

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) REGULATIONS 2013**

**(LN. 2013/103)**

*Commencement*      **22.7.2013**

Amending enactments	Relevant current provisions	Commencement date
LN. 2014/249	rr. 4(1), 8(5), 11(1A), (5A), 11A-11E, 27(22), 27(22A), 37, 38, 38(20), 39(1), (15), 40(1), 41(1), (28A), 42(2A), 45(24A), 46(1), (27A), 47(1), (15A), 48(3A), 49(1), (1A), (2A), (2B), 49A, 53A	11.12.2014
2014/252	rr. 4, 21(3A), (3B)	21.12.2014
2016/146	rr. 4(1)(a), (f), (g), 39(1), (2)	7.7.2016
2016/152	<i>Corrigendum</i>	
2017/153	rr. 11(1), (8), (9)	27.7.2017

**Transposing:**

Directive 2003/41/EC

Directive 2009/65/EC

Directive 2011/61/EU

Directive 2013/14/EU

Directive 2014/65/EU

**EU Legislation/International Agreements involved:**

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**1989-47**

**Financial Services (Investment and Fiduciary Services)**

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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 transpose 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—*

**PART 1  
PRELIMINARY**

**Title.**

1. These Regulations may be cited as the Financial Services (Alternative Investment Fund Managers) Regulations 2013.

**Commencement and transitional provision.**

2.(1) These Regulations come into force on 22 July 2013, subject to subregulations (2) and (3).

(2) Regulations 40, 41 and 43 to 47 (which give effect to the rules about passporting of AIFs set out in Articles 35 and 37 to 41 of the AIFM Directive) come into force on a day appointed by the Minister, having regard to any delegated act adopted by the European Commission under Article 67(6) of the AIFM Directive specifying the date when the rules in those Articles become applicable in all Member States.

(3) Subregulation (1) is subject to transitional provisions of or made in accordance with regulation 68.

**Overview.**

3. These Regulations lay down the rules for the authorisation, ongoing operation and transparency of the managers of alternative investment funds (“AIFMs”) which manage or market (or both) alternative investment funds (“AIFs”) in or from Gibraltar.

**Interpretation.**

4.(1) In these Regulations—

“AIF” means a collective investment undertaking (including any investment compartments) which—

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- (a) raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and
- (b) does not require authorisation pursuant to Article 5 of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS);

“AIFM” means a legal person whose regular business is managing one or more AIFs;

“AIFM Directive” has the meaning given by subregulation (3) below;

“branch”, in relation to an AIFM, means a place of business which is a part of an AIFM, which has no legal personality, where the services for which the AIFM is authorised are provided (and see subregulation (2) below);

“carried interest” means a share in the profits of an AIF accrued to its AIFM as payment for management of the AIF, excluding any share in the profits of the AIF accruing to the AIFM as a return on an investment by the AIFM into the AIF;

“close links” in relation to two or more persons means a situation where they are linked by—

- (a) ownership or control of 20% or more of the voting rights or capital of an undertaking;
- (b) one of them being controlled by the other, either as a subsidiary of a parent undertaking (or as one of a chain of subsidiaries) or by a similar relationship between a natural or legal person and an undertaking;
- (c) any other situation in which two or more natural or legal persons are permanently linked to a third person by a relationship of control;

“competent authorities” has the meaning given by subregulation (4) below;

“control” means control as defined in Article 1 of Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts;

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“credit rating agency” has the meaning given in Article 3(1)(b) of Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies;

“employees’ representatives” means employees’ representatives as defined in point (e) of Article 2 of Directive 2002/14/EC;

“ESMA” means the European Securities and Markets Authority established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC;

“ESRB” means the European Systemic Risk Board established by Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board;

“established” is to be construed in accordance with subregulation (5) below;

“EU AIF” means—

- (a) an AIF which is authorised or registered in Gibraltar, or outside Gibraltar in an EEA State under the applicable national law, or
- (b) an AIF which is not authorised or registered in an EEA State, but has its registered office or head office (or both) in Gibraltar, or outside Gibraltar in an EEA State;

“EU AIFM” means an AIFM which has its registered office in an EEA State;

“external AIFM” has the meaning given by regulation 10(2)(a);

