

2013 No. 1797

FINANCIAL SERVICES AND MARKETS

**The Alternative Investment Fund Managers (Amendment)
Regulations 2013**

Made - - - - *17th July 2013*

Laid before Parliament *18th July 2013*

Coming into force in accordance with regulation 1

The Treasury are a government department designated(a) for the purposes of section 2(2) of the European Communities Act 1972(b) in relation to financial services.

The Treasury make these Regulations in exercise of the powers conferred on them under section 2(2) of the European Communities Act 1972 and paragraphs 13(1)(b) and 22 of Schedule 3 to the Financial Services and Markets Act 2000(c).

Citation and commencement

1.—(1) These Regulations may be cited as the Alternative Investment Fund Managers (Amendment) Regulations 2013.

(2) This regulation and regulations 2 (interpretation) and 6 (consultation on rules made for the purposes of Article 35 or 37 to 41 of the directive) come into force on 22nd July 2013.

(3) Regulation 3 and Schedule 1 (amendments to legislation that implement Articles 35 and 37 to 41 of the directive) come into force on the date specified by the delegated act adopted by the European Commission pursuant to Article 67.6 of the directive as the date when the rules set out in Articles 35 and 37 to 41 of the directive become applicable.

(4) Regulation 4 and Schedule 2 (amendments to legislation that come into force on termination of Articles 36 and 42 of the directive) come into force on the date specified by the delegated act adopted by the European Commission pursuant to Article 68.6 of the directive as the date when the national regimes set out in Articles 36 and 42 of the directive are to be terminated.

(5) Regulation 5 (amendments to Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001) comes into force immediately after the principal regulations come into force.

(a) S.I. 2012/1759

(b) 1972 c. 68. Section 2(2) was amended by section 27(1)(a) of the Legislative and Regulatory Reform Act 2006 (c. 51) and the European Union (Amendment) Act 2008 (c.7), Schedule, Part 1. By virtue of the amendment of section 1(2) by section 1 of the European Economic Area Act 1993 (c.51) regulations may be made under section 2(2) of the European Communities Act to implement obligations of the United Kingdom created or arising by or under the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 (Cm 2073) and the Protocol adjusting the Agreement signed at Brussels on 17th March 1993 (Cm 2183)

(c) 2000 c. 8. Section 417(1) provides that “prescribed” means prescribed in regulations made by the Treasury. Paragraph 13(1)(b) of Schedule 3 was amended by S.I. 2007/126 and paragraph 22 of Schedule 3 was amended by the Financial Services Act 2012 (c. 21)

Interpretation

2. In these Regulations—

“the Act” means the Financial Services and Markets Act 2000;

“the directive” means Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers(a);

“the FCA” means the Financial Conduct Authority;

“the PRA” means the Prudential Regulation Authority;

“the principal regulations” means the Alternative Investment Fund Managers Regulations 2013(b);

“the Regulated Activities Order” means the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001(c);

“rule” means a rule made by the FCA or the PRA under the Act.

Amendments to legislation that implement Articles 35 and 37 to 41 of the directive

3. Schedule 1, which contains amendments to the Act and the principal regulations, has effect.

Amendments to legislation that come into force on termination of Articles 36 and 42 of the directive

4. Schedule 2, which contains further amendments to the Act and the principal regulations, amendments to the Regulated Activities Order, and related transitional provisions, has effect.

Amendments to Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001

5. In the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001(d)—

(a) in regulation 2(6) (establishment of a branch: contents of consent notice) after subparagraph (a) insert—

“(aa) particulars of the programme of operations to be carried on through the branch, including a description of the particular EEA activities to be carried on;”, and

(b) in regulation 17A(1) (full-scope UK AIFM: changes to branch details or services) for “2(6)(b) to (e)” substitute “2(6)(aa) to (e)”.

Consultation on rules made for the purposes of Article 35 or 37 to 41 of the directive

6.—(1) Before the date on which the European Commission adopts a delegated act pursuant to Article 67.6 of the directive specifying the date when the rules set out in Articles 35 and 37 to 41 of the directive become applicable, the FCA or the PRA may make rules for the purpose of implementing any provision of Article 21.5(b), 21.6, 35 or 37 to 41 of the directive without complying with sections 138I to 138L of the Act (consultation)(e).

(2) Paragraph (3) applies in relation to rules that, as a result of paragraph (1), are made by the FCA or the PRA without complying with sections 138I to 138L of the Act, but does not apply in relation to rules that are revoked before they come into force.

(3) After the rules are made, sections 138I to 138L of the Act apply in respect of those rules with the modifications set out in paragraphs (4) to (7).

(a) OJ L 174, 1.7.2011, p.1

(b) S.I. 2013/1773.

(c) S.I. 2001/544

(d) S.I. 2001/2511. Regulations 2(6) and 17A inserted by the principal regulations

(e) Inserted by section 24 of the Financial Services Act 2012 (c. 21)

- (4) Section 138I of the Act has effect as if—
- (a) in subsection (1)—
 - (i) in the opening words for “Before making any rules” there were substituted “Before any rules made by the FCA come into force”, and
 - (ii) in paragraph (b) for “a draft of the proposed rules” there were substituted “the rules”,
 - (b) in subsection (2)—
 - (i) in the opening words for “draft” there were substituted “rules”,
 - (ii) in paragraphs (b) and (d) “proposed” were omitted, and
 - (iii) in paragraph (e) for “proposals” there were substituted “rules”,
 - (c) for subsection (3) there were substituted—

