Jurisdiction

## European and non-European domiciles

Another key decision first-time fund managers must make is choosing where in the world to domicile the fund or – in the case of start-ups structured as a Master-Feeder – the funds plural. As was the case with fund structures, there are a number of different European and non-European jurisdictions to choose from. When making this decision factors such as investor location and preference, alongside where the manager intends to market the fund, should be considered. This guide outlines the most widely used cryptoasset fund jurisdiction we typically see: the Cayman Islands.

At this stage it is important to note that Cayman domiciled funds cannot currently qualify under the EU's AIFMD for an EU "passport", which is a mechanism reserved for EU domiciled funds allowing easier access to EU member states, however, the status quo regarding the EU passport is under review.

## The Cayman Islands

Crypto-asset funds are in our experience typically domiciled in the Cayman Islands because they offer an attractive combination of tax and regulatory efficiency within a common law legal system. Around 50% of all hedge funds are launched in the Cayman Islands, and consequently investors from Europe and the United States are familiar with local laws and structures. It also means that service providers are attracted to the jurisdiction, which in turn has helped to lower operating expenses due to resulting competition amongst directors, corporate secretarial services and others.

The tax efficiency is given by the fact there is no income tax, corporation tax or capital gains tax, estate duty, inheritance tax, gift tax or with-holding tax, nor are the Cayman Islands party to any double taxation treaty with another country. Taxation occurs at the investor level, rather than at that of the Feeder funds.

## Launching a fund in the Cayman Islands

The launch process in the Cayman Islands is stripped-down when compared with other jurisdictions. Only some types of AIF are regulated by the Cayman Islands Monetary Authority (**CIMA**). Closed-ended funds are not subject to regulation at all, whereas only some open-ended funds are subject to regulation. Open-ended funds that do not fall under the definition of an exempted fund may be regulated under the Mutual Funds Law. A fund may be a registered mutual fund, licensed mutual fund or administered mutual fund. Registered funds must file their offering memorandum and certain other documentation with CIMA. Crucially there is no requirement for approval of the offering memorandum, which would otherwise slow down the launch process.

# Understanding the asset class

## Classification

It is vital to understand crypto-assets in order to successfully invest into them. We pioneered the first functional classification system, described in *Developing a cryptocurrency assessment framework: function over form* by A Burnie, J, Burnie and A Henderson (2018). This system is based on empirical analysis, splitting cryptoassets based on their functionality into three categories: crypto-transaction tokens; crypto-voucher tokens; and crypto-fuel tokens. Since then, other classifications (by the Financial Conduct Authority, EBA and ESMA) have taken a similar approach.

### Crypto-Transaction Tokens

Crypto-transaction tokens, such as bitcoin, constitute a means of transferring value. Their value is linked to the network of users utilising them. For example, the more merchants that accept a crypto-transaction token, the more useful it is as a means of making payment, and so the greater the value of that token. This category is also delineated by the EBA and ESMA (referring to payment tokens) and the FCA's (referring to exchange tokens).

### Crypto-Voucher Tokens

Crypto-voucher tokens are cryptoassets which carry rights linked to underlying assets. The nature of the underlying asset could be anything; for example, equity, bonds or data storage space. The token's value derives from the underlying asset, and the rights in that asset, which the token gives the holder. The EBA, ESMA and the FCA refer to utility tokens, which are commonly agreed as being vouchers enabling access to a product or service, or investment tokens or security tokens, where they relate to securities.

### Crypto-Fuel Tokens

Crypto-fuel tokens, such as ERC-20, form the basis for developing applications. For example, a crypto-voucher token may be built to the ERC-20 technical standard, and included within this is the Ethereum platform which gives smart contract capability. The regulators do not, however, identify this type of token, which falls outside their classifications.

The below gives an overview of the different cryptoasset types set out above:

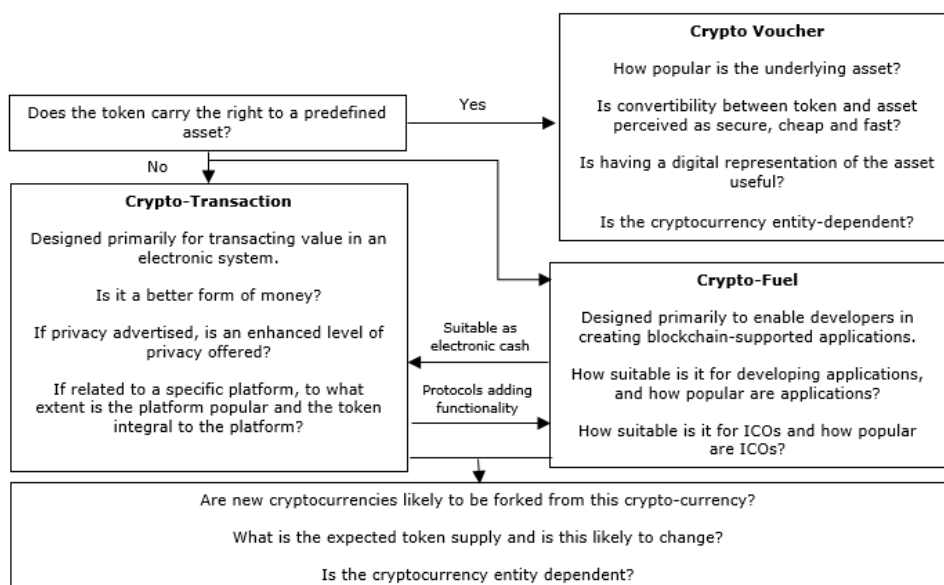


Fig. 1. Assessment framework for cryptocurrencies (*Developing a cryptocurrency assessment framework: function over form* by A Burnie, J, Burnie and A Henderson (2018)).

# Our credentials

*"Financial institutions expert Andrew Henderson acted for the Centre for Citizenship, Enterprise and Governance on its £5m ICO, and advised HSBC, WealthKernel and TAM Asset Management on robo-advice matters. Henderson and Ronald Paterson assisted Nivaura with obtaining regulatory authorisation for its new blockchain concept to automate bond trading ... Associate James Burnie is also recommended."*

**Financial Technology, Legal 500, 2019**

*"Ben Watford is truly the leader in the Alternative Asset Management space. He continues to provide us with the most innovative advice and cutting edge legal work. The "can do" attitude with the Special Forces atmosphere distinguishes Ben and his team from all other major law firms. Ben simply understands the alternative asset management space, and knows the eco system inside and out, and provided us with a complete holistic solution to fit all our needs. Having worked with many top law firms globally, I would chose Ben and his team over any other shop out there."*

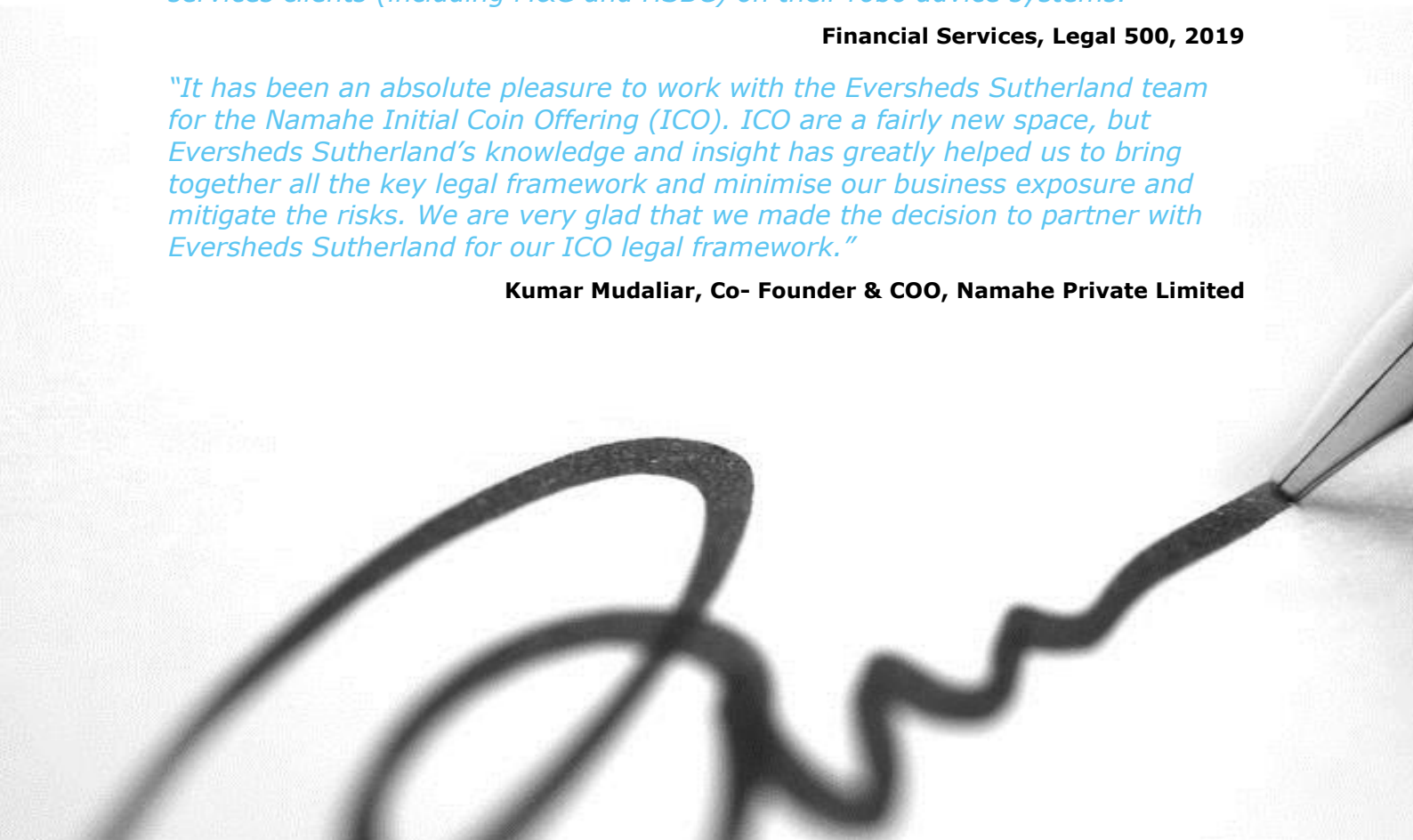
**Omer Granit, West 4 Capital Management**

