



HM TREASURY

Transposition of the Alternative Investment Fund Managers Directive: further consultation

March 2013



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1

Introduction

1.1 The Alternative Investment Fund Managers Directive (AIFMD) is due to be transposed into national law by 22 July 2013. The Government published its first consultation paper¹ on 11 January and this closed at the end of February. That consultation paper considered a number of issues that could be addressed at that time. The Financial Services Authority (FSA) published its first consultation paper² covering policy issues and some operational matters in November 2012, and is due to publish a second consultation paper shortly. To ensure consistency, the definitions used by the FSA in its first consultation paper are also used in this paper.

1.2 The Directive establishes an EU-wide harmonised framework for monitoring and supervising risks posed by Alternative Investment Fund Managers (AIFMs) and the funds they manage (AIFs); and for strengthening the internal market in alternative funds. The Directive requires the authorisation of AIFMs. There are provisions relating to how AIFMs must conduct their business, how they must report and disclose under transparency requirements and marketing. The Directive covers the managers of hedge funds, private equity funds, retail investment funds, investment companies, and real estate funds among others and is therefore relevant to many different types of asset manager. The Directive also includes new requirements for firms acting as depositary for an AIF.

1.3 The Government has set out its overall approach to transposing EU legislation, with the expectation that a “copy-out” approach will be adopted wherever possible in order to minimise the regulatory burden on firms. Gold-plating must be supported by strong justification. The Government’s proposed approach to AIFMD is consistent with this and is intended to maintain and enhance the UK’s competitiveness as a centre in which to manage and domicile funds. The approach is also intended to ensure strong consumer protection and to maintain and enhance confidence in the regulatory system. The Government welcomes views from market participants on how to achieve these objectives.

1.4 Attached to this paper are draft regulations, which are intended to be combined with the draft regulations attached to the first consultation paper. By the time the Directive is transposed into UK law, the regulator with supervisory responsibility for this area will be the Financial Conduct Authority (FCA) and this should be taken into consideration when reviewing the regulations.

1.5 The Directive will be implemented, like other EU financial services directives, by a combination of Treasury regulations and Financial Conduct Authority (FCA) rules.

¹ The Government’s discussion paper on AIFMD and the first consultation paper are available on the Treasury website at the following locations
http://www.hm-treasury.gov.uk/consult_transposition_of_the_alternative_investment_fund_managers_directive.htm – (consultation paper – Jan 2013)
http://www.hm-treasury.gov.uk/consult_policy_options_implement_aifmd.htm (discussion paper – published March 2012)

² The initial consultation of the Financial Services Authority can be found here - <http://www.fsa.gov.uk/library/policy/cp/2012/12-32.shtml>

2

Treatment of Particular Fund Types under AIFMD

Scope

2.1 The scope of the application of the Directive is determined by the Directive itself and additional European Securities and Markets Authority (ESMA) guidance¹. There is a high degree of overlap with the UK's Collective Investment Scheme (CIS) perimeter; although as noted in the first consultation paper, the two regimes do not match exactly. Some entities, for example corporate vehicles, are excluded from the CIS perimeter but meet the definition of an AIF. Conversely, some entities are CIS but do not fall within the AIF definition. Within the European framework the FSA will set out some provisional rules and guidance in its second consultation paper on how the AIFMD might apply to certain types of CIS and AIFs.

Common Investment Funds and Common Deposit Funds

2.2 Common Investment Funds (CIFs) and Common Deposit Funds (CDFs) are funds established under charities legislation which allow charities to pool their funds and gain access to more diversified investments, whilst benefiting from charitable tax reliefs and exemptions. There are also church-specific funds which are similar to CIFs and CDFs.

2.3 CIFs and CDFs fall within the regulatory category of unauthorised collective investment schemes (commonly referred to as UCIS). They are set up and regulated as charities by the Charity Commission while the managers and corporate trustees of the funds are regulated by the FSA. Such funds in Northern Ireland are regulated by the Charity Commission for Northern Ireland under devolved legislation. CIFs and CDFs are allowed to accept investment from charities in any UK jurisdiction provided the organisation is entitled to claim UK charity tax reliefs.