“(3) The FCA must have regard to any representations made to it in accordance with subsection (2)(e) and must consider whether to amend the rules before they come into force.”,
 - (d) in subsection (4) for “If the FCA makes the proposed rules, it” there were substituted “The FCA”,
 - (e) in subsection (5) for “If the rules differ from the draft” there were substituted “If the rules that come into force differ from the rules”,
 - (f) for subsection (7)(a) there were substituted—
 - “(a) an analysis of the costs together with an analysis of the benefits that would arise—
 - (i) if the rules came into force as published under subsection (1)(b), or
 - (ii) if subsection (5) applies, from the rules as amended, and”, and
 - (g) in subsection (9) for “a draft” there were substituted “rules”.
- (5) Section 138J of the Act has effect as if—
- (a) in subsection (1)—
 - (i) in the opening words for “Before making any rules” there were substituted “Before any rules made by the PRA come into force”, and
 - (ii) in paragraph (b) for “a draft of the proposed rules” there were substituted “the rules”,
 - (b) in subsection (2)—
 - (i) in the opening words for “draft” there were substituted “rules”,
 - (ii) in paragraphs (b) and (d) “proposed” were omitted, and
 - (iii) in paragraph (e) for “proposals” there were substituted “rules”,
 - (c) for subsection (3) there were substituted—

“(3) The PRA must have regard to any representations made to it in accordance with subsection (2)(e) and must consider whether to amend the rules before they come into force.”,
 - (d) in subsection (4) for “If the PRA makes the proposed rules, it” there were substituted “The PRA”,
 - (e) in subsection (5) for “If the rules differ from the draft” there were substituted “If the rules that come into force differ from the rules”,
 - (f) for subsection (7)(a) there were substituted—
 - “(a) an analysis of the costs together with an analysis of the benefits that would arise—
 - (i) if the rules came into force as published under subsection (1)(b), or
 - (ii) if subsection (5) applies, from the rules as amended, and”, and
 - (g) in subsection (9) for “a draft” there were substituted “rules”.
- (6) Section 138K of the Act has effect as if—

- (a) in subsection (1) for “proposes to make a rule (“the proposed rule”) which would apply” there were substituted “makes a rule which applies”,
 - (b) in subsection (2)(a) “proposed” were omitted,
 - (c) in the opening words of subsection (3) for “a regulator makes a rule” there were substituted “a rule comes into force”,
 - (d) in subsection (3)(b) “draft of the proposed” were omitted, and
 - (e) in subsection (4)(a) for “the impact of the rule is significantly different from the impact of the proposed rule” there were substituted “the impact of the rule as it comes into force is significantly different from the impact of the rule published under section 138I(1)(b) or 138J(1)(b) (as the case may be)”.
- (7) Section 138L(5) of the Act has effect as if—
- (a) in paragraph (a) for “the overall position if the rules are made and the overall position if the rules are not made” there were substituted “the overall position if the rules come into force as published under section 138I(1)(b) or 138J(1)(b) (as the case may be) and the overall position if the rules are amended before coming into force”, and
 - (b) in paragraph (b) for “the overall position after the making of the rules and the overall position before they were made” there were substituted “the overall position after any amendment of the rules and the overall position before any such amendment”.

Desmond Swayne
Robert Goodwill

Two of the Lords Commissioners of Her Majesty’s Treasury

17th July 2013

SCHEDULE 1

Regulation 3

Amendments to legislation that implement Articles 35 and 37 to 41 of the directive

Amendments to the Act

1.—(1) The Act is amended as follows.

(2) In section 55V(8) (determination of applications)(a) for “regulation 5” insert “regulations 5 and 5A”.

(3) In section 195A(12) (contravention by relevant EEA firm or EEA UCITS of directive requirements: home state regulator primarily responsible for securing compliance)(b), in the definition of “home state”, in paragraph (c) for “has its registered office” substitute “is authorised in accordance with the alternative investment fund managers directive”.

(4) In section 418 (carrying on regulated activities in the United Kingdom)(c)—

(a) in subsection (1) for “five” substitute “six”,

(b) after subsection (5A) insert—

“(5B) The sixth case is where—

(a) the regulated activity being carried on by the person is the regulated activity of managing an AIF,

(b) the AIF being managed—

(i) has its registered office in an EEA State, or

(ii) is marketed in an EEA State,

(c) if the AIF being managed is marketed in an EEA State, it is marketed otherwise than in accordance with provisions made under Article 42 of the alternative investment fund managers directive,

(d) the person does not have a registered office in an EEA State, and

(e) the person’s Member State of reference (as defined in Article 4.1(z) of the alternative investment fund managers directive), or the state that would be the person’s Member State of reference if the person were required to be authorised in accordance with Article 37 of the alternative investment fund managers directive, is the United Kingdom.

(5C) In subsection (5B) “marketed” is to be read in accordance with the definition of “marketing” in Article 4.1(x) of the alternative investment fund managers directive.”, and

(c) in subsection (6) for “(5A)” substitute “(5B)”.

(5) In Schedule 3 (EEA passport rights)—

(a) in paragraph 5(h) (EEA firm)(d) omit “Article 6.1 of”,

(b) in paragraph 7A(aa) (EEA right: meaning of “relevant office”)(e) for paragraph (aa) substitute—

“(aa) in relation to a person whose entitlement is subject to the conditions of the alternative investment fund managers directive—

(a) Section 55V was inserted by section 11 of the Financial Services Act 2012 (c.21) and amended by the principal regulations
(b) Inserted by S.I. 2007/126, substituted by S.I. 2011/1613 and amended by paragraph 35 of Schedule 4 to the Financial Services Act 2012, S.I. 2012/916 and the principal regulations
(c) Amended by S.I. 2002/1775 and S.I. 2012/1906
(d) Inserted by the principal regulations
(e) Inserted by S.I. 2003/1473 and amended by the principal regulations

