

EXPLANATORY MEMORANDUM TO
THE ALTERNATIVE INVESTMENT FUND MANAGERS ORDER 2014

2014 No. 1292

1.

1.1 This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This Order amends the Financial Services and Markets Act 2000 (Gibraltar) Order 2001 (S.I. 2001/3084) (“the Gibraltar Order”), in order to allow Gibraltar-based entities to exercise entitlements equivalent to certain EU rights in the United Kingdom in relation to collective investment schemes. The Order also amends the Financial Services and Markets Act 2000 (c. 8) (“FSMA”), the Financial Services and Markets Act 2000 (Regulated Activities) Order (S.I.2001/554) (“the RAO”) and the Alternative Investment Fund Managers Regulations 2013 (S.I. 2013/1773) (“the Regulations”) to alter certain aspects of the implementation of Directive 2011/61/EU of the European Parliament and the Council of 8 June 2011 on Alternative Investment Fund Managers (OJ No. L 174, 01/07/2011, pp.1-73) (“AIFMD”).

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 The Regulations implement the Directive by making amendments to FSMA, the RAO and other relevant legislation so that managing an alternative investment fund, which is required by AIFMD to be done only by authorised managers, is regulated under the regime set out in FSMA. Stand alone provisions in the main body of the Regulations and further amendments in the Schedules also apply AIFMD requirements both to persons regulated under that regime, and to other persons who are not required to be authorised under AIFMD but on whom AIFMD imposes requirements. The Alternative Investment Fund Managers (Amendment) Regulations 2013 made further provision to implement parts of AIFMD which do not come into effect until dates to be specified by the European Commission in delegated acts. This Order makes amendments to both of those sets of Regulations.

4.2 Section 418 of FSMA specifies the conditions under which a firm is considered to be carrying on a regulated activity in the United Kingdom. The Order amends that section to ensure that where a firm manages an EEA alternative investment fund or marketing of an alternative investment fund in the EEA, and carries on that activity from outside the EEA, if the firm is registered in the United Kingdom the activity will be considered to be carried on in the United Kingdom and regulated in the United Kingdom.

4.3 The RAO is made under section 22 of FSMA and specifies activities which may not be carried on without permission from the Financial Conduct Authority or the Prudential Regulation Authority. Article 4(4A) of the RAO provides that a firm which is carrying on activities within scope of Directive 2002/92/EC of the European Parliament and of the Council on Insurance Mediation (OJ No. L 009, 15/01/2013, pp.3-10) (“IMD”) does not benefit from various exclusions in the RAO, so that the firm is required to obtain permission to carry on those activities notwithstanding the exclusions. The Order adds to article 4(4A) the exclusion at article 72AA of the RAO which arises out of permission to manage an alternative investment fund or an Undertaking for Collective Investment in Transferable Securities, so that a firm with such firm must obtain additional permission to carry on activities within scope of IMD even if the activities would otherwise be covered by the exclusion. The Order also makes arrangements for those firms that have already applied for permission to manage an alternative investment fund to obtain additional permission to carry on activities within the scope of IMD without having to make a new application.

4.4 Schedule 3 of FSMA provides for firms which are authorised under the single market directives in an EEA State other than the UK, and which have a right under such a directive to establish a branch or provide services in the UK, to exercise that right. One such directive is AIFMD. It also provides for UK firms to exercise the same rights in other EEA States. The Gibraltar Order, made under section 409 of FSMA, provides an equivalent entitlement for Gibraltar firms to establish a branch or provide services in the United Kingdom, and for United Kingdom firms to do the same in Gibraltar. This Order amends the Gibraltar Order to extend the entitlement to the management and marketing of alternative investment funds, and makes a related amendment to the Regulations.

4.5 With the exception of the amendments to the RAO and the Gibraltar Order, which are made under sections 22 and 409 of FSMA respectively, this Order is made under the power at section 2(2) of the European Communities Act 1972 (c. 68).

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

The Economic Secretary to the Treasury, Andrea Leadsom MP, has made the following statement regarding Human Rights:

“In my view the provisions of the Alternative Investment Fund Managers Order 2014 are compatible with the Convention rights.”