2.4 Given the considerable changes already underway to implement AIFMD, the Government intends to maintain this current system of regulation at the present time and is not consulting on requiring the funds to obtain FSA authorisation. The decision not to require authorisation of the funds themselves was in order to ensure significant costs were not imposed upon charities as part of the Government's transposition of AIFMD, such as the costs of restructuring funds into authorised fund vehicles.

2.5 The Government's analysis is that all CIFs and CDFs meet the AIFMD definition of AIFs, except those constituted under church legislation. CIFs and CDFs meet the definition of an alternative investment fund as given by Article 4(1) AIFMD, in that they are collective investment undertakings which raise capital from a number of investors and invest it in accordance with a defined investment policy for the benefit of those investors. The Government's analysis is that church funds are outside the scope of AIFMD because they do not raise external capital and the funds are not managed as a regular business.

¹ ESMA published a consultation paper on the definition of an AIF and draft technical standards on types of AIFMs last December. These papers are published here - <http://www.esma.europa.eu/consultation/Consultation-Guidelines-key-concepts-AIFMD>
<http://www.esma.europa.eu/consultation/Consultation-Draft-regulatory-technical-standards-types-AIFMs>

2.6 Managers and corporate trustees of CIFs and CDFs will therefore be subject to the requirements of AIFMD upon its implementation in July 2013 (subject to transitional provisions set out in chapter 6 of the Government's first consultation²).

2.7 AIFMD requires AIFMs to be authorised but permits Member States to establish a de minimis registration – or authorisation with fewer requirements – regime for AIFMs managing AIFs with assets under management below certain thresholds³. The Government's first consultation paper⁴ outlined the Government's proposed approach regarding requirements for AIFMs of sub-threshold unregulated collective investment schemes. Other than the minimum requirements for the AIFMD sub-threshold registration regime, AIFMD requirements that go beyond the current requirements for CIS operators will not be applied in the regulations. This is the approach that would apply to any sub-threshold CIFs or CDFs under the AIFMD implementing legislation.

2.8 The Charity Commission may require fund managers who want to set up new CIFs or CDFs in the future to be authorised as full-scope AIFMs. In order to support CIFs and CDFs with the transition to AIFMD, the Charity Commission will provide an updated model scheme on its website shortly. Trustees of CIF schemes can use the updated model as a guide in amending their model schemes in order to comply with AIFMD requirements. The Charity Commission considers that the amendments can be made under section 280 of the Charities Act 2011. Guidance on the power of amendment can be found on their website at: http://www.charitycommission.gov.uk/About_us/pogs/g519a001.aspx

2.9 AIFMD introduces a marketing passport that will enable authorised AIFMs in any Member State to market their AIFs to professional investors in any other Member State. The Government therefore intends to amend the relevant charities legislation⁵ so that any charity which satisfies the definition of a charity as set out in schedule 6 to the Finance Act 2010, from any Member State, will also be able to invest in CIFs and CDFs.

Box 2.A: Sub threshold CIFs and CDFs under AIFMD

- 1 Do you agree with the proposed approach for sub-threshold AIFMs managing CIFs?
- 2 Do you agree with the proposed approach for sub-threshold AIFMs managing CDFs?
- 3 Would the proposed approach impose significant costs on businesses and/or charities?

Powers of the FCA in respect of AIFs, European Venture Capital Funds and European Social Entrepreneurship Funds

2.10 It is anticipated that the final European Venture Capital Funds Regulation and European Social Entrepreneurship Funds Regulation will be agreed by the European Parliament and Council prior to 22 July 2013. The regulations are directly applicable but the Government will consider whether it is necessary to legislate to make technical changes to the powers of the FCA under the Financial Services and Markets Act 2000 to enforce the provisions.

