

**ALTERNATIVE INVESTMENT FUND MANAGERS REGULATIONS
(ENFORCEMENT GUIDANCE) INSTRUMENT 2013**

Powers exercised by the Financial Conduct Authority

- A. The Financial Conduct Authority makes this instrument in the exercise of:
- (1) the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):
 - (a) section 139A (Power of the FCA to give guidance);
 - (b) section 169(9) (Investigations etc. in support of overseas regulator) as applied by regulation 71(2) of the Alternative Investment Fund Managers Regulations 2013;
 - (c) section 210 (Statements of policy) as applied by regulation 71(3) of the Alternative Investment Fund Managers Regulations 2013; and
 - (2) the following powers in the Alternative Investment Fund Managers Regulations 2013:
 - (a) regulation 70(2) (Application of procedural provisions of the Act); and
 - (b) regulation 71 (Application of provisions of the Act to unauthorised AIFMs).

Commencement

- B. This instrument comes into force on 26 July 2013.

Amendments to the Handbook

- C. The Glossary of definitions is amended in accordance with Annex A to this instrument.
- D. The Decision Procedure and Penalties manual (DEPP) is amended in accordance with Annex B to this instrument.

Material outside the Handbook

- E. The Enforcement Guide (EG) is amended in accordance with Annex C to this instrument.

Citation

- F. This instrument may be cited as the Alternative Investment Fund Managers Regulations (Enforcement Guidance) Instrument 2013.

By order of the Board of the Financial Conduct Authority
25 July 2013

Annex A

Amendments to the Glossary of definitions

Insert the following new definitions in the appropriate alphabetical position. The text is not underlined.

- qualifying social entrepreneurship fund* has the meaning given in article 3(b) of the *EuSEF regulation*.
- qualifying venture capital fund* has the meaning given in article 3(b) of the *EuVECA regulation*.
- unauthorised AIFM* a person who is not an *authorised person* but who is:
- (a) a *small registered UK AIFM*; or
 - (b) a small registered EEA AIFM, i.e. an *EEA AIFM* that is a *small AIFM* that has not opted in to become a *full-scope EEA AIFM*; or
 - (c) a *full-scope EEA AIFM* that is entitled to *market* an *AIF* in the *United Kingdom* following a notification under regulation 57 of the *AIFMD UK regulation*; or
 - (d) an *small non-EEA AIFM* that is entitled to *market* an *AIF* in the *United Kingdom* following a notification under regulation 58 of the *AIFMD UK regulation*; or
 - (e) an *above-threshold non-EEA AIFM* to which the requirement at regulation 59(3) of the *AIFMD UK regulation* applies; or
 - (f) a *full-scope EEA AIFM* that is exercising a right to *market* an *AIF* in the *United Kingdom* arising out of the *EuSEF regulation* or the *EuVECA regulation*.

Annex B

Amendments to the Decision Procedure and Penalties manual (DEPP)

In this Annex, underlining indicates new text and striking through indicates deleted text.

2 Annex 1G Warning notices and decision notices under the Act and certain other enactments

Note: Third party rights and access to *FCA* material apply to the powers listed in this Annex where indicated by an asterisk * (see *DEPP* 2.4)

| Section of the Act | Description | Handbook reference | Decision maker |
|-----------------------|---|--------------------|-----------------------------|
| ... | | | |
| 271(1)/(3) | when the <i>FCA</i> is proposing or deciding to refuse approval of a <i>collective investment scheme</i> as a <i>recognised scheme</i> under section 270 | COLL9 | <i>Executive procedures</i> |
| ... | | | |
| 280(1)/(2) | when the <i>FCA</i> is proposing or deciding to direct that a section 270 <i>recognised scheme</i> is to cease to be recognised or to revoke a section 272 order in respect of a <i>recognised scheme</i> * | | <i>RDC</i> |
| ... | | | |

...

| Recognised Auction Platforms Regulations 2011 | Description | Handbook reference | Decision maker |
|---|-------------|--------------------|----------------|
| ... | | | |