“FATF” means the Financial Action Task Force (the inter-governmental body established in 1989);

“FSC” means the Financial Services Commission established under the Financial Services Commission Act 2007;

“feeder AIF” means an AIF which—

- (a) invests at least 85% of its assets in units or shares of another AIF (the ‘master AIF’),

- (b) invests at least 85% of its assets in more than one master AIFs where those master AIFs have identical investment strategies, or
- (c) has otherwise an exposure of at least 85% of its assets to such a master AIF;

“financial instrument” means an instrument as specified in Section C of Schedule 1 to the Financial Services (Markets in Financial Instruments) Act 2006;

“Gibraltar AIFM” means an AIFM of which Gibraltar is the home Member State;

“holding company” means a company with shareholdings in one or more other companies, the commercial purpose of which is to carry out a business strategy or strategies through its subsidiaries, associated companies or participations in order to contribute to their long-term value, and which is either a company—

- (a) operating on its own account and whose shares are admitted to trading on a regulated market in the European Union; or
- (b) not established for the main purpose of generating returns for its investors by means of divestment of its subsidiaries or associated companies, as evidenced in its annual report or other official documents;

“home Member State” in relation to an AIF means—

- (a) Gibraltar, if the AIF is authorised or registered under the law of Gibraltar, or in case of multiple authorisations or registrations, if the AIF has been authorised or registered for the first time under the law of Gibraltar; or
- (b) the Member State in which the AIF is authorised or registered under applicable national law, or in case of multiple authorisations or registrations, the Member State in which the AIF has been authorised or registered for the first time; or
- (c) if the AIF is neither authorised nor registered in a Member State, the Member State in which the AIF has its registered office or head office (or both);

“home Member State of the AIFM” means—

- (a) Gibraltar, if the AIFM has its registered office in Gibraltar; or
- (b) the Member State in which the AIFM has its registered office; or
- (c) for non-EU AIFMs, the ‘Member State of reference’, as provided for in Part 8;

“host Member State of the AIFM” means any of the following—

- (a) Gibraltar, if any of the activities specified in paragraphs (b) to (h) take place in Gibraltar;
- (b) a Member State, other than the home Member State, in which an EU AIFM manages EU AIFs;
- (c) a Member State, other than the home Member State, in which an EU AIFM markets units or shares of an EU AIF;
- (d) a Member State, other than the home Member State, in which an EU AIFM markets units or shares of a non-EU AIF;
- (e) a Member State, other than the Member State of reference, in which a non-EU AIFM manages EU AIFs;
- (f) a Member State, other than the Member State of reference, in which a non-EU AIFM markets units or shares of an EU AIF;
- (g) a Member State, other than the Member State of reference, in which a non-EU AIFM markets units or shares of a non-EU AIF; or
- (h) a Member State, other than the home Member State, in which an EU AIFM provides the services referred to in regulation 12(5);

“initial capital” means funds as referred to in points (a) and (b) of the first subregulation of Article 57 of Directive 2006/48/EC;

“issuer” means an issuer within the meaning of point (d) of Article 2(1) of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, where that issuer has its registered office in the European Union, and where its shares are admitted to trading on a regulated market within the meaning of

point (14) of Article 4(1) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC;

“legal representative” means a natural person domiciled in the European Union or a legal person with its registered office in the European Union, and which, expressly designated by a non-EU AIFM, acts on behalf of such non-EU AIFM in relation to the authorities, clients, bodies and counterparties to the non-EU AIFM in the European Union with regard to the non-EU AIFM’s obligations under the AIFM Directive;

“leverage” means any method by which the AIFM increases the exposure of an AIF it manages whether through borrowing of cash or securities, or leverage embedded in derivative positions or by any other means, in accordance with any measures adopted by the European Commission in accordance with Article 4(3) of the AIFM Directive;

“managing AIFs” means performing at least investment management functions referred to in point 1(a) or (b) of Annex I of the AIFM Directive for one or more AIFs;

“marketing” means a direct or indirect offering or placement at the initiative of the AIFM or on behalf of the AIFM of units or shares of an AIF it manages to or with investors domiciled or with a registered office in the European Union;