*"Although the scope of his regulatory work is wide ranging, Andrew Henderson has been at the forefront of the most significant FinTech work including advising on initial coin offerings (including KodakCoin) and assisting numerous financial services clients (including M&G and HSBC) on their robo advice systems."*

**Financial Services, Legal 500, 2019**

*"It has been an absolute pleasure to work with the Eversheds Sutherland team for the Namahe Initial Coin Offering (ICO). ICO are a fairly new space, but Eversheds Sutherland's knowledge and insight has greatly helped us to bring together all the key legal framework and minimise our business exposure and mitigate the risks. We are very glad that we made the decision to partner with Eversheds Sutherland for our ICO legal framework."*

**Kumar Mudaliar, Co- Founder & COO, Namahe Private Limited**



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*"Ben Watford was the partner in charge when we instructed his firm to oversee the set-up of our Cryptocurrency Hedge Fund. He was diligent, always made himself available and delivered a highly professional service. He was respected by and managed his team well and was fair and transparent about his fees."*

**Charlie Forrest (Partner) and Edward Fricker (Partner), Babbage Capital LLP**

*"From day one, Andrew and James welcomed us and our different ideas with open arms and open minds. Every step of the way they have provided us with high-quality guidance and in some instances a word of caution. But most importantly, they armed us with the confidence we needed to conquer grey areas of law and regulation, a quality indispensable to spearheading major innovations ... Lastly, a word on their open-mind and pragmatism. Compliance and regulation is often shrouded in the most risk-averse interpretation of rules and the proliferation of industry norms. My biggest reassurance from working with Eversheds-Sunderland to solve complicated problems is that the conclusions we draw are guided purely by reason and knowledge."*

*"Thanks again for being there for us from day one. To many more years working together!"*

**Karan Shanmugarajah (CEO) and Yannick Brunner (Co-Founder), WealthKernel**

*"The best thing about working with Ben and the team is that you really feel like they're on your side – and there's nothing quite like having a bunch of sharp lawyers fighting your corner."*

**Jari Habib (COO), Westbeck Capital**

*"In my opinion, without exception, the work is absolutely top quality. We have all the confidence in the world in Eversheds Sutherland."*

**Client quote – Chambers, 2017**



# Contacts

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Ben is a Partner in the London office of Eversheds Sutherland and leads the Hedge Fund practice. Ben previously lead the London office investment funds team at a "top 3" investment fund firm.

Ben has been voted as a "leading lawyer" and "Rising Star" in the Legal 500 and won 5 industry awards and led over 30 fund launches over the last 3 years.

Ben's practice focuses on the establishment of hedge and other alternative investment funds and advising investors and other service providers to such funds.

Ben has worked on a wide range alternative investment funds for fund managers, family offices, sovereign investors and entrepreneurs including credit, event driven, special situations, global macro, crypto emerging markets, long/short equity, quantitative, multi-strategy, fund of funds, commodities and real estate. Such funds have been domiciled in various jurisdictions including the Cayman Islands, Ireland, Luxembourg, Channel Islands, BVI, Malta, UK and the US.

Ben also has considerable experience in regulatory matters including the EU Alternative Investment Fund Managers Directive, the Financial Services and Markets Act and FCA authorisations and related regulatory matters.

Ben is committed to providing an integrated and high quality service to all of his clients, in a cost effective and highly responsive way. He will act as your primary point of contact on all legal matters.



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Andrew is a partner in our financial services group with over 19 years' experience as a financial regulatory lawyer. He leads our non-contentious financial regulation practice and our crypto-assets group. He is recommended for financial services in the IFLR 1000, Chambers & Partners, and Legal 500, where he is also recommended in the financial technology and Brexit categories.