7. Policy background

7.1 The AIFMD grants a marketing passport for fund managers authorised under the AIFMD framework, allowing them to market to professional investors in any Member State. It provides a similar right for fund managers authorised under the AIFMD framework to provide AIFMD related services in any Member State. However, as Gibraltar is not a separate Member State, Gibraltar registered managers

and funds cannot exercise these rights in the United Kingdom. This statutory instrument corrects that anomaly. It also provides for the exercise of corresponding rights by UK registered managers and funds in Gibraltar.

7.2 The Order ensures that where a firm manages an alternative investment fund from outside the EEA, and the fund is an EEA fund or is marketed in the EEA, if the firm is registered in the United Kingdom the activity will be considered to be carried on in the United Kingdom and regulated in the United Kingdom.

7.3 The Order amends the RAO to ensure that firms that are authorised under the AIFMD framework and that are also carrying out insurance mediation activity with respect of the funds that they manage that would bring them into scope of IMD must apply for a separate permission with respect of these insurance mediation activities and are not carved out of their IMD requirements. It also makes arrangements for those firms that have already applied to the FCA for permission to manage an alternative investment fund to obtain separate permission to carry on activities within the scope of IMD without having to make a new application for permission.

7.4 The Order also amends the transitional provisions for existing UK firms being brought into the scope of the AIFMD framework. The Regulations provide a transitional year for UK firms that were carrying out AIFMD regulated activities before AIFMD entered into force on 22 July 2013. A transitional firm would have twelve months to submit its application and for the Financial Conduct Authority to approve its application for authorisation under the AIFMD framework. The Order provides that if the Financial Conduct Authority has not determined the application by the end of the transitional year, the transitional firm may continue to manage and market funds in the UK as if it had been granted the authorisation or registration for which it had applied, however it would need to comply with its relevant AIFMD requirements once the transitional period has elapsed. Such a firm would not have a right to manage or market alternative investment funds in other Member States arising out of AIFMD until it became authorised.

7.5 AIFMD also provides grandfathering provisions for closed ended investment funds that were established before AIFMD entered into force and that are no longer open to new investment subscriptions and are close to the end of their life cycle, so that their managers are not required to be authorised under AIFMD but must comply with selected requirements of AIFMD. The Order ensures that the Financial Conduct Authority will have appropriate enforcement powers over the managers of such funds. The Order also ensures that, even if such a manager does apply for permission to carry on the new regulated activity of managing an alternative investment fund, the manager is considered to be carrying on the former regulated activities and the FCA rules attaching to those activities will apply to the manager.

- ***Consolidation***

7.6 The Regulations amend the Financial Services and Markets Act 2000 and related provisions. There are no current plans to consolidate the Act.

8. Consultation outcome

8.1 A formal consultation published in March 2013 indicated that HM Treasury intended to amend the Gibraltar Order once Gibraltar had fully implemented AIFMD. No concerns or objections were raised. The Financial Conduct Authority has been consulted and it has no concerns regarding the funds of Gibraltar authorised managers being marketed to UK investors. The Government of Gibraltar and the Gibraltar Financial Services Commission have also been consulted and they are content for the United Kingdom to proceed with the amendment to the Gibraltar Order.

8.2 HM Treasury has consulted informally with industry with regard to the other changes made by this Order.

9. Guidance

9.1 The Treasury is not planning to issue any further guidance on these Regulations.

10. Impact

10.1 No impact on business, charities or voluntary bodies is foreseen.

10.2 No impact on the public sector is foreseen.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation applies to small business

11.2 No special action is needed to assist small business because no regulatory burden is imposed by this instrument.

12. Monitoring & review

12.1 The Government has committed to review the Regulations and publish a report setting out the conclusions of the review by 22 July 2018. This Order will be included in that review.

13. Contact

Queries regarding this statutory instrument should be directed to Jonathan Gee at HM Treasury Tel: 0207 270 6275 email:jonathan.gee@hmtreasury.gsi.gov.uk