“master AIF” means an AIF in which another AIF invests or to which the other AIF has an exposure of at least 85% of its assets;

“Member State” means a member of the European Economic Area (EEA);

“Member State of reference” means the Member State determined in accordance with regulation 43(5) to (10);

“the Minister” means the Minister with responsibility for financial services;

“non-EU AIF” means an AIF which is not an EU AIF;

“non-EU AIFM” means an AIFM which is not an EU AIFM;

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“non-Gibraltar AIFM” means an AIFM of which Gibraltar is not the home Member State but is a host Member State;

“non-listed company” means a company which has its registered office in the European Union and the shares of which are not admitted to trading on a regulated market within the meaning of point (14) of Article 4(1) of Directive 2004/39/EC;

“own funds” means own funds as referred to in Articles 56 to 67 of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions; and for this purpose Articles 13 to 16 of Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions shall apply with any necessary modifications;

“parent undertaking” means a parent undertaking within the meaning of Articles 1 and 2 of Directive 83/349/EEC;

“place of establishment” has the meaning given by subregulation (5) below;

“prime broker” means a credit institution, a regulated investment firm or another entity subject to prudential regulation and ongoing supervision, offering services to professional investors primarily to finance or execute transactions in financial instruments as counterparty and which may also provide other services such as clearing and settlement of trades, custodial services, securities lending, customised technology and operational support facilities;

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

“professional investor” means an investor which is considered to be a professional client or may, on request, be treated as a professional client within the meaning of Schedule 2 to the Financial Services (Markets in Financial Instruments) Act 2006;

“qualifying holding” means a direct or indirect holding in an AIFM which represents 10% or more of the capital or of the voting rights, in accordance with Articles 9 and 10 of Directive 2004/109/EC, taking into account the conditions regarding aggregation of the holding laid down in Article 12(4) and (5) thereof, or which makes it possible to exercise a significant influence over the management of the AIFM in which that holding subsists;

“retail investor” means an investor who is not a professional investor;

“securitisation special purpose entities” means entities whose sole purpose is to carry on a securitisation or securitisations within the meaning of Article 1(2) of Regulation (EC) No 24/2009 of the European Central Bank of 19 December 2008 concerning statistics on the assets and liabilities of financial vehicle corporations engaged in securitisation transactions and other activities which are appropriate to accomplish that purpose;

“small AIFM” has the meaning given by regulation 8(5);

“subsidiary” means a subsidiary undertaking as defined in Articles 1 and 2 of Directive 83/349/EEC;

“supervisory authorities” in relation to non-EU AIFs means the national authorities of a third country which are empowered by law or regulation to supervise AIFs;

“supervisory authorities” in relation to non-EU AIFMs means the national authorities of a third country which are empowered by law or regulation to supervise AIFMs; and

“UCITS” means an undertaking for collective investment in transferable securities authorised in accordance with Article 5 of Directive 2009/65/EC.

(2) Where an AIFM whose registered office is outside Gibraltar has branches in Gibraltar (within the meaning of subregulation (1)), all those places of business shall be treated as a single branch of the AIFM.

(3) In these Regulations a reference to the AIFM Directive is a reference to Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers, as the same may be amended from time to time.

(4) In these Regulations a reference to competent authorities is a reference to—

- (a) the FSC in relation to Gibraltar and, in relation to a Member State outside Gibraltar, the national authority empowered to supervise AIFMs;
- (b) in relation to a depositary which is a credit institution authorised under Directive 2006/48/EC, the competent authorities as defined in Article 4(4) of that Directive;

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- (c) in relation to a depositary which is an investment firm authorised under Directive 2004/39/EC, the competent authorities as defined in Article 4(1)(22) of that Directive;
- (d) in relation to a depositary which falls within a category of institution referred to in Article 21(3)(c) of the AIFM Directive, the FSC or, in relation to a depositary whose home Member State is not Gibraltar, the national authorities of its home Member State which are empowered to supervise that category of institution;
- (e) in relation to a depositary which is an entity referred to in the third subparagraph of Article 21(3) of the AIFM Directive, the FSC or, in relation to a depositary which has its registered office in a Member State outside Gibraltar, the national authorities of that State which are empowered by law to supervise the entity or the official body competent to register or supervise the entity pursuant to rules of professional conduct;
- (f) in relation to a depositary which is appointed as depositary for a non- EU AIF in accordance with Article 21(5)(b) of the AIFM Directive and which does not fall within the scope of paragraphs (b) to (e) above, the relevant national authorities of the third country where the depositary has its registered office; and
- (g) in the phrase ‘competent authorities of the EU AIF’, means the national authorities of a Member State which are empowered by law or regulation to supervise AIFs.

