

2014 No. 1292

FINANCIAL SERVICES AND MARKETS

The Alternative Investment Fund Managers Order 2014

Made - - - - *8th May 2014*

Laid before Parliament *23rd May 2014*

Coming into force in accordance with article 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 this Order in exercise of the powers conferred on them under section 2(2) of the European Communities Act 1972 and sections 22(1), 409(1)(a) and (b) and 428(3) of, and paragraph 25 of Schedule 2 to, the Financial Services and Markets Act 2000(c).

PART 1

Introductory provisions

Citation and commencement

- 1.—(1) This Order may be cited as the Alternative Investment Fund Managers Order 2014.
- (2) This Order, except for article 6 (amendment to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001), comes into force on 1st June 2014.
- (3) Article 6 comes into force on 1st July 2014.

(a) S.I. 2012/1759.

(b) 1972 c. 68 (“the ECA”). Section 2(2) of the ECA 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 section 1(2)(m) of the ECA, 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). Section 1(2)(m) was inserted by section 1 of the European Economic Area Act 1993 (c.51).

(c) 2000 c. 8. Section 22 was amended by section 7 of the Financial Services Act 2012 (c. 21). Section 22(5) provides that “specified” in section 22(1) means specified in an order made by the Treasury. Section 409(5) provides that “specified” in section 409(1) means specified in an order made under that subsection. Section 409 was amended by the Financial Services Act 2012 (c. 21), Schedule 18, paragraph 23, and by S.I. 2011/1613. Paragraph 25 of Schedule 2 was amended by section 8 of the Financial Services Act 2012.

PART 2

Amendments coming into force on 1st June 2014

The Financial Services and Markets Act 2000

2. In section 418 of the Financial Services and Markets Act 2000(a) (carrying on regulated activities in the United Kingdom)—

- (a) in subsection (1) for “five” substitute “six”;
- (b) after subsection (5A) insert—

“(5AA) 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) the person’s registered office is in the United Kingdom or, if the person does not have a registered office, the person’s head office is in the United Kingdom; and
 - (d) the activity is carried on from an establishment maintained in a country or territory outside the EEA.”;
- (c) in subsection (6) for “(5A)” substitute “(5AA)”;
- (d) after subsection (7) insert—

“(8) In this section “marketing”, in relation to an AIF, is to be read in accordance with the definition of “marketing” in Article 4.1(x) of the alternative investment fund managers directive(b).”

The Financial Services and Markets Act 2000 (Gibraltar) Order 2001

3.—(1) The Financial Services and Markets Act 2000 (Gibraltar) Order 2001(c) is amended as follows.

- (2) In article 1(2) (interpretation) for the definition of “Gibraltar-based firm” substitute—

““Gibraltar-based firm” means—

 - (a) an AIFM (as defined in Article 4.1(b) of the alternative investment fund managers directive(d)) which is authorised in Gibraltar in accordance with the alternative investment fund managers directive; or
 - (b) a firm not falling within paragraph (a) which has its head office in Gibraltar;”.
- (3) In article 2 (exercise of deemed passport rights by Gibraltar-based firms)—
 - (a) after paragraph (3C) insert—

“(3D) A Gibraltar-based firm falling within paragraph 5(h) of Schedule 3 is to be treated as having an entitlement, corresponding to its EEA right deriving from the alternative investment fund managers directive, to establish a branch or provide services in the United Kingdom.”;
 - (b) in paragraph (4)—
 - (i) for “and (3C)” substitute “, (3C) and (3D)”;

(a) Section 418 was amended by S.I. 2002/1775, 2011/1043 and 2012/1906 and is to be amended by S.I. 2013/1797.
(b) S.I. 2013/1773 inserted a definition of “alternative investment fund managers directive” at section 425 of, and paragraph 4E of Schedule 3 to, the Financial Services and Markets Act 2000.
(c) S.I. 2001/3084, amended by S.I. 2005/1, 2006/1805 and 3221, 2007/2932 and 3254, 2012/2017 and 2013/472 and 3115.
(d) S.I. 2013/1773 inserted a definition of “alternative investment fund managers directive” at section 425 of, and paragraph 4E of Schedule 3 to, the Financial Services and Markets Act 2000.