- (i) if the person’s registered office is in an EEA State, its registered office;
- (ii) if the person’s registered office is not in an EEA State, the registered office or branch of its legal representative (as defined in Article 4(1)(u) of the alternative investment fund managers directive);”,
- (c) in paragraph 10A(aa) (UK firm: meaning of “relevant office”)(a) for paragraph (aa) substitute—
 - “(aa) in relation to a firm whose EEA right derives from the alternative investment fund managers directive—
 - (i) if the firm’s registered office is in an EEA State, its registered office;
 - (ii) if the firm’s registered office is not in an EEA State, the registered office or branch of its legal representative (as defined in Article 4(1)(u) of the alternative investment fund managers directive);”,
- (d) in paragraph 14(3A) (services)(b) after “Article 32” insert “, 35, 39 or 40”,
- (e) in paragraph 19(7BB)(b) (establishment)(c) omit “Article 6.1 of”,
- (f) in paragraph 20(3D)(a)(ii) (services)(d) omit “Article 6.1 of”, and
- (g) in paragraph 20C (notice of intention to market an AIF)(e)—
 - (i) in sub-paragraph (1) for “a UK AIF or EEA AIF” substitute “an AIF”,
 - (ii) for sub-paragraph (5)(b) substitute—
 - “(b) if the AIF is a third country AIF or a third country feeder AIF—
 - (i) appropriate co-operation arrangements are in place between the FCA and the supervisory authorities of the relevant third country in order to ensure an efficient exchange of information that allows the FCA to carry out its duties in accordance with the alternative investment fund managers directive,
 - (ii) the relevant third country is not listed as a Non-Cooperative Country and Territory by the Financial Action Task Force,
 - (iii) the relevant third country has signed an agreement with the United Kingdom and with each other EEA State in which the units or shares of the AIF are intended to be marketed, and
 - (iv) the agreement fully complies with the standards laid down in Article 26 of the Organisation for Economic Co-operation and Development’s Model Tax Convention on Income and on Capital 2010(f) and ensures an effective exchange of information on tax matters, including any multilateral tax agreements.”, and
 - (iii) in sub-paragraph (12), in the appropriate places insert the following definitions—
 - ““relevant third country” means—
 - (a) in relation to a third country AIF, the country in which the AIF is authorised or registered or, if the AIF is not authorised or registered, the country in which it has its registered office;
 - (b) in relation to a third country feeder AIF, the country in which the master AIF is authorised or registered or, if the master AIF is not authorised or registered, the country in which it has its registered office;
 - “third country AIF” has the meaning given in regulation 2 of the Alternative Investment Fund Managers Regulations 2013;

(a) Inserted by S.I. 2003/1473 and amended by the principal regulations
 (b) Inserted by the principal regulations
 (c) Inserted by the principal regulations
 (d) Inserted by the principal regulations
 (e) Inserted by the principal regulations
 (f) ISBN 978-92-64-17517-4

“third country feeder AIF” has the meaning given in regulation 2 of the Alternative Investment Fund Managers Regulations 2013;

“third country AIFM” has the meaning given in regulation 2 of the Alternative Investment Fund Managers Regulations 2013.”.

(6) In paragraph 2B of Schedule 6 (threshold conditions - location of offices)(a), in sub-paragraph (7), for “a full-scope UK AIFM, A’s head office and registered office must be in the United Kingdom” substitute—

“a full-scope UK AIFM—

- (a) A’s head office and registered office must be in the United Kingdom, or
- (b) A’s registered office must be in a country that is not an EEA State.”.

Amendments to the principal regulations

2.—(1) The principal regulations are amended as follows.

(2) In regulation 2(1) (interpretation)—

- (a) in the definition of “external valuer” after “full-scope UK AIFM” insert “other than an AIF that is marketed only pursuant to provisions implementing Article 42 of the directive”,
- (b) in the definition of “full-scope EEA AIFM” omit “Article 6.1 of”,
- (c) in the definition of “small registered EEA AIFM”—
 - (i) omit sub-paragraph (b), and
 - (ii) in sub-paragraph (c), after “Article 3.3(a) of the directive” insert “in an EEA State other than the United Kingdom”,
- (d) in the definition of “small third country AIFM” at the end insert “and which has not exercised the option mentioned in Article 3.4 of the directive to meet the full requirements of the directive”,
- (e) at the appropriate place insert—
 - ““third country feeder AIF” means a UK AIF or EEA AIF that—
 - (a) is managed by an AIFM with its registered office in an EEA State, and
 - (b) is a feeder AIF whose the master AIF is a third country AIF or is managed by a third country AIFM;”, and
- (f) for the definition of “UK AIFM” substitute—
 - ““UK AIFM” means an AIFM that—
 - (a) has its registered office in the United Kingdom,
 - (b) has its registered office in a third country, and has the United Kingdom as its Member State of reference, or
 - (c) has its registered office in a third country, and would have the United Kingdom as its Member State of reference if it were required to be authorised in accordance with Article 37 of the directive;”.

(3) At the end of regulation 2 insert—

“(4) Any reference in these Regulations to cancellation of a Part 4A permission to carry on the regulated activity of managing an AIF includes reference to the variation of a Part 4A permission to remove the regulated activity of managing an AIF from those activities to which the permission relates.”.

(4) In regulation 5 (applications for Part 4A permission)—

(a) Paragraph 2B was substituted by S.I. 2013/555 and sub-paragraph (7) was inserted by the principal regulations

- (a) in paragraph (1) for “applies” in the first place it appears substitute “and regulation 5A apply”,
 - (b) in paragraph (3)(b) for “the regulator” substitute “subject to regulation 5A(4), the regulator”,
 - (c) in paragraph (4) for “The regulator” substitute “Subject to regulation 5A(5), the regulator”,
 - (d) in paragraph (7) for “If the regulator” substitute “Subject to regulation 5A(5), if the regulator”, and
 - (e) in paragraph (8) for “An application” substitute “Subject to regulation 5A(6), an application”.
- (5) After regulation 5 insert—

“Applications by AIFMs from third countries

5A. —(1) Paragraph (2) applies where—

- (a) a person whose registered office is in a third country intends to become authorised under the directive in an EEA State in order to manage or market an AIF in an EEA State;
- (b) there is more than one EEA State that may be the person’s Member State of reference; and
- (c) the United Kingdom is a possible Member State of reference.

(2) The person must submit a request to the FCA and to the competent authority of each other possible Member State of reference to determine its Member State of reference.