(5) In these Regulations a reference to the place of establishment—

- (a) in relation to AIFMs, is a reference to the place of the registered office;
- (b) in relation to AIFs, is a reference to the place where the AIF is authorised or registered or, if there is no such place, to the place where the AIF has its registered office;
- (c) in relation to a depositary, is a reference to the place where it has its registered office or branch;
- (d) in relation to a legal representative which is a legal person, is a reference to the place where it has its registered office or branch; and

- (e) in relation to a legal representative which is a natural person, is a reference to the place of domicile.

(6) Any question arising as to the determination of types of AIFM or the application of the AIFM Directive shall be resolved in accordance with any relevant regulatory technical standards adopted by the European Commission under Article 4(4) of the AIFM Directive.

## **PART 2 SCOPE OF REGULATIONS**

### *Principal rules for application*

#### **AIFMs to which these Regulations apply.**

5.(1) These Regulations apply to—

- (a) EU AIFMs which manage one or more AIFs irrespective of whether such AIFs are EU AIFs or non-EU AIFs;
- (b) non-EU AIFMs which manage one or more EU AIFs; and
- (c) non-EU AIFMs which market one or more AIFs in the European Union irrespective of whether such AIFs are EU AIFs or non-EU AIFs.

(2) Subregulation (1) is subject to the exemptions provided for in regulations 6 to 8.

(3) For the purposes of subregulation (1) the following shall be of no significance—

- (a) whether an AIF belongs to the open-ended or closed-ended type;
- (b) whether an AIF is constituted under the law of contract, under trust law, under statute, or has any other legal form;
- (c) the legal structure of the AIFM.

### *Exemptions*

#### **Exemption for holding companies and public service entities.**

6. These Regulations do not apply to the following entities—

- (a) holding companies;
- (b) institutions for occupational retirement provision which are covered by Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision, including, where applicable, the authorised entities responsible for managing such institutions and acting on their behalf referred to in Article 2(1) of that Directive or the investment managers appointed pursuant to Article 19(1) of that Directive, in so far as they do not manage AIFs;
- (c) supranational institutions, such as the European Central Bank, the European Investment Bank, the European Investment Fund, the European Development Finance Institutions and bilateral development banks, the World Bank, the International Monetary Fund, and other supranational institutions and similar international organisations, in the event that such institutions or organisations manage AIFs and in so far as those AIFs act in the public interest;
- (d) the Government of Gibraltar in its role as the national central bank of Gibraltar and other national central banks;
- (e) the Government of Gibraltar and any other national, regional or local governments and bodies or other institutions which manage funds supporting social security and public pension systems (in Gibraltar or elsewhere);
- (f) employee participation schemes or employee savings schemes;
- (g) securitisation special purpose entities.

**Exemption for self-investment AIFMs.**

7. These Regulations do not apply to an AIFM in so far as it manages one or more AIFs whose only investors are the AIFM or the parent undertakings or the subsidiaries of the AIFM or other subsidiaries of those parent undertakings, provided that none of those investors is itself an AIF.

**Exemption for small AIFMs.**

8.(1) This regulation applies to—

- (a) AIFMs which either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage

portfolios of AIFs whose assets under management, including any assets acquired through use of leverage, in total do not exceed a threshold of EUR 100 million; and

- (b) AIFMs which either directly or indirectly, through a company with which the AIFM is linked by common management or control, or by a substantive direct or indirect holding, manage portfolios of AIFs whose assets under management in total do not exceed a threshold of EUR 500 million when the portfolios of AIFs consist of AIFs that are unleveraged and have no redemption rights exercisable during a period of 5 years following the date of initial investment in each AIF.