2.11 Technical changes to the FCA's powers will also be needed in respect of AIFMs which are not authorised persons (such as small registered AIFMs and AIFMs managing funds on the Article 36

² Chapter 6 sets out the Government's approach to Article 66 of AIFMD - http://www.hm-treasury.gov.uk/consult_transposition_of_the_alternative_investment_fund_managers_directive.htm

³ The proposed threshold is defined under Part 4, regulation 11 of the draft regulations in http://www.hm-treasury.gov.uk/consult_transposition_of_the_alternative_investment_fund_managers_directive.htm

⁴ The consultation paper remains available here and the relevant sections are paragraphs 2.20-2.22 http://www.hm-treasury.gov.uk/consult_transposition_of_the_alternative_investment_fund_managers_directive.htm

⁵ The Charities Act 2011 and the Charities Act (Northern Ireland) 2008

or Article 42 register), and in respect of obligations which arise under the regulations implementing AIFMD or under directly applicable EU Regulations rather than under the 2000 Act.

2.12 Such legislation will appear in draft on the Treasury website in due course. It is anticipated that the final European Venture Capital Funds Regulation and European Social Entrepreneurship Funds Regulation will be agreed by the European Parliament and Council prior to 22 July 2013. The regulations are directly applicable but the Government will consider whether it is necessary to make legislation giving the FSA the powers necessary to enforce the provisions. Any such legislation will appear in draft on the Treasury website in due course.

3

Marketing

3.1 The Directive gives Member States discretion to permit selective marketing to retail investors and to impose greater restrictions on such activity than those for marketing to professional investors. AIFMD defines ‘professional investor’ as an investor which is considered to be a professional client or may, on request, be treated as a professional client within the meaning of Annex II of the MiFID directive. AIFMD defines ‘retail investor’ as an investor who is not a professional investor.

3.2 The UK’s existing financial promotion regime regulates the promotion of funds to retail investors. The draft regulations attached to the Government’s first consultation paper set out the way in which this existing regime is proposed to interact with the new regime regulating marketing of AIFs. The requirements of both regimes would need to be met for a fund to be marketed to retail investors. In the remainder of this part of this consultation paper, references to “marketing” are to the activities regulated by the combination of these regimes, with a particular focus on the proposed amendments to the UK financial promotion regime.

3.3 The Government’s first consultation paper set out its proposed overall approach to the UK retail AIFs regime; the Government proposes no amendments to the range of AIFs that may be marketed to retail investors. These include Collective Investment Schemes that are authorised by the FSA such as Non-UCITS Retail Schemes (NURS) and Qualifying Investor Schemes (QIS) (in the case of sophisticated investors or high net worth individuals).

3.4 AIFs managed outside the UK and which are not constituted as UK authorised unit trusts or Open Ended Investment Companies can currently be marketed to UK retail investors under the “recognised schemes” regime. The regime requires funds to provide equivalent or adequate protection for investors when compared to UK retail investment schemes authorised by the FSA.

3.5 The Financial Services and Markets Act 2000 (FSMA) provides for two marketing routes into the UK through the recognised schemes regime which covers non-UCITS funds.

- Section 270 – Funds managed and authorised in designated territories (currently the Isle of Man, Guernsey and Jersey) and authorised by the home regulator may take advantage of a territory-specific approvals process, in which the FSA assesses the domestic legislation and practice under which funds are authorised and the co-operation arrangements in place. Following FSA assessment, the Treasury may make a legislative order designating territories and specifying classes of fund in those designated territories. The funds in those specified classes can then apply to the FSA to become recognised schemes in order to market to retail investors in the UK.
- Section 272 – Funds managed and authorised anywhere outside the UK may apply to the FSA on a case by case basis for authorisation to market to retail investors irrespective of co-operation arrangements in place between the FSA and the home regulator. They must demonstrate to the FSA that they have in place adequate safeguards similar to those for UK retail funds. Operators and depositaries of such schemes must be able and willing to co-operate with the FSA.

3.6 The Government proposes to reform the section 270 and 272 recognised schemes regime in order to address some of the weaknesses in the current approach:

- Recognised AIFs may over time diverge from current UK regulation. This can be due to updates to regulation in the UK, to changes to the scheme particulars or changes to regulation in the fund's home state; and
- Under section 270, there can be a lag in managers being able to market to UK retail investors following legislative changes in designated territories. This is because the new legislation first needs to be assessed by the FSA, and then on the advice of FSA, the Government specifies the updated equivalent regimes through secondary legislation.