(3) In the case of an applicant for Part 4A permission whose registered office is in a third country, the regulator must not give the Part 4A permission unless, in addition to the conditions specified in regulation 5(3) being met—

- (a) the regulator is satisfied that the determination by the applicant that the United Kingdom is its Member State of reference complies with the criteria laid down in Article 37.4 of the directive;
- (b) the applicant has appointed a legal representative who—
 - (i) is the point of contact for the FCA, other competent authorities, ESMA and investors in relation to the AIFs managed or to be managed by the applicant;
 - (ii) is sufficiently equipped to perform the compliance function pursuant to the directive in relation to those AIFs; and
 - (iii) if an individual, is domiciled in the United Kingdom, or if not an individual, has a registered office or a branch in the United Kingdom;
- (c) appropriate co-operation arrangements are in place between the FCA, the competent authority in relation to any EEA AIF managed by the applicant, and the supervisory authorities of the third country in which the applicant has its registered office, in order to ensure an efficient exchange of information that enables the FCA and any other relevant competent authority to carry out their duties in accordance with the directive;
- (d) the third country in which the applicant has its registered office is not listed as a Non-Cooperative Country and Territory by the Financial Action Task Force;
- (e) the third country in which the applicant has its registered office has signed an agreement with the United Kingdom, which fully complies with the standards laid down in Article 26 of the Organisation for Economic Co-operation and Development’s Model Tax Convention on Income and on Capital and ensures an effective exchange of information on tax matters, including any multilateral tax agreements; and

- (f) the effective exercise by the FCA or the competent authority in relation to any EEA AIF managed by the applicant of its supervisory functions under the directive is not prevented by the laws, regulations or administrative provisions of a third country which apply to the applicant, nor by limitations in the supervisory and investigatory powers of that country's supervisory authorities.

(4) Notwithstanding regulation 5(3)(b), the regulator may give the Part 4A permission to an applicant whose registered office is in a third country if the regulator is satisfied that—

- (a) it is impossible for the applicant to comply with an implementing provision applicable to a full-scope UK AIFM which has its registered office in a third country because of a mandatory provision in the law that applies to the applicant or a third country AIF that the applicant intends to market in an EEA State,
- (b) the law that applies to the applicant or the third country AIF provides for a rule that is equivalent to that implementing provision, has the same regulatory purpose as that provision and offers the same level of protection to the investors of the AIFs managed by the applicant or, as the case may be, the investors of that AIF, and
- (c) the applicant or, as the case may be, the AIF complies with that equivalent rule.

(5) Where regulation 8A(3) or (7)(a) applies, when calculating the periods mentioned in regulation 5(4) and (7), the period starting with the date on which the regulator notifies or informs ESMA in accordance with regulation 8A(3) or (7)(a) and ending with the date on which ESMA issues advice under paragraph 5 or 9 of Article 37 of the directive is not to be counted.

(6) In the case of an applicant whose registered office is in a third country, the application is complete if, in addition to containing the information mentioned in regulation 5(8), it contains—

- (a) a justification by the applicant of its assessment regarding the Member State of reference in accordance with the criteria set out in Article 37.4 of the directive, with information on the applicant's marketing strategy;
- (b) a list of any implementing provisions with which it is impossible for the applicant to comply because of a mandatory provision in the law that applies to the applicant or a third country AIF that the applicant intends to market in an EEA State, or confirmation that there are no such provisions;
- (c) if any provision is included in a list provided under sub-paragraph (b), written evidence that—
 - (i) the law that applies to the applicant or the third country AIF provides for a rule that is equivalent to the provision;
 - (ii) the equivalent provision has the same regulatory purpose as the provision included in the list provided under sub-paragraph (b);
 - (iii) the equivalent provision offers the same level of protection to the investors of the AIFs managed by the applicant or, as the case may be, the investors of the third country AIF; and
 - (iv) the applicant or, as the case may be, the third country AIF complies with that equivalent rule, such evidence being based on regulatory standards developed by ESMA;
- (d) if evidence is provided under sub-paragraph (c), a legal opinion in support of the evidence on the existence of the relevant mandatory provision, and a description of the regulatory purpose of and the nature of the investor protection pursued by the equivalent rule;
- (e) the name of the legal representative of the applicant and the place where the legal representative has its registered office or a branch (in the case of a legal person) or where he or she is domiciled (in the case of an individual).”.

(6) For regulation 8 (notification to ESMA) substitute—

“Change of Member State of reference

8.—(1) The FCA must require a full-scope UK AIFM that has its registered office in a third country to indicate to the FCA its Member State of reference based on its actual marketing strategy if—

- (a) it appears from the actual course of the AIFM’s business development in the EEA within a period of 2 years from the date on which it was given Part 4A permission to carry on the regulated activity of managing an AIF that the marketing strategy presented by the AIFM in its application for such Part 4A permission was not followed;
- (b) the AIFM made false statements in relation to its marketing strategy in connection with its application for Part 4A permission; or
- (c) the AIFM changes its marketing strategy without complying with implementing provisions relating to Article 37.11 of the directive.

(2) If an AIFM does not comply with a requirement under paragraph (1), the FCA must cancel the AIFM’s Part 4A permission to carry on the regulated activity of managing an AIF.

(3) Paragraphs (4) to (8) apply where the FCA receives—

- (a) an indication by a full-scope UK AIFM that has its registered office in a third country following a requirement imposed under paragraph (1);
- (b) a notification by a full-scope UK AIFM that has its registered office in a third country under implementing provisions relating to Article 37.11 of the directive; or
- (c) a request by a full-scope UK AIFM that has its registered office in a third country to change its Member State of reference on the basis of a change to its marketing strategy made more than 2 years after the date on which it was given Part 4A permission to carry on the regulated activity of managing an AIF.

(4) The FCA must—

- (a) assess whether the AIFM’s determination of its Member State of reference is correct; and
- (b) notify ESMA of its assessment and provide with that notification—
 - (i) the AIFM’s justification of its determination regarding its Member State of reference; and
 - (ii) information on the AIFM’s new marketing strategy.

