

Subsidiary Legislation made under s. 53 of the Financial Services (Investment and Fiduciary Services) Act as read with section 23(g)(i) and (ii) of the Interpretation and General Clauses Act.

FINANCIAL SERVICES (ALTERNATIVE INVESTMENT FUND MANAGERS) (REGULATORY POWERS) REGULATIONS 2014

(LN. 2014/123)

Commencement **17.7.2014**

Amending
enactments

Relevant current
provisions

Commencement
date

Transposing:

Directive 2011/61/EU

EU Legislation/International Agreements involved:

ARRANGEMENT OF REGULATIONS

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In exercise of the powers conferred upon him by section 53 of the Financial Services (Investment and Fiduciary Services) Act as read with section 23(g)(i) and (ii) of the Interpretation and General Clauses Act, and in order to supplement provisions of the Financial Services (Alternative Investment Fund Managers) Regulations 2013 for the purpose of transposing into the law of Gibraltar provisions of Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and related matters, the Minister has made the following Regulations—

Title.

1. These Regulations may be cited as the Financial Services (Alternative Investment Fund Managers) (Regulatory Powers) Regulations 2014.

Commencement.

2. These Regulations come into force on the day of publication.

Overview.

3. These Regulations give the FSC the powers that it needs in order to monitor and enforce compliance with the AIFM Regulations.

Interpretation.

- 4.(1) In these Regulations—

“AIFM Regulations” means the Financial Services (Alternative Investment Fund Managers) Regulations 2013;

“Collective Investment Schemes Act” means the Financial Services (Collective Investment Schemes) Act 2011;

“controlled activity” means an activity to which the AIFM Regulations apply;

“Fees Regulations” means the Financial Services (Alternative Investment Fund Managers) (Fees) Regulations 2013;

“Financial Services Act” means the Financial Services (Investment and Fiduciary Services) Act;

“financial year” means the period from 1 April to 31 March; and

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“investment business” means investment business of a kind to which the AIFM Regulations apply.

(2) A reference to the “public interest” includes a reference to the protection of the public and the reputation of Gibraltar as a financial centre.

(3) Expressions used in these Regulations and in the AIFM Regulations have the same meaning in these Regulations as in the AIFM Regulations.

Imposition of conditions on authorisation.

5.(1) The FSC may on or at any time after issuing an authorisation under the AIFM Regulations, by notice in writing served on the authorised AIFM, impose such conditions as appear to the FSC to be necessary or desirable for the protection of investors, and may vary or revoke any condition so imposed.

(2) Without prejudice to the generality of subregulation (1), a condition imposed under this regulation may—

- (a) prohibit an authorised AIFM from—
 - (i) entering into transactions of any specified description or in specified circumstances or to a specified extent or with persons of a specified description;
 - (ii) soliciting investment business or transacting a controlled activity in a specified place, or from persons of a specified description or otherwise than from such persons;
 - (iii) carrying on investment business or a controlled activity in a specified manner or otherwise than in a specified manner;
 - (iv) disposing of, or otherwise dealing with any, or with specified, property or assets, in any specified manner or otherwise than in a specified manner;
- (b) require an authorised AIFM to take all necessary steps to transfer to the custody of a person approved by the FSC all property or assets, or all property or assets of any specified description, which—
 - (i) belong to the authorised AIFM or the AIF; or

(ii) are held by or to the order of the authorised AIFM or the AIF and either belong to investors or relate to the investment business or controlled activity carried on by the authorised AIFM;

(c) require an authorised AIFM to maintain property or assets of such value and of such description as appear to the FSC in its absolute and unfettered discretion to be desirable with a view to ensuring that the authorised AIFM will be able to meet its liabilities in respect of the investment business or controlled activity carried on by it and which is in accordance with applicable capital requirements legislation.

(3) A prohibition or requirement under subregulation (2) may relate to property or assets outside Gibraltar.