| <u>Alternative Investment Fund Managers Regulations 2013</u> | <u>Description</u> | <u>Handbook reference</u> | <u>Decision maker</u> |
|--|--|-------------------------------|--|
| <u>Regulation 13(1)</u> | where the <i>FCA</i> proposes to refuse an application for entry on the register of <i>small registered UK AIFMs</i> | | <u>Executive procedures</u> |
| <u>Regulation 13(2)(a)</u> | where the <i>FCA</i> decides to refuse an application for entry on the register of <i>small registered UK AIFMs</i> | | <u>Executive procedures where no representations are made in response to a warning notice otherwise by the RDC</u> |
| <u>Regulation 18(1)</u> | where the <i>FCA</i> proposes to revoke the registration of a <i>small registered UK AIFM</i> including, where applicable, its registration as a <i>EuSEF manager</i> or <i>EuVECA manager</i> | | <u>RDC</u> |
| <u>Regulation 18(2)(a)</u> | where the <i>FCA</i> decides to revoke the registration of a <i>small registered UK AIFM</i> including where applicable its registration as a <i>EuSEF manager</i> or <i>EuVECA manager</i> | | <u>RDC</u> |
| <u>Regulation 25(2)</u> | where the <i>FCA</i> proposes to disqualify an <i>external valuer</i> | | <u>RDC</u> |
| <u>Regulation 25(3)(a)</u> | where the <i>FCA</i> decides to disqualify an <i>external valuer</i> | | <u>RDC</u> |
| <u>Regulation 27(2)</u> | where the <i>FCA</i> proposes to revoke approval given to a <i>full-scope UK AIFM</i> for the delegation of functions of portfolio or risk management | | <u>Executive procedures</u> |
| <u>Regulation</u> | where the <i>FCA</i> decides to revoke | | <u>Executive</u> |

| | | | |
|----------------------------|---|--|-------------------|
| <u>27(3)(a)</u> | <u>approval given to a full-scope UK AIFM for the delegation of functions of portfolio management or risk management</u> | | <u>procedures</u> |
| <u>Regulation 56</u> | <u>where the FCA is proposing to revoke a full-scope UK AIFM's approval to market an AIF under regulation 54</u> | | <u>RDC</u> |
| <u>Regulation 56</u> | <u>where the FCA is deciding to revoke a full-scope EEA AIFM's approval to market an AIF under regulation 54</u> | | <u>RDC</u> |
| <u>Regulation 62(2)</u> | <u>where the FCA proposes to revoke an AIFM's entitlement to market an AIF</u> | | <u>RDC</u> |
| <u>Regulation 62(3)</u> | <u>where the FCA decides to revoke the entitlement of an AIFM to market an AIF</u> | | <u>RDC</u> |
| <u>Regulation 71(1)(e)</u> | <u>where the FCA is proposing or deciding to publish a statement that an unauthorised AIFM has contravened the regulations or directly applicable EuSEF regulation or EuVECA regulation</u> | | <u>RDC</u> |
| <u>Regulation 71(1)(f)</u> | <u>where the FCA is proposing or deciding to impose a financial penalty on an unauthorised AIFM that has contravened the regulations or directly applicable EuSEF regulation or EuVECA regulation</u> | | <u>RDC</u> |
| | | | |

2 Annex Supervisory notices
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| Payment Services Regulations | Description | Handbook reference | Decision maker |
|------------------------------|-------------|--------------------|----------------|
| ... | | | |

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| <u>Alternative Investment Fund Managers Regulations 2013</u> | <u>Description</u> | <u>Handbook reference</u> | <u>Decision maker</u> |
|--|--|---------------------------|---|
| Regulation 22(4) | where the <i>FCA</i> is exercising its power on its own initiative to give or vary a direction under regulation 22(1) to a <i>small registered UK AIFM</i> , a <i>EuSEF manager</i> or <i>EuVECA manager</i> | | <i>RDC or executive procedures</i> See <i>DEPP 2.5.7G</i> to <i>2.5.8G</i> |
| Regulation 22(4) | where the <i>FCA</i> is exercising its power on its own initiative to give or vary a direction under regulation 22(2) to a <i>small registered UK AIFM</i> with its registered office in an <i>EEA State</i> other than the <i>UK</i> in accordance with article 19.3 of the <i>EuSEF regulation</i> or article 18.3 of the <i>EuVECA regulation</i> | | <i>RDC or executive procedures</i> See <i>DEPP 2.5.7G</i> to <i>2.5.8G</i> |

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Sch 3 Fees and other required payments

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Sch 3.2G

The *FCA*'s power to impose financial penalties is contained in:

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| | ... |
| | the <i>OTC derivatives, CCPs and trade repositories regulation</i> |
| | <u>the AIFMD UK regulation</u> |

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Sch 4 Powers Exercised

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Sch
4.2G

| | |
|---|---|
| The following additional powers and related provisions have been exercised by the FCA to make the statements of policy in <i>DEPP</i> : | |
| | ... |
| | Regulation 14 (Guidance) of the <i>Cross-Border Payments in Euro Regulations</i> |
| | <u>Regulation 70 (Warning Notices, Decision Notices and Supervisory Notices) of the AIFMD UK regulation</u> |
| | <u>Regulation 71 (Application of Act to <i>unauthorised AIFs</i>) of the AIFMD UK regulation</u> |

Annex C

Amendments to the Enforcement Guide (EG)

In this Annex, underlining indicates new text and striking through indicates deleted text.