(5) After receiving advice issued by ESMA under the third sub-paragraph of Article 37.11 of the directive, the FCA must—

- (a) decide whether the AIFM’s determination of its Member State of reference is correct; and
- (b) inform the AIFM, the AIFM’s original legal representative and ESMA of its decision.

(6) If the AIFM determined that its Member State of reference is an EEA State other than the United Kingdom and the FCA decides that the AIFM’s determination of its Member State of reference is correct, the FCA must—

- (a) inform the competent authority of the new Member State of reference of the change; and
- (b) transfer a copy of the authorisation and the supervision file relating to the AIFM to the competent authority of the new Member State of reference.

(7) On the date on which the FCA transfers the authorisation and the supervision file relating to the AIFM in accordance with paragraph (6)(b), the FCA must cancel the AIFM’s Part 4A permission to carry on the regulated activity of managing an AIF.

(8) If the FCA’s decision under paragraph (5)(a) is contrary to advice issued by ESMA under the third sub-paragraph of Article 37.11 of the directive—

- (a) the FCA must inform ESMA, stating its reasons;
- (b) if the AIFM markets units or shares of an AIF managed by it in an EEA State other than the United Kingdom, the FCA must inform the competent authority of that EEA State, stating its reasons;
- (c) if the AIFM manages an EEA AIF, the FCA must inform the competent authority for that EEA AIF, stating its reasons.

(9) If the authorisation and the supervision file relating to an AIFM is transferred to the FCA by a competent authority under the fifth sub-paragraph of Article 37.11 of the directive, from the date of transmission of the authorisation and the supervision file the AIFM has a Part 4A permission to carry on the regulated activity of managing an AIF.

Other notifications to ESMA

8A.—(1) The FCA must inform ESMA—

- (a) without undue delay, about the outcome of an application for permission under Part 4A of the Act to carry on the regulated activity of managing an AIF from a person whose registered office is in a third country;
- (b) where an application referred to at sub-paragraph (a) is refused, about the applicant and the reasons for the refusal; and
- (c) on a quarterly basis, about—
 - (i) permissions granted under Part 4A of the Act to full-scope UK AIFMs to carry on the regulated activity of managing an AIF;
 - (ii) the cancellation of such permissions; and
 - (iii) the AIFs managed or marketed in EEA States by full-scope UK AIFMs.

(2) Paragraphs (3) and (4) apply where—

- (a) a regulator receives an application for permission under Part 4A of the Act to carry on the regulated activity of managing an AIF from a person whose registered office is in a third country, and
- (b) the regulator assesses that the determination by the applicant that the United Kingdom is its Member State of reference complies with the criteria laid down in Article 37.4 of the directive.

(3) Before determining the application, the regulator must notify ESMA and must, in the notification—

- (a) request advice on the regulator’s assessment of the applicant’s determination of its Member State of reference;
- (b) provide the justification given by the applicant regarding its determination of the Member State of reference; and
- (c) provide information on the applicant’s marketing strategy.

(4) If the regulator proposes to give the permission otherwise than in accordance with advice issued by ESMA under Article 37.5 of the directive, before giving the permission—

- (a) the regulator must inform ESMA, stating its reasons;
- (b) if the applicant intends to market units or shares of an AIF managed by it in an EEA State other than the United Kingdom, the regulator must inform the competent authority of that EEA State, stating its reasons;
- (c) if the applicant manages or intends to manage an EEA AIF, the regulator must inform the competent authority for that EEA AIF, stating its reasons.

(5) Paragraphs (6) and (7) apply where—

- (a) a regulator receives an application for permission under Part 4A of the Act to carry on the regulated activity of managing an AIF from a person whose registered office is in a third country, and

- (b) the regulator is satisfied that the conditions specified in regulation 5A(4) are met (impossible for applicant to comply with implementing provision).
- (6) The regulator must, without undue delay, notify ESMA and provide to ESMA the information mentioned at regulation 5A(6)(b) to (d).
- (7) If the regulator proposes to give the permission contrary to advice issued by ESMA under Article 37.9 of the directive—
- (a) the regulator must inform ESMA, stating its reasons;
 - (b) if the applicant intends to market units or shares of an AIF managed by it in an EEA State other than the United Kingdom, the regulator must inform the competent authority of that EEA State, stating its reasons.
- (8) The FCA must inform ESMA where, in relation to an AIF managed by a full-scope UK AIFM with its registered office in a third country, or a third country AIF or a third country feeder AIF managed by a full-scope UK AIFM with its registered office in the United Kingdom—
- (a) the FCA approves the marketing of the AIF under regulation 54 or sends a copy of a notice of intention in respect of the marketing of the AIF under paragraph 20C of Schedule 3 to the Act;
 - (b) a change is made or planned to information provided by the AIFM under regulation 54(2)(b) in respect of which the FCA has not informed the AIFM under regulation 55(2) and has not required the FCA to take steps under 55(3), and the change results in the termination of the marketing of the AIF or the marketing of an additional AIF; or
 - (c) a change is made or planned in relation to which regulation 17A(8) of the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001 applies, and the change results in the termination of the marketing of the AIF or the marketing of an additional AIF.
- (9) If the FCA considers that a full-scope UK AIFM that has its registered office in a third country is in breach of an obligation under an implementing provision, it must notify ESMA as soon as possible, explaining why it considers the AIFM to be in breach of such obligation.”.
- (7) For regulation 10(2)(c) (small registered UK AIFMs) substitute—
- “(c) either—
- (i) in the case of an AIFM with its registered office in the United Kingdom, grounds do not exist which would permit or require a court to make a disqualification order within the meaning of section 1(1) of the Company Directors Disqualification Act 1986^(a) against an individual responsible for the management or operation of the AIFM; or
 - (ii) in the case of an AIFM with its registered office in a third country, such grounds would not exist if the AIFM were a company incorporated in the United Kingdom.”.
- (8) For regulation 29(1) (depository liability: general provisions) for the words from “in relation to” to the end substitute—
- “in relation to—
- (a) the depository of a UK AIF managed by a full-scope UK AIFM or an EEA AIFM; or
 - (b) the depository of a third country AIF managed by a full-scope UK AIFM if—
 - (i) the depository has its registered office or a branch in the United Kingdom; and

(a) 1986 c. 46. Section 1(1) was amended by section 204(1) and (3) of the Enterprise Act 2002 (c. 40) and section 5(1) of the Insolvency Act 2000 (c. 39)

(ii) the AIF is marketed otherwise than pursuant to provisions implementing Article 36 or Article 42 of the directive.”.