(2) AIFMs to which this regulation applies are subject only to the provisions of regulation 11 (and regulation 55); and rights under the AIFM Directive or these Regulations do not apply to them.

(3) Where this regulation ceases to apply to an AIFM it must apply for authorisation under Part 4 during the period of 30 calendar days beginning with the day on which this regulation ceases to apply.

(4) Where an AIFM to which this regulation would otherwise apply opts in to the AIFM Directive (in accordance with Article 3(4) and (5) and the implementing acts adopted by the European Commission for the purposes of Article 3(5)), this regulation shall not apply to the AIFM.

(5) An AIFM to which this regulation applies is referred to in these Regulations as a small AIFM.

### **PART 3 PRINCIPAL DUTIES OF AIFMs AND AIFs**

#### *General duties*

#### **General duty to comply with Regulations and with AIFM Directive.**

9. An AIFM to which these Regulations apply must comply with the provisions of these Regulations (and of the AIFM Directive) at all times.

#### **Requirement to have AIFM.**

10.(1) Each AIF to which these Regulations apply must have a single AIFM which is responsible for ensuring compliance with these Regulations and with the AIFM Directive.

- (2) The AIFM must be either—

- (a) an external manager, which is the legal person appointed by the AIF or on behalf of the AIF and which through this appointment is responsible for managing the AIF (an “external AIFM”); or
- (b) where the legal form of the AIF permits an internal management and where the AIF’s governing body chooses not to appoint an external AIFM, the AIF itself, which shall then be authorised as an AIFM.

(3) In cases where an external AIFM is unable to ensure compliance with requirements of these Regulations or the AIFM Directive for which an AIF or another entity on its behalf is responsible, it must immediately inform—

- (a) the FSC, and
- (b) if applicable, the competent authorities of the EU AIF concerned.

(4) On receipt of information under subregulation (3) the FSC shall require the AIFM to take the necessary steps to remedy the situation.

(5) If, notwithstanding the steps referred to in subregulation (4) being taken, the non-compliance persists, and in so far as it concerns an EU AIFM or an EU AIF, the FSC shall require the AIFM to resign as AIFM of the AIF; in which case—

- (a) the AIF may no longer be marketed in Gibraltar or elsewhere in the European Union (whether or not the AIF is an EU AIF);
- (b) the FSC shall immediately inform the competent authorities of the host Member States of the AIFM.

**Small AIFMs.**

11.(1) Subject to sub-regulations (8) and (9), a small AIFM must comply with this regulation.

(1A) A small AIFM which complies with this regulation may market to professional investors, in Gibraltar, the units or shares of AIFs it manages.

(2) The AIFM must register with the FSC in writing, in accordance with any administrative directions given by the FSC.

(3) The registration must identify the AIFM and the AIFs that it manages at the time of registration.

(4) The registration must include information on the investment strategies of the AIFs that the AIFM manages at the time of registration.

(5) The AIFM must from time to time, in accordance with guidance issued by the FSC, provide the FSC with information on the main instruments in which the AIFM is trading and on the principal exposures and most important concentrations of the AIFs that it manages; and the information must be sufficient to enable the FSC to monitor systemic risk effectively.

(5A) If there is a material change to the information provided in accordance with subregulation (5) the small AIFM must give written notification of the change to the FSC—

- (a) in the case of a change planned by the small AIFM, at least one month before implementing the change; and
- (b) in any other case, immediately following the occurrence of the change.

(6) The AIFM must notify the FSC in writing if it no longer meets the conditions for exemption in regulation 8.

(7) Nothing in this regulation prevents an AIFM from being required to comply with rules under any other enactment that supplement, or are more demanding than, the provisions of this regulation.

(8) This regulation does not apply to a small AIFM which is—

- (a) an external AIFM; and
- (b) authorised as a small scheme manager in accordance with Part XIA of the Financial Services (Collective Investment Schemes) Regulations 2011.

(9) A small AIFM to which sub-regulation (8) applies, when undertaking any activity of a small scheme manager, must act in accordance with Part XIA of the Financial Services (Collective Investment Schemes) Regulations 2011 and the Financial Services (Collective Investment Schemes) Act 2011.