3.7 The Government proposes to combine schemes recognised under section 270 and 272 into a modified section 272 regime and remove the section 270 regime.

3.8 Schemes seeking to market under the reformed section 272 would comply with the following process. Reforms to the existing section 272 approach are underlined below and are intended to ensure ongoing compliance with UK retail investor protection safeguards:

- The AIF would ensure it was providing adequate protection, for example, by complying with requirements that are equivalent to UK authorised funds, and apply to the FSA for recognition.
- The FSA will continue to require as part of any application a gap analysis comparing home and UK regulatory regimes¹.
- The FSA would use this gap analysis as the starting point for its assessment of the AIF. When undertaking the assessment, the FSA would take into account the extent to which, where appropriate, the home state regulator of the AIF and its AIFM had already implemented AIFMD requirements.
- Upon completion of a favourable assessment, the FCA would be in a position to recognise the scheme. Once a year following recognition and upon a material change, the AIFM would need to confirm to the FCA whether the scheme was compliant with requirements comparable to the current UK regulatory requirements for retail funds.
- The annual re-confirmation would highlight any divergence from the UK regulatory requirements for retail funds and would enable the FCA to require compliance with such requirements.

3.9 The Government proposes to use the reformed approach to permit AIFs established in the EEA (but outside the UK) to market to UK retail investors. When used by such AIFs, it will be consistent with the Directive requirement² that the UK does not impose additional or stricter requirements for marketing to retail investors on EEA AIFs than UK AIFs.

3.10 As now, schemes marketing under section 272 would be permissible investments within Individual Savings Accounts and Child Trust Funds.

3.11 The option of not reforming sections 270 and 272 remains open at this stage. If that option were chosen following consultation, then the retail regimes of designated territories under section 270 would be reassessed by the FSA under existing arrangements and the Government would designate the updated equivalent regimes through secondary legislation.

3.12 All existing schemes recognised under section 270 would be treated as schemes recognised under section 272 from 22 July 2013. From that point the reformed section 272 regime will

¹ This is based on s.272(5) of FSMA which can be found here - <http://www.legislation.gov.uk/ukpga/2000/8/section/272>

² Article 43 of the Directive relating to the marketing of AIFs by AIFMs to retail investors is set out here - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:174:0001:01:EN:PDF>

apply to all existing recognised schemes, and during the AIFMD transitional period, ending on 21 July 2014, the operators of such schemes would be required to provide their first confirmation to the FCA as to whether the scheme was compliant with requirements comparable to the current UK regulatory requirements for retail funds. The proposed approach means that any existing recognised schemes which did not provide such confirmation by 22 July 2014 would lose recognition. Existing investors could remain within these schemes, which would continue to be supervised by the home authority but the schemes could no longer market and promote to new UK investors.

3.13 The Government has considered alternative approaches including “grandfathering” – allowing continued recognition for all section 270 schemes with no need to comply with the reformed section 272 regime. However, given the changes necessary under AIFMD, the Government judges such an approach to be contrary to the objectives of our overall transposition. Subject to this consultation, a transitional period is considered a better approach in order to allow managers to make the change to the new section 272 regime.

3.14 In addition to the regulations being consulted on with this consultation, the FSA will be consulting on further details in its second consultation paper. This will include how it proposes to modify the fees charged to section 272 recognised schemes.

3.15 The Government has had initial discussions with industry, overseas regulators and the FSA. The Government believes the proposed section 272 single marketing gateway for overseas retail schemes is expected to result in some additional compliance costs on AIFMs of recognised schemes. These costs are due to introducing policies and procedures to satisfy the UK retail requirements and to confirm compliance.

3.16 The Government considers that the proposed approach will maintain choice for UK retail investors while ensuring consistent investor protection. The approach puts overseas schemes marketed to UK retail investors on the same footing as domestic retail investment schemes by putting in place a simpler mechanism for ensuring they are up to date with current UK regulatory requirements.