- (ii) for “and (f)” substitute “, (f) and (h)”;
- (c) in paragraph (5)—
 - (i) for “or (3C)”, on each occasion it occurs, substitute “, (3C) or (3D)”;
 - (ii) after “references in Schedule 3” insert “, article 51ZD of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001(a)”;
 - (iii) for “and Part 4 of the Undertakings for Collective Investment in Transferable Securities Regulations 2011” substitute “Part 4 of the Undertakings for Collective Investment in Transferable Securities Regulations 2011 and the Alternative Investment Fund Managers Regulations 2013(b)”;
- (d) in paragraph (7) for “or (3C)” substitute “, (3C) or (3D)”.
- (4) In article 3(3) (EEA firms satisfying conditions under Gibraltar law) for “7” substitute “7A”.
- (5) In article 4(3) (exercise by UK firms of deemed passport rights in Gibraltar), for “and article 77 of the Financial Services and Markets Act 2000 (Transitional Provisions) (Authorised Persons etc.) Order 2001” substitute “, article 77 of the Financial Services and Markets Act 2000 (Transitional Provisions) (Authorised Persons etc.) Order 2001 and the Alternative Investment Fund Managers Regulations 2013”.

The Alternative Investment Fund Managers Regulations 2013

4.—(1) The Alternative Investment Fund Managers Regulations 2013(c) are amended as follows.

- (2) In regulation 2 (interpretation), after paragraph (3) insert—
 - “(3A) Any reference in these Regulations to an EEA State other than the United Kingdom is to be read as including reference to Gibraltar.”.
- (3) In regulation 22 (power to direct small registered UK AIFMs and EuSEF and EuVECA Managers to take appropriate measures), for paragraph (4) substitute—
 - “(4) Sections 55Y (exercise of own-initiative power: procedure) and 55Z3(2) (right to refer matters to the Tribunal) of the Act apply to a direction to an AIFM under paragraph (1) or (2) as they apply to a requirement imposed on an authorised person under section 55L(3) of the Act (imposition of requirements by the FCA).”.
- (4) In regulation 71 (application of provisions of the Act to unauthorised AIFMs), in paragraph (5)—
 - (a) at the end of sub-paragraph (e) omit “or”;
 - (b) at the end of sub-paragraph (f) add—
 - “; or
 - (g) an AIFM to which regulation 75 (closed-ended AIFs whose subscription period has closed) applies”.
- (5) In regulation 72 (AIFMs managing AIFs immediately before 22nd July 2013)—
 - (a) in paragraph (6) after “these Regulations” insert “or the Alternative Investment Fund Managers Order 2014”;
 - (b) after paragraph (6) insert—
 - “(6A) Paragraphs (6B) and (6C) apply where a UK AIFM falling within paragraph (1) submits an application in accordance with paragraph (3)(a) or (b), but on 22nd July 2014—
 - (a) where the application was submitted in accordance with paragraph (3)(a), the AIFM does not have a Part 4A permission to carry on the regulated activity of managing an AIF;

(a) S.I. 2001/544; article 51ZD was inserted by S.I. 2013/1773.

(b) S.I. 2013/1773.

(c) S.I. 2013/1773, amended by S.I. 2013/1797.