*National Private Placement Regime*

**Conditions for the marketing in Gibraltar of AIFs managed by a small AIFM established in a Member State outside Gibraltar.**

11A.(1) A small AIFM established in a Member State outside Gibraltar may market to professional investors, in Gibraltar, the units or shares of AIFs it manages as soon as the conditions laid down in this regulation are met.

(2) Before marketing an AIF in accordance with subregulation (1), a small AIFM must give written notification to the FSC, including confirmation that the small AIFM is responsible for the marketing of the AIF.

(3) The small AIFM must provide the FSC, in order to enable the FSC to monitor systematic risk effectively, with such information as the FSC directs about—

- (a) the instruments in which the small AIFM trades; and
- (b) the exposures and concentrations of the AIFs that it manages.

(4) The FSC may not give a direction under subregulation (3) that requires a small AIFM to provide information if the FSC is satisfied that there is no present or expected investment in an AIF as a result of marketing in reliance on subregulation (1).

(5) If there is a material change to the information provided in a notification under subregulation (1) the small AIFM must give written notification of the change to the FSC—

- (a) in the case of a change planned by the small AIFM, at least one month before implementing the change; and
- (b) in any other case, immediately following the occurrence of the change.

**Conditions for the marketing in Gibraltar of AIFs managed by a small AIFM which is not established in a Member State.**

11B.(1) A small AIFM which is not established in a Member State may market to professional investors, in Gibraltar, the units or shares of AIFs it manages provided that the conditions laid down in this regulation are met.

(2) Before marketing an AIF in accordance with subregulation (1), a small AIFM must submit a written application to the FSC, including confirmation that the small AIFM is responsible for the marketing of the AIF.

(3) The small AIFM must provide the FSC, in order to enable the FSC to monitor systematic risk effectively, with such information as the FSC directs about—

- (a) the instruments in which the small AIFM trades; and
- (b) the exposures and concentrations of the AIFs that it manages.

(4) The FSC may not give a direction under subregulation (3) that requires a small AIFM to provide information if the FSC is satisfied that there is no present or expected investment in an AIF as a result of marketing in reliance on subregulation (1).

(5) Following receipt of a complete application under subregulation (2), the FSC shall without unreasonable delay inform the small AIFM whether or not it may start marketing the AIF identified in the application in Gibraltar.

(6) The FSC shall not authorise the marketing of the AIF if it considers it appropriate not to do so in order—

- (a) to protect the public against financial loss; or
- (b) to protect the reputation of Gibraltar as a financial services centre or otherwise.

(7) If there is a material change to the information provided in a notification under subregulation (1) the small AIFM must give written notification of the change to the FSC—

- (a) in the case of a change planned by the small AIFM, at least one month before implementing the change; and
- (b) in any other case, immediately following the occurrence of the change.

**Revocation of entitlement to market.**

11C.(1) The FSC may revoke a small AIFM's entitlement to market an AIF following a notification under regulation 11A or 11B if it appears to the FSC that—

- (a) the small AIFM has contravened a provision which applies to it;
- (b) the small AIFM has given the FSC information which is false or misleading in a material particular;
- (c) a condition confirmed in the notification as being met is no longer satisfied;

- (d) the AIF is wound up;
- (e) it is undesirable in the interests of investors or potential investors that the AIF should continue to be marketed; or
- (f) it is necessary to protect the public against financial loss, or to protect the reputation of Gibraltar as a financial services centre or otherwise.

(2) Before revoking a small AIFM's entitlement to market an AIF under subregulation (1)(a) to (f), the FSC must give a warning notice to the small AIFM.

(3) If the FSC decides to revoke a small AIFM's entitlement to market an AIF under subregulation (1)—

- (a) it must give a decision notice to the small AIFM; and
- (b) the small AIFM may appeal to the Supreme Court.

**Suspension of entitlement to market.**

11D.(1) The FSC may by notice (a "suspension notice") suspend a small AIFM's entitlement to market an AIF following a notification under regulation 11A or 11B, on any of the grounds in subregulation (2).