(9) In regulation 33 (management of third country AIFs) after “full-scope UK AIFM” insert “that has its registered office in the United Kingdom”.

(10) In regulation 49 (marketing by full-scope EEA AIFMs of certain AIFs)—

- (a) in the heading omit “of certain AIFs”,
- (b) in the opening words omit “that does not fall within regulation 57(1)”,
- (c) at the end of sub-paragraph (a) omit “or”, and
- (d) after sub-paragraph (b) insert—

“; or

(c) the marketing is permitted under regulation 50.”.

(11) For the table in regulation 50 (marketing by AIFMs of other AIFs) substitute the following table—

<i>“A – AIFM</i>	<i>B – AIF</i>	<i>C – Condition</i>
Full-scope UK AIFM with its registered office in the United Kingdom	An AIF that is not a third country AIF or a third country feeder AIF	The FCA has approved marketing of the AIF in accordance with regulation 54.
Full-scope UK AIFM with its registered office in the United Kingdom	A third country AIF or a third country feeder AIF	The FCA has approved marketing of the AIF in accordance with regulation 54; or the AIFM has notified the FCA in accordance with regulation 57 and meets the conditions at regulation 57(4)(a) to (c), and the FCA has not suspended or revoked the AIFM’s entitlement to market the AIF.
Full-scope UK AIFM with its registered office in a third country	Any AIF	The FCA has approved marketing of the AIF in accordance with regulation 54; or the AIFM has notified the FCA in accordance with regulation 59 and meets the conditions at regulation 59(2)(a) to (e), and the FCA has not suspended or revoked the AIFM’s entitlement to market the AIF.
Full-scope EEA AIFM with its registered office in an EEA State other than the United Kingdom	A third country AIF or a third country feeder AIF	The marketing is permitted under regulation 49; or the AIFM has notified the FCA in accordance with regulation 57 and meets the conditions at regulation 57(4)(a) to (c), and the FCA has not suspended or revoked the AIFM’s entitlement to market the AIF.
Full-scope EEA AIFM with its registered office in a third country	Any AIF	The marketing is permitted under regulation 49; or the AIFM has notified the FCA in accordance with regulation 59 and meets the conditions at regulation 59(2)(a) to (e), and the FCA has not suspended or revoked the AIFM’s entitlement to market the AIF.
Small third country AIFM that is not a	Any AIF	The AIFM is a small registered UK AIFM or a small authorised UK AIFM; or

full-scope UK AIFM or a full-scope EEA AIFM		the AIFM has notified the FCA in accordance with regulation 58 and meets the conditions at regulation 58(2)(a) and (b), and the FCA has not suspended or revoked the AIFM’s entitlement to market the AIF.
Third country AIFM that is not a small AIFM, a full-scope UK AIFM or a full-scope EEA AIFM	Any AIF	The AIFM has notified the FCA in accordance with regulation 59 and meets the conditions at regulation 59(2)(a) to (e), and the FCA has not suspended or revoked the AIFM’s entitlement to market the AIF.”

(12) In regulation 54 (FCA approval for marketing)—

(a) for paragraph (1) substitute—

“(1) This regulation applies to—

- (a) a full-scope UK AIFM seeking to market in the United Kingdom an AIF managed by the AIFM;
- (b) a full-scope EEA AIFM seeking to market in the United Kingdom to retail investors an AIF managed by the AIFM, where the FCA has not received a regulator’s notice in relation to the marketing of the AIF in accordance with Schedule 3 to the Act (EEA passport rights).”, and

(b) after paragraph (8) insert—

“(9) The FCA must refuse an application if satisfied that the AIF is a third country AIF or a third-country feeder AIF and the following conditions are not met—

- (a) appropriate co-operation arrangements are in place between the FCA (or, in the case of an AIF managed by an AIFM with its registered office in an EEA State other than the UK, the competent authority in that EEA State) and the supervisory authorities of the relevant third country in order to ensure an efficient exchange of information that allows the FCA or competent authority to carry out its duties in accordance with the directive;
- (b) the relevant third country is not listed as a Non-Cooperative Country and Territory by the Financial Action Task Force; and
- (c) the relevant third country has signed an agreement with the United Kingdom (or, in the case of an AIF managed by an AIFM with its registered office in an EEA State other than the UK, with that EEA State) and with each other EEA State in which the units or shares of the AIF are intended to be marketed, which fully complies with the standards laid down in Article 26 of the Organisation for Economic Co-operation and Development’s Model Tax Convention on Income and on Capital 2010(a) and ensures an effective exchange of information on tax matters, including any multilateral tax agreements.

(10) In paragraph (9) “relevant third country” means—

- (a) in relation to a third country AIF, the country in which the AIF is authorised or registered or, if the relevant AIF is not authorised or registered, the country in which it has its registered office;
- (b) in relation to a third country feeder AIF, the country in which the AIF’s master AIF is authorised or registered or, if the master AIF is not authorised or registered, the country in which it has its registered office.”.