- (b) where the application was submitted in accordance with paragraph (3)(b), the AIFM is not a small registered UK AIFM;
 - (c) the AIFM has not received a decision notice from the FCA or the PRA refusing the application; and
 - (d) the AIFM has not withdrawn the application in accordance with section 55V(4) of the Act (determination of applications).
- (6B) During the additional transitional period—
- (a) sections 19(1) (the general prohibition) and 20(1) and (1A) of the Act (authorised persons acting without permission) do not apply to the AIFM in respect of the activities to which the application relates, in so far as those activities are specified in article 51ZC of the Regulated Activities Order;
 - (b) notwithstanding paragraph (5), Part 6 of these Regulations does not apply to the AIFM in respect of the AIFs to which the application relates;
 - (c) all other implementing provisions^(a) apply in respect of the AIFM—
 - (i) where the application was submitted in accordance with paragraph (3)(a), as if the appropriate regulator (within the meaning of section 55V(1) of the Act (determination of applications)) had given the AIFM written notice on 22nd July 2014 granting its application with immediate effect;
 - (ii) where the application was submitted in accordance with paragraph (3)(b), as if the AIFM had been entered on the register of small registered UK AIFMs on 22nd July 2014; and
 - (d) if the AIFM is not an authorised person and is not an unauthorised AIFM (as defined in regulation 71(5)), the AIFM is to be treated as an unauthorised AIFM for the purposes of paragraphs (1) to (4) of regulation 71 (application of provisions of the Act to unauthorised AIFMs).
- (6C) In paragraph (6B) “the additional transitional period” means the period starting on 22nd July 2014 and ending—
- (a) where the application was submitted in accordance with paragraph (3)(a), on the date on which a Part 4A permission for the AIFM to carry on the regulated activity of managing an AIF has effect;
 - (b) where the application was submitted in accordance with paragraph (3)(b), on the date on which the AIFM becomes a small registered UK AIFM;
 - (c) on the date on which the FCA or the PRA gives the AIFM a decision notice refusing the application; or
 - (d) on the date on which the AIFM withdraws the application.”
- (6) In regulation 74 (closed-ended AIFs that make no additional investments)—
- (a) in paragraph (2) for “The AIFM need not” substitute “Notwithstanding regulation 72(3), the AIFM need not”; and
 - (b) for paragraph (4) substitute—

“(4) If the AIFM is given a Part 4A permission to carry on the regulated activity of managing an AIF, article 72AA of the Regulated Activities Order (managers of UCITS and AIFs)^(b) does not apply in respect of the AIFM’s management of the AIF referred to in paragraph (1).

(5) If, at the same time that the AIFM is given a Part 4A permission to manage an AIF, the AIFM’s Part 4A permission is also varied by the removal from the regulated activities to which that permission relates of regulated activities that the AIFM carries on in connection with or for the purposes of managing the AIF referred to in paragraph (1), the

(a) “implementing provision” is defined in regulation 2(1) of the Alternative Investment Fund Managers Regulations 2013.
 (b) Article 72AA of the Regulated Activities Order was inserted by S.I. 2013/1773.

AIFM is to be treated as if the AIFM's Part 4A permission had not been varied by such removal at such time.

(6) If, immediately before 22nd July 2013, the AIFM had a Part 4A permission to carry on an activity of the kind specified by article 51 of the Regulated Activities Order (establishing, operating or winding up a collective investment scheme) as that article applied at that date^(a), from the relevant date (as defined in regulation 72(7)) that permission is to be treated as if it were a Part 4A permission to carry on an activity of the kind specified by article 51ZE of the Regulated Activities Order.”.

(7) In regulation 75 (closed-ended AIFs whose subscription period has closed)—

(a) in paragraph (2) for “The AIFM need not” substitute “Notwithstanding regulation 72(3), the AIFM need not”;

(b) after paragraph (2) insert—

“(2A) If the AIFM is given a variation of its Part 4A permission to add the regulated activity of managing an AIF, article 72AA of the Regulated Activities Order (managers of UCITS and AIFs)^(b) does not apply in respect of the AIFM's management of the AIF referred to in paragraph (1).

(2B) If at the same time that the AIFM is given a Part 4A permission to manage an AIF, the AIFM's Part 4A permission is also varied by the removal from the regulated activities to which that permission relates of regulated activities that the AIFM carries on in connection with or for the purposes of managing the AIF referred to in paragraph (1), the AIFM is to be treated as if the AIFM's Part 4A permission had not been varied by such removal at such time.

(2C) If, immediately before 22nd July 2013, the AIFM had a Part 4A permission to carry on an activity of the kind specified by article 51 of the Regulated Activities Order (establishing, operating or winding up a collective investment scheme) as that article applied at that date^(c), from the relevant date (as defined in regulation 72(7)) that permission is to be treated as if it were a Part 4A permission to carry on an activity of the kind specified by article 51ZE of the Regulated Activities Order.”.

(c) for paragraph (3) substitute—

“(3) Subject to paragraph (4), the AIFM need not comply with the implementing provisions in respect of that AIF.”

(d) in paragraph (4) for “that would apply to it” substitute “with which it would be required to comply”;

(e) after paragraph (4) add—

“(5) The AIFM must give the FCA such information in respect of its compliance with paragraph (4) as the FCA may direct.