Box 3.A: Marketing

- 1 Do you agree with the proposed approach?
- 2 What are the expected significant business costs as a consequence of the proposed approach? How can they be mitigated?
- 3 What impact is the change likely to have on choice for UK retail investors?
- 4 Are there further changes that you would propose to the Section 270 and Section 272 regimes?
- 5 Are there specific features of the proposed approach that you would support or change? What are they and why should they be changed?

Passporting

3.17 The draft regulations attached to this paper are drafted on the basis that a non-UK EEA AIFM may obtain a passport to conduct the non-core activities permitted under Article 6(4) of the Directive in the UK. However, we are aware that there is currently disagreement at an EU level as to the availability of such a passport and the FSA is working with its counterparts in Europe in an effort to address this issue.

Gibraltar

3.18 In line with Government policy, once the Directive, the European Venture Capital Funds Regulation and the European Social Entrepreneurship Funds Regulation have entered force, the necessary amendments will be made to the Gibraltar Order³ to permit managers authorised or registered by the Gibraltar Financial Services Commission that are eligible to make use of the marketing passports these regimes provide to market units or shares of the AIFs that they manage to investors in the UK.

³ The Financial Services and Markets Act 2000 (Gibraltar) Order 2001 in its original form is available here <http://www.legislation.gov.uk/uksi/2001/3084/contents/made>

4

Approved Persons Regime

Application to authorised Internally Managed Investment Companies

4.1 Within the UK, the FSA applies an “approved persons” regime to individuals carrying out “controlled functions” within authorised firms, including fund managers. These are typically individuals who have a significant influence over the operations of the firm (for example the CEO or managing partner) or are performing key roles, such as compliance, audit, and risk management or dealing with customers.

4.2 This regime enables the FSA to assess the fitness and propriety of key individuals, and apply appropriate sanctions if they breach the FSA’s rules or principles¹. There are also requirements around training and competence for certain functions carried on for retail clients.

4.3 The approved persons regime is a concept under the Financial Services and Markets Act 2000. The Directive permits, but does not require, the UK to apply the approved persons regime to AIFMs². The Government may therefore decide whether or not to restrict the application of the regime to individuals within AIFMs newly subject to FSA authorisation. These include internally managed investment companies. The FSA has indicated that if the regime were applied, it would exercise its powers in a proportionate manner.

4.4 Applying the approved persons regime would give the FSA the opportunity to vet the suitability of an individual to perform important functions. Furthermore, because the regime covers individuals rather than the firm, it would allow the FSA to take a nuanced proportionate approach, taking action against individuals rather than the firm.

4.5 However, directors of internally managed investment companies are already subject to company law requirements and in many cases, the Listing Rules, which impose corporate governance requirements. It could be argued that, given the existing degree of regulation, application of the approved persons regime in addition would be regarded as unnecessary gold-plating. While consistent with the approach taken for other AIFMs, it could also be inconsistent with the approach taken to individuals in AIFMs passporting into the UK from other Member States under the Directive, since it cannot be assumed that a comparable regime would be applied in those Member States.

4.6 Our proposal for internally managed investment companies, both above and below the threshold, is that the approved persons regime will not be applied. This approach was argued for strongly in the responses to the Government’s earlier discussion paper and we believe that similar standards of investor protection are already in place.

4.7 Our proposal for external managers of investment companies is that the FSA should continue to be able to apply the approved persons regime as it does now. This will apply to both above and below threshold AIFMs.

¹ See Statements of Principle and Code of Practice of Approved Persons Regime (APER) for an introduction to the regime <http://fsahandbook.info/FSA/html/handbook/APER> and www.fsa.gov.uk/static/pubs/handbook/rel128-aper.pdf

² See Recital 22 of AIFMD here - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:174:0001:01:EN:PDF>

Box 4.A: Application of Approved Persons Regime to Listed Investment Companies

- 1 Do you agree with the proposed approach?
- 2 What are the additional business costs of the preferred approach?