In addition to his general UK and financial regulatory and financial technology practice, Andrew is a leading crypto-asset practitioner having led the teams guiding blockchain businesses, Nivaaura, Resonance X, 2030 and Finequia through the FCA 'sandbox'; led the team on acting for the Centre for Citizenship and Enterprise in the first successful ICO in the UK (the Seratio coin); advised 2030, BNP Paribas, Finequia, Funderbeam, Kinesis, MakerDao and Northern Trust on the legal and regulatory



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treatment of cryptoassets and the rules and governance requirements that apply to those assets and the businesses that hold, market, manage or provide other services in connection with them.

Andrew is also a leading client assets, client money and custody regulatory lawyer, having acted as for over twenty-five financial institutions on the implementation of the revised UK FCA Client Assets Sourcebook (CASS), doing ongoing CASS advisory work and agreement review work, advising on custody and sub-custody structures, advising on the transfer of client assets (including advice on dormant assets and "gone-aways"), acting as an FCA 'skilled person' leading a review of a firm's processes for holding client money and contracts for differences, and helping defend Barclays Bank in the FCA enforcement action in 2014 for breaches of the CASS Custody Rules. In 2018, he chaired the Legal Experts Group supporting the Dormant Assets Commission making recommendations for reforming the law on the return of financial assets held by custodians, banks and depositaries, and was also seconded in 2011 to the Secretariat to the Bank of England Financial Markets Law Committee examining law reform in light of the Lehman Brothers collapse.

Andrew spent one and half years on secondment to the UK Financial Services Authority and to the compliance department of an international investment bank. He has contributed to various financial services publications, including co-authored articles in the Butterworths Journal of International Banking and Financial Law (2018/19) on cryptoassets and the UK Chapter in The Financial Technology Review (2018). Andrew was a college law lecturer at the University of Cambridge where he obtained a PhD in public law.

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Ronald is a partner in our financial institutions group and is the managing partner of our office in Luxembourg. He has extensive experience of advising the fund management industry and led Eversheds' advice on the EU Alternative Investment Fund Managers Directive (AIFMD) and co-leads the team advising on the implementation of the Markets in Financial Instruments Directive (MiFID II) and the Markets in Financial Instruments Regulation (MiFIR).



Ronald has a long track record of helping fund managers to launch innovative funds and to set up new businesses. He has experience of setting up funds to invest in a wide range of asset classes including quoted securities, direct private equity investments, private equity funds, hedge fund strategies, structured products and real estate. He regularly advises investors in venture capital funds, private equity funds and hedge funds. In addition he has extensive experience of corporate finance, mergers and acquisitions, joint ventures and corporate governance.

He is ranked by Chambers Directory of the Legal Profession which commends him for "his vast experience, strong technical ability and good common-sense problem-solving skills" and by Legal 500 for displaying "good knowledge and business sense."

Ronald is a former member of the Technical Committee of the Association of Investment Companies, a member of its working party on the Alternative Investment Fund Managers' Directive and a former non-executive director of British & American Investment Trust PLC.

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James is an associate in our financial institutions group specialising in UK and EU financial services regulation as well as FinTech. He is a member of our award winning cryptoassets group, which was "Highly Commended" at the Financial Times Innovative Lawyers Europe awards 2019, and runner up for the Banking and Finance Team of the Year with the British Legal Awards (Legal Week).



He advises financial institutions on all aspects of EU and UK financial regulation. This includes advisory, project and transactional work in connection with the Markets in Financial Instruments Directive (including MiFID II implementation), the FCA Handbook and PRA Rulebook (including advice on capital instruments), the Second Payment Services Directive (including scope issues) as well as passporting, authorisation and conduct of business issues more generally.

James' experience includes:

- advising a blockchain solutions business on becoming one of the first entities in the UK to become authorised as a blockchain business: this involved assisting with dealing with the FCA through the sandbox, as well as determining the position of the firm within the UK regulatory regime
  - advising on crypto-currencies and tokenisation using blockchain
  - advising on automated advice solutions, including advising a high street bank and a specialist automated advice FinTech start-up
  - advising on the acquisition of a FinTech company that matches small businesses with financial products via automated services
  - advising two firms in the FCA sandbox
  - advising a high street UK bank with a financial management App, interlinking accounts and using algorithms to influence saving behaviours: including assisting with drafting terms & conditions, and dealing with potential client money implications arising from using the App
  - advising on the first successful UK Initial Coin Offering James regularly lectures on FinTech, has been selected to co-author the RegTech book, whose authorship is crowd-sourced through a voting process, and published on blockchain with the Journal of International Banking and Financial Law. He has a specialist corporate and commercial LLM from the London School of Economics, where he specialised in Information Technology and the Law. James is currently a lecturer with the FINTECH Circle Institute, and publishes on FinTech matters, including with the Journal of International Banking and Financial Law.
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