(4) By virtue of this subregulation, it shall be a condition of every authorisation under the AIFM Regulations that the authorised AIFM will at all times comply with—

- (a) any conditions imposed by the FSC under this regulation; and
- (b) the requirements of the AIFM Regulations, these Regulations and any other applicable enactment.

(5) Sections 44 and 45 of the Financial Services Act (representations concerning decisions of the FSC, and appeals) apply in relation to decisions under this regulation.

Directions.

6.(1) If it appears to the FSC that there are grounds for the cancellation or suspension of an authorisation under the AIFM Regulations in accordance with regulation 10 of these Regulations, the FSC may impose any of the conditions provided for in regulation 5 by way of directions.

(2) If it appears to the FSC that a person is not fit and proper to carry out any function in relation to investment business or a controlled activity carried on by an authorised AIFM, the FSC may direct that the person is under an obligation not to perform a specified function, any function falling within a specified description, or any function as stated in the direction.

(3) The cancellation or suspension of an authorisation licence shall not affect the operation of any direction under subregulation (1) which is then in force; and any such direction may be varied or added to after any such cancellation or suspension.

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(4) The FSC may, either of its own motion or on the application of the person on whom a direction has been served under subregulation (1) withdraw or vary the direction if it appears to the FSC that it is no longer necessary for the direction to take effect or continue in force or, as the case may be, that it should take effect or continue in force in a different form.

Notice of directions.

7.(1) The power to give a direction under regulation 6 shall be exercisable by written notice served by the FSC on the person concerned and any such notice shall take effect on such date as is specified in the notice.

(2) If the FSC refuses to withdraw or vary a direction on the application of the person on whom it was served, the FSC shall provide that person with a written notice of refusal.

(3) A notice giving a direction, or varying it otherwise than on the application of the person on whom it was served, or refusing to withdraw or vary a direction on the application of such a person, shall state the reason for which the direction was given or varied or, as the case may be, why the application was refused.

(4) The FSC may by publication in the Gazette give public notice of a direction given by it under regulation 6 or of any withdrawal or variation of such a direction.

(5) Sections 44 and 45 of the Financial Services Act (representations concerning decisions of the FSC, and appeals) apply in relation to decisions under this regulation.

Application to the Court.

8.(1) Where the FSC has power to give a direction under regulation 6 in relation to an AIFM, the FSC may apply to the Supreme Court—

- (a) for an order removing one or more persons exercising functions in respect of the AIFM or its AIF and replacing any or all of them with one or more persons nominated by it and appearing to it to satisfy any prescribed requirements for the appointment of persons exercising those functions; or
- (b) if it appears to the FSC that there is no person satisfying the prescribed requirements, for an order removing one or more of the specified persons, and appointing a person to wind up the AIFM.

(2) On an application under this regulation, the Court may make such order as it thinks fit, and the Court may, on the application of the FSC, rescind any such order as is mentioned in subregulation (1)(b) and substitute such an order as is mentioned in subregulation (1)(a).

(3) The FSC shall give written notice of the making of an application under this regulation to the person who is to be the subject of the order and take such steps as it considers appropriate for bringing the making of the application to the attention of investors in the AIF concerned.

Investigations.

9.(1) The FSC may appoint one or more persons (an “appointed person”) to investigate and report on—

- (a) the affairs of any person suspected of carrying on an investment business or controlled activity contrary to any of the provisions of the AIFM Regulations, or in a manner which is otherwise prejudicial to the public, to any investor or potential investor, or to the reputation of Gibraltar as a financial centre;
- (b) the affairs of, or of a person exercising functions in relation to, an authorised or exempt AIFM, in so far as they relate to activities carried on in or from within Gibraltar, if it appears to the FSC that it is in the interests of the investors or potential investors or of the reputation of Gibraltar as a financial centre so to do; or
- (c) the affairs of an authorised AIFM or the AIF in relation to business suspected of being carried out in or from within Gibraltar in contravention of the provisions of the AIFM Regulations.