- (2) The grounds are that it appears to the FSC that—
  - (a) the small AIFM has contravened, or is likely to contravene, a provision that applies to it;
  - (b) the small AIFM has given the FSC information which is false or misleading in a material particular;
  - (c) one or more of the conditions confirmed in the notification as being met is no longer satisfied;
  - (d) it is undesirable in the interests of investors or potential investors that the AIF should continue to be marketed;
  - (e) it is necessary to protect the public against financial loss, or to protect the reputation of Gibraltar as a financial services centre or otherwise.

(3) A suspension under this regulation may be—

- (a) for a specified period;
  - (b) until the occurrence of a specified event; or
  - (c) until specified conditions are complied with.
- (4) A suspension takes effect—
- (a) immediately, if the suspension notice so provides;
  - (b) on such date as may be specified in the suspension notice; or
  - (c) otherwise in accordance with provision of the suspension notice.
- (5) The FSC must be satisfied that the provision under subregulation (4) is necessary having regard to the grounds of suspension.
- (6) The small AIFM may appeal to the Supreme Court against the suspension notice.
- (7) A suspension notice must—
- (a) give details of the suspension (including the provision made under subregulation (4));
  - (b) state the FSC's reasons for giving the suspension and for that provision;
  - (c) inform the small AIFM that it may make representations to the FSC within a specified period (which the FSC may extend);
  - (d) inform the small AIFM of the right to appeal to the Supreme Court.
- (8) Having considered representations by the small AIFM the FSC may withdraw or amend the suspension notice.

**Effect of permission to market.**

11E. Regulations 11, 11A and 11B have effect notwithstanding any provision of, or made under, the Financial Services (Collective Investment Schemes) Act 2011, or any other enactment.”.

**PART 4  
AUTHORISATION OF AIFMs**

**Authorisation as conditions for taking up activities as AIFM.**

12.(1) An AIFM may not manage an AIF unless authorised in accordance with these Regulations.

(2) An AIFM authorised in accordance with these Regulations must meet the conditions for authorisation established in these Regulations at all times.

(3) An external AIFM may not engage in activities other than those referred to in Annex I to the AIFM Directive and the additional management of UCITS subject to authorisation under Directive 2009/65/EC (but this subregulation is subject to subregulation (5)).

(4) An internally managed AIF may not engage in activities other than the internal management of that AIF in accordance with Annex I to the AIFM Directive.

(5) An external AIFM may provide the following services—

- (a) management of portfolios of investments, including those owned by pension funds and institutions for occupational retirement provision in accordance with Article 19(1) of Directive 2003/41/EC, in accordance with mandates given by investors on a discretionary, client-by-client basis;
- (b) non-core services comprising—
  - (i) investment advice;
  - (ii) safe-keeping and administration in relation to shares or units of collective investment undertakings;
  - (iii) reception and transmission of orders in relation to financial instruments;

and Articles 2(2), 12, 13 and 19 of Directive 2004/39/EC shall apply to the provision of the services referred to in this subregulation by AIFMs.

(6) An AIFM may not be authorised to provide—

- (a) only the activities referred to in subregulation (5);
- (b) non-core services referred to in subregulation (5)(b) without also being authorised to provide the services referred to in subregulation (5)(a);

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- (c) only the activities referred to in point 2 of Annex I to the AIFM Directive; or
- (d) the services referred to in point 1(a) of that Annex without also providing the services referred to in point 1(b) of that Annex (or vice versa).

(7) An AIFM must provide the FSC with the information it requires to monitor compliance with the conditions referred to in these Regulations and the AIFM Directive at all times.

(8) Investment firms authorised under Directive 2004/39/EC and credit institutions authorised under Directive 2006/48/EC shall not be required to obtain an authorisation under these Regulations in order to provide investment services such as individual portfolio management in respect of AIFs; but those investment firms may, directly or indirectly, offer units or shares of AIFs to, or place such units or shares with, investors in the European Union, only to the extent the units or shares can be marketed in accordance with these Regulations.

(9) Authorisation by the competent authorities of any Member State shall be treated as valid in Gibraltar.

**Application for authorisation.**

13.(1) An application for authorisation under these Regulations—

- (a) must be made to the FSC, and
- (b) may be made only by an AIFM for which Gibraltar is the home Member State.