(13) In regulation 57 (marketing under Article 36 of the directive)—

(a) in paragraph (3) for “must give written notification to the FCA before marketing” substitute “may give written notification to the FCA that it intends to market”, and

- (b) at the beginning of paragraph (5) for “The AIFM” substitute “An AIFM that has given a notification under paragraph (3)”.
- (14) In regulation 58 (marketing of AIFs managed by small third country AIFMs)—
- (a) in paragraph (1) for “must give written notification to the FCA before marketing” substitute “may give written notification to the FCA that it intends to market”, and
 - (b) at the beginning of paragraph (3) for “The AIFM” substitute “An AIFM that has given a notification under paragraph (1)”.
- (15) In regulation 59 (marketing under Article 42 of the directive)—
- (a) in paragraph (1) for “must give written notification to the FCA before marketing” substitute “may give written notification to the FCA that it intends to market”, and
 - (b) after paragraph (4) insert—
 - “(5) Paragraph (6) applies where a full-scope UK AIFM that has its registered office in a third country markets an AIF only—
 - (a) pursuant to a notification under this regulation, or
 - (b) pursuant to provisions in other states implementing Article 42.
- (6) The AIFM need not comply with implementing provisions in respect of the AIF other than as required by this Part.”.

SCHEDULE 2

Regulation 4

Amendments to legislation that come into force on termination of Articles 36 and 42 of the directive

PART 1

Amendments to legislation

Amendment to the Act

1. In section 418(5B) of the Act (carrying on regulated activities in the United Kingdom)(a), omit paragraph (c).

Amendment to the Regulated Activities Order

2. In Schedule 8 to the Regulated Activities Order (persons excluded from regulated activity of managing an AIF), omit paragraph 11(b).

Amendments to the principal regulations

3.—(1) The principal regulations(c) are amended as follows.

(2) In regulation 2(1) (interpretation)—

(a) in the definition of “external valuer” omit “other than an AIF that is marketed only pursuant to provisions implementing Article 42 of the directive”.

(3) For regulation 29(1)(b) (depository liability: general provisions) substitute—

“(b) the depository of a third country AIF managed by a full-scope UK AIFM, if the depository has its registered office or a branch in the United Kingdom.”.

(4) For regulation 34 (introductory provision) substitute—

“Introductory provision

34. In this Part, a reference to an AIFM is to a full-scope UK AIFM.”.

(5) In regulation 49 (marketing by full-scope EEA AIFMs)—

(a) after paragraph (a) insert “or”,

(b) after paragraph (b) omit “or”, and

(c) omit paragraph (c).

(6) For regulation 50 (marketing by AIFMs of other AIFs), substitute—

“Marketing by full-scope UK AIFMs

50. A full-scope UK AIFM may not market an AIF in the United Kingdom unless the FCA has approved the marketing in accordance with regulation 54.”.

(7) For regulation 56 (suspension or revocation of approval granted to a full-scope EEA AIFM) substitute—

(a) Inserted by paragraph 1 of Schedule 1 to these Regulations

(b) Inserted by paragraph 1(17) of Schedule 2 to the principal regulations and amended by regulation 81 of the principal regulations

(c) Amended by paragraph 2 of Schedule 1 to these Regulations

“Suspension or revocation of approval granted to a full-scope EEA AIFM

56. Regulations 56A to 56C apply where the FCA has approved marketing by a full-scope EEA AIFM under regulation 54.

Revocation of approval to market

56A.—(1) The FCA may revoke the AIFM’s approval to market an AIF if it appears to the FCA that—

- (a) the AIFM has contravened an implementing provision;
- (b) the AIFM has, in purported compliance with an implementing provision, knowingly or recklessly given the FCA information which is false or misleading in a material particular;
- (c) the AIF has been wound up; or
- (d) none of sub-paragraphs (a) to (c) applies, but it is undesirable in the interests of investors or potential investors that the AIF should continue to be marketed.

(2) If the FCA proposes to revoke an AIFM’s approval to market an AIF it must give a warning notice to the AIFM.

(3) If the FCA decides to revoke an AIFM’s approval to market an AIF under paragraph (1)—

- (a) it must give a decision notice to the AIFM; and
- (b) the AIFM may refer the matter to the Tribunal.

Suspension of approval to market

56B.—(1) If one of the grounds in paragraph (2) is met, the FCA may suspend an AIFM’s approval to market an AIF for a specified period, until the occurrence of a specified event or until specified conditions are complied with.

(2) The grounds are that it appears to the FCA that—

- (a) the AIFM has, in purported compliance with an implementing provision, knowingly or recklessly given the FCA information which is false or misleading in a material particular;
- (b) sub-paragraph (a) does not apply, but it is undesirable in the interests of investors or potential investors that the AIF should continue to be marketed.

(3) In this regulation “specified” means specified by the FCA in a notice given under regulation 56C.

Procedure on suspension

56C.—(1) A suspension under regulation 56B takes effect—

- (a) immediately, if the notice given under paragraph (3) states that that is the case;
- (b) on such date as may be specified in the notice; or
- (c) if no date is specified in the notice, when the matter to which the notice relates is no longer open to review.

(2) A suspension may be expressed to take effect immediately (or on a specified date) only if the FCA, having regard to the ground on which it is suspending the AIFM’s approval to market, considers that it is necessary for the suspension to take effect immediately (or on that date).

(3) If the FCA proposes to suspend an AIFM’s approval to market an AIF, or suspends such approval with immediate effect—

- (a) it must give written notice to the AIFM; and

- (b) the AIFM may refer the matter to the Tribunal.
- (4) A notice under paragraph (3)(a) must—
- (a) give details of the suspension;
 - (b) inform the person to whom it is given of when the suspension takes effect;
 - (c) state the FCA’s reasons for the suspension and for its determination as to when the suspension takes effect;
 - (d) inform the person to whom it is given that it may make representations to the FCA within such period as may be specified in it (whether or not it has referred the matter to the Tribunal); and
 - (e) inform the person to whom it is given of their right to refer the matter to the Tribunal.
- (5) The FCA may extend the period allowed under the notice for making representations.
- (6) Paragraph (7) applies if, having considered any representations made by a person to whom the notice was given, the FCA decides—
- (a) to make the suspension in the way proposed,
 - (b) to make the suspension in a way other than that proposed, or
 - (c) if it has been made, not to revoke the suspension.
- (7) If this paragraph applies—
- (a) the FCA must give written notice to the AIFM; and
 - (b) the AIFM may refer the matter to the Tribunal.
- (8) If, having considered any representations made by a person to whom the notice was given, the FCA decides—
- (a) not to suspend the approval to market in the way proposed, or
 - (b) to revoke a suspension,
- it must give written notice to the AIFM.
- (9) For the purposes of paragraph (1)(c), section 391(8) of the Act (publication) applies as if a notice under paragraph (3)(a), (7)(a) or (8) were a supervisory notice.”.
- (8) Omit regulations 57 to 64 and the heading preceding regulation 57.
- (9) In regulation 71(5) (application of provisions of the Act to unauthorised AIFMs), omit sub-paragraphs (c) to (e).