(2) An appointed person may also, if he thinks it necessary for the purposes of an investigation under subregulation (1)(b), investigate the affairs of any other authorised or exempt AIFM in connection with which functions are exercised by the person who is the subject of the investigation.

(3) The appointed person under this regulation shall have all the powers conferred on the FSC by or by virtue of the AIFM Regulations or these Regulations.

(4) An appointed person may, and if so directed by the FSC shall, make interim reports to the FSC and on the conclusion of his investigation shall make a final report to it.

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(5) Any such report shall be written or printed as the FSC may direct and the FSC may, if it thinks fit—

- (a) furnish a copy, on request and on payment of the prescribed fee to any person whose affairs are under investigation pursuant to subregulation (1)(a) or to a person exercising functions in respect of the AIFM under investigation or to any other person whose conduct is referred to in the report; and
- (b) cause the report to be published.

(6) Nothing in this regulation requires a person carrying on investment business or a controlled activity to disclose any information or produce any document relating to the affairs of an investor unless—

- (a) the investor is a person who the appointed person has reason to believe may be able to give information relevant to the investigation;
- (b) the FSC is satisfied that the disclosure or production is necessary for the purposes of the investigation; and
- (c) the Supreme Court orders the disclosure or production.

(7) A person is not required by this regulation to disclose any information or produce any document which he would be entitled to refuse to disclose or produce on grounds of legal professional privilege in proceedings in the Court or on grounds of confidentiality as between client and professional legal adviser in any such proceedings, except that a lawyer may be required to furnish the name and address of his client.

Cancellation or suspension of authorisation

10.(1) The FSC may, by notice in writing served on an authorised AIFM—

- (a) cancel its authorisation;
- (b) suspend its authorisation for a specified period, until the occurrence of a specified event, or until specified conditions are complied with, or
- (c) alter its authorisation.

(2) In exercising its powers under subregulation (1) the FSC may cancel, suspend or alter an authorisation—

- (a) at the request of the AIFM provided that the FSC may refuse such a request if it considers that any matter should be investigated as a preliminary to a decision on the question whether the authorisation should be revoked or that revocation would not be in the interest of investors;
- (b) if the AIFM has contravened a provision of the AIFM Regulations or of these Regulations;
- (c) if the AIFM has failed to comply with a condition of the authorisation;
- (d) if the AIFM has failed to pay the prescribed fees including annual fees;
- (e) if the AIFM has furnished misleading or inaccurate information to the FSC under or for the purposes of any provision of the AIFM Regulations or these Regulations;
- (f) if the AIFM or AIF has not commenced to carry on in or from within Gibraltar the business or activity to which the authorisation relates within 6 months of its issue;
- (g) if the AIFM or AIF has ceased to carry on in or from within Gibraltar the business or activity to which the authorisation relates;
- (h) if the FSC considers it desirable for the protection of investors, of the public or the reputation of Gibraltar as a financial centre;
or
- (i) if at any time the FSC considers that, were the AIFM then making an application for the authorisation in question, it would refuse to grant the application.

(3) Sections 44 and 45 of the Financial Services Act (representations concerning decisions of the FSC, and appeals) apply in relation to decisions under this regulation.

Protection order.

11.(1) The FSC may apply to the Court for a protection order with respect to an AIFM or AIF if—

- (a) the FSC is entitled to take enforcement action against or in respect of the AIFM or AIF under the AIFM Regulations or these Regulations; or

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- (b) the FSC considers it desirable for a protection order to be made to protect the interests of investors or potential investors or to protect the public interest.

(2) On an application made under subregulation (1), the Court may make such order as it considers necessary to protect or preserve the business or property of the AIFM or AIF, or the interests of its investors, or potential investors, or the public including—

- (a) an order preventing any person from transferring, disposing of or otherwise dealing with any AIF property in his custody or control;
- (b) an order removing from office any person undertaking any function with respect to the scheme and replacing him with a person nominated by the FSC; and
- (c) an order appointing an administrator to take over and manage the AIFM or AIF.