(6) The AIFM must give information required under paragraph (5) at such times and in such manner, and verify that information in such manner, as the FCA may direct.

(7) The AIFM must take such steps as are necessary to ensure compliance with paragraph (4) as the FCA may direct.

(8) Sections 55Y (exercise of own-initiative power: procedure) and 55Z3(2) (right to refer matters to the Tribunal) of the Act apply to a direction to an AIFM under paragraph (7) as they apply to a requirement imposed on an authorised person under section 55L(3) of the Act (imposition of requirements by the FCA).”.

(8) In regulation 78(3) (permission for existing managers, depositaries and trustees of UCITS) after “these Regulations” insert “or the Alternative Investment Fund Managers Order 2014”.

(a) Articles 51ZA to 51ZG of the Regulated Activities Order were substituted for article 51 of that Order by S.I. 2013/1773.

(b) Article 72AA of the Regulated Activities Order was inserted by S.I. 2013/1773.

(c) Articles 51ZA to 51ZG of the Regulated Activities Order were substituted for article 51 of that Order by S.I. 2013/1773.

The Alternative Investment Fund Managers (Amendment) Regulations 2013

5. In Schedule 1 to the Alternative Investment Fund Managers (Amendment) Regulations 2013(a) (amendments to legislation that implement Articles 34 and 37 to 41 of the Directive), in paragraph 1(4) (which contains amendments of section 418 of the Financial Services and Markets Act 2000 which have not yet come into force)—

- (a) for paragraph (a) substitute—
 - “(a) in subsection (1) for “six” substitute “seven”,”;
- (b) in paragraph (b)—
 - (i) for “after subsection (5A)” substitute “after subsection (5AA)”;
 - (ii) in the subsection (5B) to be inserted, for “sixth” substitute “seventh”;
 - (iii) omit the subsection (5C) that was to have been inserted; and
- (c) for paragraph (c) substitute—
 - “(c) in subsection (6) for “(5AA)” substitute “(5B)”.”.

PART 3

Amendment of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 and related provision

The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001

6. In article 4(4A)(b) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001(b) (specified activities: general) for “and 67” substitute “, 67 and 72AA”.

Notification of insurance mediation activity

7.—(1) This article applies where a person has made an application for a Part 4A permission to carry on an activity of the kind specified by article 51ZA or article 51ZC of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, or for a variation of the person’s Part 4A permission by the addition of such an activity.

(2) The person may give notice in writing to the FCA that the person intends to carry on an activity of the kind mentioned in article 4(4A)(a) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 in connection with or for the purposes of the activity mentioned in paragraph (1) in respect of which the application was made.

(3) Notice under paragraph (2) must—

- (a) be given so that it is received by the FCA before 1st July 2014; and
- (b) state the regulated activities for which the person will require permission in respect of the activity to which the notification relates after the coming into force of article 6.

(4) Paragraph (5) applies if, at the time that the FCA receives the notice—

- (a) the application has been granted; and
- (b) the FCA has not imposed a requirement on the person to refrain from carrying on an activity to which the notification relates.

(5) The person is to be treated as if the FCA had given the person a Part 4A permission to carry on the regulated activities stated in the notice, or varied the person’s Part 4A permission by the addition of those regulated activities, on the later of—

(a) S.I. 2013/1797.

(b) S.I. 2001/544, amended by S.I. 2003/1476. There are other amending instruments but none is relevant here.

- (a) the date on which the permission or variation of permission for which the person applied has effect, or
- (b) 1st July 2014.

(6) If, at the time that the FCA receives the notice, the application has not been determined, the application is to be treated as including an application for a Part 4A permission for the regulated activities stated in the notice, or for a variation of the person's Part 4A permission by the addition of such regulated activities.

Stephen Crabb
Anne Milton

8th May 2014

Two of the Lords Commissioners of Her Majesty's Treasury

EXPLANATORY NOTE

(This note is not part of the Order)

This Order makes amendments to the United Kingdom's implementation of Directive 2011/61/EU of the European Parliament and of the Council on Alternative Investment Fund Managers ("the Directive") (OJ L 174, 1.7.2011, p.1). The Directive was implemented in the UK by the Alternative Investment Fund Managers Regulations 2013 (S.I. 2013/1773) and the Alternative Investment Fund Managers (Amendment) Regulations 2013 (S.I. 2013/1797).