PART 2

Transitional provisions relating to marketing by third country AIFMs

- 4.—(1) Sub-paragraphs (2) and (3) apply where—
- (a) an AIFM has given a notification under regulation 58(1) of the principal regulations (marketing of AIFs managed by small third country AIFMs) in respect of an AIF,
 - (b) an investor has acquired units or shares of the AIF as a result of marketing that is permitted because of that notification, and
 - (c) the AIFM is not—
 - (i) registered in accordance with Article 3 of the directive in respect of the AIF otherwise than by virtue of that notification, or
 - (ii) authorised in accordance with Article 37 of the directive in respect of the AIF.
- (2) The revocation of regulations 58(3) and (4)(a) and 71(5)(d) of the principal regulations by paragraph 3 does not have effect in relation to that AIFM.

(3) In regulation 71(5)(d) of the principal regulations (in so far as it continues to apply by virtue of paragraph (2)) for “that is entitled to market an AIF following notification under regulation 58” substitute “to which the requirement at regulation 58(3) applies”;

5.—(1) Sub-paragraph (2) applies where—

- (a) an AIFM has given a notification under regulation 59(1) of the principal regulations (marketing under Article 42 of the directive) in respect of an AIF,
- (b) an investor has acquired units or shares of the AIF as a result of marketing that is permitted because of that notification, and
- (c) the AIFM is not authorised in accordance with Article 37 of the directive in respect of the AIF.

(2) The substitution of regulation 34 of the principal regulations and the revocation of regulations 59(3) and (4)(a) and 71(5)(e) of the principal regulations by paragraph 3 do not have effect in relation to that AIFM.

6. Any expression used in this Part that is used in the principal regulations has the same meaning as in the principal regulations.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement those provisions of Directive 2011/61/EU of the European Parliament and of the Council on Alternative Investment Fund Managers (“the Directive”) that must be transposed by 22nd July 2013 but do not come into effect until a date to be specified by the European Commission in a delegated act (“third country provisions”). The Financial Conduct Authority (“FCA”) is responsible for the implementation of other elements of the third country provisions. The parts of the Directive that come into effect on 22nd July 2013 are implemented by the Alternative Investment Fund Managers Regulations 2013 (“the principal regulations”). A transposition note setting out how the Directive will be transposed into United Kingdom law is available on HM Treasury’s website (www.hm-treasury.gov.uk).

Regulation 1(3) provides that regulation 3 comes into force on the date on which Articles 35 and 37 to 41 of the Directive become applicable. Regulation 3 introduces Schedule 1, which makes amendments to legislation in order to implement those Articles. In particular, paragraph 1 of Schedule 1 amends section 418 of the Financial Services and Markets Act 2000 (“the Act”) to provide that the management of alternative investment funds is considered to take place in the UK where managers from outside the EEA have the UK as their Member State of reference (as defined in the Directive) and the funds managed are either EEA funds or are marketed in the EEA. Paragraph 1 also amends the Act to provide for such managers, and for UK managers of funds outside the EEA, to have access to the procedure by which UK managers may manage or market EEA funds in other EEA states.

Paragraph 2 of Schedule 1 amends the principal regulations. The effect of the amendments is to apply the regime for authorisation or registration of UK managers of alternative investment funds to managers from outside the EEA that have the UK as their Member State of reference. The amendments also apply provisions relating to the managing and marketing of alternative investment funds by UK managers to managers from outside the EEA that become authorised or registered in the UK. The separate national regime permitting managers from outside the EEA and UK managers of funds from outside the EEA to market their funds in the UK is, however, retained as an alternative. Paragraph 2 also amends the principal regulations to enable EEA managers of funds outside the EEA to market those funds in the UK on the same basis as EEA funds.

Regulation 1(4) provides that regulation 4 comes into force on a later date on which regimes under Articles 36 and 42 of the Directive are to be terminated. Regulation 4 introduces Schedule 2, Part 1 of which makes amendments to legislation to revoke the separate national regime for managers from outside the EEA and UK managers of funds from outside the EEA to market their funds in the UK, with the result that from that point all managers of alternative investment funds managing UK funds or marketing funds in the UK must be authorised in the UK or in another EEA state. Part 2 of Schedule 2 contains transitional provisions to preserve the ongoing obligations of managers from outside the EEA that have marketed funds under those separate national regimes.

Regulation 1(5) provides that regulation 5 comes into force immediately after the principal regulations come into force (on 22nd July 2013). Regulation 5 makes two minor amendments to the Financial Services and Markets Act 2000 (EEA Passport Rights) Regulations 2001 to correct an error in amendments to those Regulations made by the principal regulations.

Regulation 1(2) provides that regulation 6 comes into force on 22nd July 2013. Regulation 6 provides that the FCA or the Prudential Regulation Authority (“PRA”) may make rules to implement the third country provisions without complying with various procedural requirements imposed under the Act, including the obligation to consult on a draft of the rules before making them. If the FCA or PRA does so, an equivalent consultation will need to be carried out before the rules come into force, unless the rules are revoked before they come into force.

An impact assessment of the effect of the principal regulations on the costs of business and the voluntary sector has been prepared and is available from Her Majesty’s Treasury, 1 Horse Guards Road, London, SW1A 2HQ or on www.hm-treasury.gov.uk and is published with the Explanatory Memorandum alongside those Regulations on www.legislation.gov.uk.

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