5

Investor redress

Application of the Financial Services Compensation Scheme

5.1 The Directive introduces a management passport that will allow non-UK EEA AIFMs to manage AIFs domiciled in the UK. The Government must decide the extent to which the Financial Services Compensation Scheme (FSCS) may be extended to the activities of managers of such AIFs. It should be noted that compensation depends on a variety of factors, including whether there is an eligible claimant.

5.2 The scope of the FSCS covers most UK authorised persons; certain EEA firms that are authorised persons as a result of using a passport to establish a branch or provide services in the UK are also required to participate, and others may opt to provide “top-up” participation. Therefore it already covers UK fund managers, including those managing FSA-authorised AIFs (i.e. Non-UCITS Retail Schemes (NURS) and Qualified Investor Schemes (QIS)) as well as those managing UK UCITS funds.

5.3 Under AIFMD, EEA AIFMs will be able to make use of the AIFMD passport to establish a branch or provide services in the UK. As the legislation currently stands, such AIFMs would be required to participate in the FSCS. However, the Government may decide to restrict the coverage of the FSCS to non-UK EEA AIFMs.

5.4 The Government’s preferred option is to restrict FSCS coverage so that it only applies compulsorily to non-UK EEA managers of UK authorised AIFs, and allowing EEA AIFMs providing other services under a passport to elect to participate in the FSCS if they wish. The Government proposes retaining the compulsory element because investors may not always obtain equivalent protection from the home compensation scheme of the non-UK EEA AIFM. The Government considers it important to ensure that investors in all UK authorised funds (which, depending on the fund, may be marketed to some or all retail investors) receive such protection.

5.5 The Government’s preferred option mirrors the approach taken to the non-UK EEA managers of UCITS funds, which are also covered by the FSCS. The preferred approach will be reviewed following responses to this consultation.

5.6 Under our proposed approach, we would expect that incoming EEA managers setting up or taking over the management of an authorised fund in the UK would be required to pay a levy to the FSCS. The cost of FSCS coverage to incoming EEA managers would be calculated in the same way as it is for UK managers.

5.7 The FSA will set out more detailed proposals on the territorial scope of the FSCS in its forthcoming consultation paper, in line with the Government’s preferred approach.

Box 5.A: Application of the Financial Services Compensation Scheme

- 1 Do you agree with the Government's preferred approach?
- 2 Are there any significant business costs as a result of our approach?
- 3 What are the broader costs and benefits of implementing such an approach?

Application of the Financial Ombudsman Service

5.8 The FSA will set out in its forthcoming consultation paper the application of the Financial Ombudsman Service in relation to firms in scope of AIFMD. The approach will also cover non-UK EEA AIFMs managing FSA-authorized AIFs. This particular issue will be set out under the rules of the FSA with regard to the requirements of AIFMD.

6

The consultation process

How to respond

6.1 This document provides details on the proposed implementation of the AIFMD. Responses to the consultation should be sent by 5 April 2013 by e-mail to aifmd@hmtreasury.gsi.gov.uk.

6.2 Responses can also be sent by post to:

AIFMD Transposition Consultation,
Financial Regulation and Markets,
HM Treasury, 1st Floor Red 1,
1 Horse Guards Road,
London
SW1A 2HQ.

6.3 Please be aware that all responses may be shared with the FCA and the Charity Commission.

6.4 The consultation document has been written in accordance with the Consultation Principles, published by the Cabinet Office. These principles can be read at:
<http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf>

6.5 All responses will be acknowledged, but it will not be possible to give substantive replies to individual representations.

6.6 When responding please state whether you are a business, private individual or representative body. In the case of representative bodies please provide information as to the number and nature of people or businesses you represent.

Confidentiality

6.7 Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information regulations 2004.

6.8 If you want the information that you provide to be treated as confidential, please be aware that, under FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals with, amongst other things, obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on HM Treasury or the FCA.

6.9 HM Treasury and the FCA will process your personal data in accordance with the Data Protection Act 1998 and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

HM Treasury contacts

This document can be found in full on our website: <http://www.hm-treasury.gov.uk>

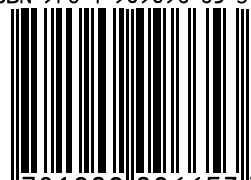
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