(3) Without limiting subregulation (2)(c), an order made under that subregulation shall specify the powers of an administrator which may include the powers of an authorised person or of a liquidator under the Companies Act and may—

- (a) require an administrator to provide security to the satisfaction of the Court;
- (b) fix and provide for the remuneration of the administrator;
- (c) require such persons as it considers necessary to appear before the Court for the purposes of giving information or producing records concerning the AIFM or AIF.

(4) An order made under subregulation (2)(c) shall make provision for reports to be submitted by the administrator to the Court and to the FSC.

(5) The Court may on its own motion or on the application of the FSC or, where appointed, the administrator—

- (a) rescind or vary an order made under this regulation;
- (b) give directions to the administrator concerning the exercise of his powers;
- (c) vary the powers of the administrator; or

- (d) terminate the appointment of the administrator.
- (6) An application under subregulation (1) may be made—
 - (a) on an ex parte basis or upon such notice as the Court may require; and
 - (b) before the FSC has given notice of intention to revoke an authorisation.

Grounds for taking enforcement action.

12. The FSC may take enforcement action under these Regulations against, or with respect to, an AIFM or an AIF if, in the FSC's opinion—

- (a) a person undertaking a function with respect to the AIF or AIFM—
 - (i) has contravened or is in contravention of the AIFM Regulations or these Regulations;
 - (ii) has contravened or is in contravention of any Act or applicable Regulations relating to money laundering or the combating of the financing of terrorism;
 - (iii) has failed to comply with a direction given to it by the FSC;
 - (iv) has provided the FSC with any false, inaccurate or misleading information, whether on making any application to the FSC or subsequent to the grant of any application;
- (b) the AIF or AIFM is operating, or being operated—
 - (i) in a manner detrimental to the public interest or to the interest of any of its participants, or potential participants, or
 - (ii) in breach of any term or condition of its authorisation;
- (c) a person undertaking any function with respect to the AIF or AIFM is not a fit and proper person to undertake that function with respect to the AIF or AIFM;

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- (d) the FSC considers that, were the AIFM then making an application for an authorisation under the AIFM Regulations, it would refuse to grant the application;
- (e) the AIF or AIFM—
 - (i) is or is likely to become insolvent,
 - (ii) is compulsorily wound up, passes a resolution for voluntary winding up or is dissolved, or
 - (iii) has a receiver appointed in respect of any of its property;
- (f) one or more of the requirements for authorisation under the AIFM Regulations recognition are no longer satisfied;
- (g) any fee or penalty payable by or with respect to the AIF or AIFM under the AIFM Regulations, the Fees Regulations or any other Act has not been paid; or
- (h) the FSC is entitled to take enforcement action under a provision in another enactment.

Skilled Person's Report.

13.(1) The FSC may, by notice in writing given to a relevant person, require him to provide the FSC, at such time or times or at such intervals or in respect of such period or periods as may be specified in the notice, with a report on any aspect of any matter about which the FSC may reasonably require information for the performance of its functions under the AIFM Regulations, these Regulations or any other enactment in respect of which it exercises its regulatory powers.

(2) The FSC may require the report to be in such form as may be specified in the notice.

(3) The person appointed to make a report required under subregulation (1) must be a person—

- (a) nominated or approved by the FSC; and
- (b) appearing to the FSC to have the professional skills necessary to make a report on the matter concerned.

(4) The costs of producing a report under subregulation (1) shall be borne by the relevant person required to provide the report.

- (5) In this regulation “relevant person” means—
- (a) an authorised AIFM;
 - (b) an exempt AIFM (for the purposes of the AIFM Regulations);
 - (c) a person exercising functions in respect of an AIFM or AIF;
 - (d) a person who is or has been employed directly or indirectly (whether or not under a contract of service) by a person within paragraphs (a) to (c);
 - (e) a person who has, or who has at any time had, a direct or indirect proprietary, financial or other interest in or in connection with a person within paragraphs (a) to (c).

Public statements.