14. Collective Investment Schemes

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14.8 ...

Exercise of the powers in respect of recognised schemes: sections 279 and 281 of the Act – powers to revoke recognition of schemes recognised under ~~section 270~~ or section 272: the FCA's policy

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19. Non-FSMA powers

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19.130 ...

Alternative Investment Fund Managers Regulations 2013

19.131 The AIFMD UK regulation transposes AIFMD, EuSEF and EuVECA regulations and provides new and updated powers to both existing and new managers of AIFs, whether authorised or registered.

19.132 The AIFMD UK regulation includes information gathering and sanctioning powers that enable the FCA to investigate and take action for breaches of the regulations and directly applicable EU regulations. Specific standalone powers are in the AIFMD UK regulation for unauthorised AIFMs, by applying relevant sections of the Act. Amendments to the Act, including those made under the Financial Services and Markets Act (Qualifying EU Provisions) Order 2013, extend certain FCA powers (e.g. disciplinary powers, injunctions and restitution) so that they apply to contraventions of requirements of the AIFMD UK regulation and to contraventions of directly applicable EU regulations.

Information gathering and investigation powers

19.133 The FCA has decided that its approach to enforcing the AIFMD UK regulation requirements will mirror its general approach to enforcing the Act in EG 2. Therefore, the FCA will apply the same procedures and policies under the Act for appointing investigators and requiring information for breaches of the AIFMD UK regulation.

19.134 The new powers under the AIFMD UK regulation include powers of direction and the power to revoke the registration of small registered UK AIFMs, including a EuSEF manager or a EuVECA manager and, in some circumstances, EEA managers of a qualifying social entrepreneurship fund or a qualifying venture capital fund, respectively.

19.135 The FCA will respect the principle of proportionality when taking action against EuSEF or EuVECA managers for breaches identified in articles 22 and 21 of the directly applicable EuSEF regulation and EuVECA regulation, respectively. The FCA may take action to ensure compliance with the regulations or prohibit the use of the designation of EuSEF manager or EuVECA manager and revoke registration of such managers. The prohibition route is more likely to apply to serious breaches of the EU regulations such as in situations where:

- registration has been obtained through false statements or any other irregular means; or
- there are grounds for concern over the behaviour of a EuSEF manager or a EuVECA manager in the management of a qualifying social entrepreneurship fund or a qualifying venture capital fund, respectively.

Decision making under the AIFMD UK regulation

19.136 The RDC is the FCA's decision maker for some decisions under the AIFMD UK regulation, as set out in DEPP 2 Annex 1G. The RDC will make its decisions following the procedure in DEPP 3.2 or, where appropriate, DEPP 3.3 and 3.4. For decisions made by executive procedures, the procedures to be followed are in DEPP 4.

19.137 The AIFMD UK regulation does not require the FCA to publish procedures to commence criminal prosecutions. However, the FCA will normally follow its equivalent decision-making procedures for similar decisions under the Act.

19.138 The AIFMD UK regulation applies the procedural provisions of Part 9 and Part 26 of the Act for matters that can be referred to the Tribunal and to warning and decision notices under the regulations as it applies to referrals and notices under the Act. The AIFMD UK regulation also applies sections 205 and 206 of the Act to unauthorised AIFMs and, accordingly, the FCA will give third party rights (section 393 of the Act) and access to material (section 394 of the Act).

Imposition of penalties under the AIFMD UK regulation

19.139 When determining whether to take action to impose a penalty under the AIFMD UK regulation, the FCA's policy includes having regard to the relevant factors in DEPP 6.2 and DEPP 6.4. When determining the level of financial penalty, the FCA's policy includes having regard to relevant principles and factors in DEPP 6.5 to 6.5A, DEPP 6.5B, DEPP 6.5D and DEPP 6.7.

19.140 As with cases under the Act, the FCA may settle or mediate appropriate cases involving civil breaches of the AIFMD UK regulation to assist it to exercise its functions. DEPP 5, DEPP 6.7 and EG 5 set out information on the FCA's

settlement process and the settlement discount scheme.

19.141 The FCA will apply the approach to publicity that is outlined in EG 6.

Statement of Policy in section 169(7) interviews (as applied by the AIFMD UK regulation)

19.142 Regulation 71(2) of the AIFMD UK regulation applies section 169 of the Act in respect of unauthorised AIFMs, which requires the FCA to have a statement of policy on the conduct of certain interviews in response to requests from overseas regulators. The FCA will follow the procedures described in DEPP 7.