Article 2 amends section 418 of the Financial Services and Markets Act 2000 (c. 8) so that if a firm registered in the United Kingdom manages an alternative investment fund ("AIF") from outside the EEA and that fund is registered in, or marketed in, an EEA State (including the United Kingdom), the management activity is to be regulated as if it were in the United Kingdom.

Article 3 amends the Financial Services and Markets Act 2000 (Gibraltar) Order 2001 (S.I. 2001/3084) to provide entitlements to carry on cross-border activities between the United Kingdom and Gibraltar relating to the management and marketing of AIFs, equivalent to the entitlements to carry on cross-border activities between EEA States provided by the Directive.

Article 4 makes a number of amendments to the Alternative Investment Fund Managers Regulations 2013 ("the principal regulations")—

- Paragraph (2) provides that, where the principal regulations make provision about AIFs or their managers based in an EEA State other than the United Kingdom, the provision applies in the same way in relation to AIFs or their managers based in Gibraltar. This complements the provision made by article 3.
- Paragraph (3) provides that a manager of an AIF which is registered under the principal regulations (instead of having full authorisation under the Financial Services and Markets Act 2000) has a right of appeal to the Upper Tribunal if the Financial Conduct Authority ("FCA") directs it to take specified steps to comply with regulatory requirements.
- Paragraphs (4) and (7)(e) give the FCA powers to monitor and enforce compliance with the limited regulatory regime that applies to a closed-ended AIF for which the subscription period expired before 22nd July 2011 and which is constituted for a period that expires before 22nd July 2016.
- Paragraph (5) provides that, where a manager of an AIF has applied for, but has not been granted, registration or authorisation as such a manager before the end of the existing transitional period on 22nd July 2014, the prohibition in the Financial Services and Markets Act 2000 on carrying on an activity regulated under that Act without permission will not apply until the firm's application has been determined.
- Paragraphs (6) and (7)(a) to (d) amend the transitional provisions for managers of closed-ended AIFs that make no additional investments after 22nd July 2013, or for which the subscription period expired before 22nd July 2011 and which are constituted for a period that expires before 22nd July 2016 ("grandfathered AIFs"). The principal regulations provide that such a manager is not required to apply for permission to carry on the new regulated activity of managing an AIF in respect of grandfathered AIFs, which was inserted into the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 by the principal regulations. The amendments provide that if such a manager is given permission to carry on the new regulated activity of managing an AIF, the manager will still need permission to carry on other regulated activities it carries on in connection with or for the purposes of managing grandfathered AIFs. However, even if the manager does not retain its existing permission to carry on such other regulated activities when varying its permission, it will be treated as if it had done so.

Article 5 makes amendments to the Alternative Investment Fund Managers (Amendment) Regulations 2013 in consequence of the amendment made by article 2.

Article 6 amends article 4 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544) so that where a firm is carrying on insurance mediation activities

within the scope of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation (OJ L 9, 15.1.2003, p.3), the exemption in article 72AA will not apply to those activities. Article 72AA provides that where a firm has permission to carry on the regulated activity of managing an AIF or managing a UCITS fund, the firm is exempted from requiring permission for any other regulated activity that the firm may carry on in connection with or for the purpose of such management.

Article 7 provides a process whereby fund managers which have applied for permission to carry on the new regulated activities of managing an AIF or managing a UCITS before this Order comes into force, and which will require permission to carry on insurance mediation activities after article 6 of this Order comes into force, may notify the FCA of this fact and obtain such permission without the need to make a new application for a variation of permission.

An impact assessment has not been produced for this instrument as no impact on the costs of business or the voluntary sector is foreseen. An impact assessment of the effect of the principal regulations on the costs of business and the voluntary sector was produced and is available from Her Majesty's Treasury, 1 Horse Guards Road, London, SW1A 2HQ or on the HM Treasury website (www.gov.uk/government/organisations/hm-treasury), and is published with the Explanatory Memorandum alongside those Regulations on www.legislation.gov.uk.

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