14.(1) Where the FSC is entitled to take enforcement action under these Regulations or the AIFM Regulations with respect to an AIF or AIFM, the FSC may issue a public statement in such manner as it considers fit setting out the reasons for the enforcement action and the enforcement action that it intends to take, or has taken with respect to the AIF or AIFM.

(2) Where it considers it in the public interest to do so, the FSC may issue a public statement in such manner as it considers fit relating to a person who is promoting or operating an AIF or AIFM contrary to the AIFM Regulations.

(3) Where a public statement is to be issued under this regulation in relation to an AIF or AIFM, the FSC shall give the AIF or AIFM 7 days written notice of its intention to issue the public statement and the reasons for the issue of the statement.

(4) If, on the application of the FSC, the Court is satisfied that it is in the public interest or in the interests of any of the investors in or creditors of an AIF or AIFM that subregulation (3) should not have effect or that the period referred to in that subregulation should be reduced, it may so order.

(5) An application under subregulation (4) may be made on an ex parte basis or upon such notice as the Court may require.

Application of conduct of business regulations.

15.(1) The following regulations apply in relation to the conduct of business by AIFMs.

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(2) Those regulations are regulations made under section 53 of the Financial Services Act including, in particular—

- (a) conduct of business regulations made in accordance with section 12;
- (b) accounting and financial regulations made in accordance with section 13;
- (c) advertising regulations made in accordance with section 14;
- (d) unsolicited calls regulations made in accordance with section 15;
- (e) compensation regulations made in accordance with section 54;
- (f) cancellation regulations made in accordance with section 55; and
- (g) winding up regulations made in accordance with section 57.

(3) In so far as any regulations have effect by virtue of this regulation, they have effect—

- (a) with any modifications necessary for their application in relation to AIFMs, and
- (b) subject to any provision of AIFM Regulations.

Offences and penalties.

16.(1) Any person who contravenes any provision of the AIFM Regulations or these Regulations, or who fails to comply with any obligation imposed on him by the AIFM Regulations or these Regulations is guilty of an offence.

(2) A person who-

- (a) fails to comply with or contravenes any requirement or condition imposed on him under the AIFM Regulations or these Regulations; or
- (b) in purported compliance with a requirement under the AIFM Regulations or these Regulations furnishes information or

makes a statement which he knows to be false or misleading in a material particular, or recklessly furnishes information or makes a statement which is false or misleading in a material particular; or

- (c) not being an authorised or exempt AIFM, knowingly describes himself as such or so holds himself out as to indicate, or to be reasonably understood to indicate, that he is such a person,

is guilty of an offence.

(3) A person who is knowingly party to the carrying on of an investment business or a controlled activity carried on by an authorised AIFM with any fraudulent intent or for any fraudulent purpose is guilty of an offence.

(4) A person who-

- (a) by any statement, promise or forecast which he knows to be misleading, false or deceptive; or
- (b) by any dishonest concealment of material facts; or
- (c) by the reckless making (dishonestly or otherwise) of any statement, promise or forecast which is misleading, false or deceptive,

induces or attempts to induce another person to enter into or to offer to enter into an investment agreement or an agreement in relation to a controlled activity carried on by an authorised AIFM is guilty of an offence.

(5) A person who, with intent to avoid detection of an offence under the AIFM Regulations or these Regulations removes from Gibraltar, destroys, conceals or fraudulently alters any books or papers is guilty of an offence.

(6) Any person guilty of an offence under this Regulation shall be liable-

- (a) on conviction on indictment, to imprisonment for a term not exceeding 7 years or to a fine or to both;
- (b) on summary conviction, to a fine not exceeding £25,000.

(7) The FSC may, with the consent of the Attorney-General, in its discretion stay or compound any proceedings for an offence under this Regulation and where the FSC exercises its discretion to compound such proceedings-

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- (a) it shall take account of the provisions of subregulation (6) in so doing;
- (b) any amounts paid by virtue of this subregulation shall be received by the FSC and form part of the revenue of the FSC.