(2) An AIFM applying for an authorisation shall provide the following information relating to the AIFM to the FSC—

- (a) information on the persons effectively conducting the business of the AIFM;
- (b) information on the identities of the AIFM's shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings and on the amounts of those holdings;
- (c) a programme of activity setting out the organisational structure of the AIFM, including information on how the AIFM intends to comply with its obligations under these Regulations;

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- (d) information on the remuneration policies and practices pursuant to regulation 19;
- (e) information on arrangements made for the delegation and sub-delegation to third parties of functions as referred to in regulation 26.

(3) An AIFM applying for authorisation must further provide to the FSC the following information on the AIFs it intends to manage—

- (a) information about the investment strategies including the types of underlying funds if the AIF is a fund of funds, and the AIFM's policy as regards the use of leverage, and the risk profiles and other characteristics of the AIFs it manages or intends to manage, including information about the Member States or third countries in which such AIFs are established or are expected to be established;
- (b) information on where the master AIF is established if the AIF is a feeder AIF;
- (c) the rules or instruments of incorporation of each AIF the AIFM intends to manage;
- (d) information on the arrangements made for the appointment of the depositary in accordance with regulation 27 for each AIF the AIFM intends to manage;
- (e) any additional information referred to in regulation 29 for each AIF the AIFM manages or intends to manage.

(4) Where a management company is authorised pursuant to Directive 2009/65/EC (UCITS management company) and applies for authorisation as an AIFM under these Regulations, the FSC may not require the UCITS management company to provide information or documents which the UCITS management company has already provided when applying for authorisation under Directive 2009/65/EC, provided that such information or documents remain up to date.

(5) The FSC shall, on a quarterly basis, inform ESMA of authorisations granted or withdrawn in accordance with these Regulations, for inclusion in the central public register kept by ESMA under Article 7 of the AIFM Directive, in accordance with any standards adopted by the European Commission under that Article.

**Conditions for granting authorisation.**

- 14.(1) The FSC shall not grant authorisation to an AIFM unless—
- (a) it is satisfied that the AIFM will be able to meet the conditions of these Regulations and the AIFM Directive;
  - (b) the AIFM has sufficient initial capital and own funds in accordance with regulation 15;
  - (c) the persons who effectively conduct the business of the AIFM are of sufficiently good repute and are sufficiently experienced also in relation to the investment strategies pursued by the AIFs managed by the AIFM, the names of those persons and of every person succeeding them in office being communicated forthwith to the FSC and the conduct of the business of the AIFM being decided by at least two persons meeting such conditions;
  - (d) the shareholders or members of the AIFM that have qualifying holdings are suitable taking into account the need to ensure the sound and prudent management of the AIFM; and
  - (e) the head office and the registered office of the AIFM are located in Gibraltar.
- (2) The FSC shall consult the relevant competent authorities of Member States involved before authorisation is granted to the following AIFMs—
- (a) a subsidiary of another AIFM, of a UCITS management company, of an investment firm, of a credit institution or of an insurance undertaking authorised outside Gibraltar in a Member State;
  - (b) a subsidiary of the parent undertaking of another AIFM, of a UCITS management company, of an investment firm, of a credit institution or of an insurance undertaking authorised outside Gibraltar in a Member State; and
  - (c) a company controlled by the same natural or legal persons as those that control another AIFM, a UCITS management company, an investment firm, a credit institution or an insurance undertaking authorised outside Gibraltar in a Member State.
- (3) The FSC shall not grant authorisation to an AIFM where the effective exercise of its supervisory functions is prevented by any of the following—

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- (a) close links between the AIFM and other natural or legal persons;
- (b) the laws, regulations or administrative provisions of a third country governing natural or legal persons with which the AIFM has close links;
- (c) difficulties involved in the enforcement of those laws, regulations and administrative provisions.

(4) The FSC may restrict the scope of an authorisation, in particular as regards the investment strategies of AIFs the AIFM is allowed to manage.

(5) The FSC shall inform the applicant in writing within 3 months of the submission of a complete application, whether or not authorisation has been granted.

(6) The FSC may prolong that period for up to three additional months, where it considers it necessary due to the specific circumstances of the case and after having notified the AIFM accordingly.

(7) For the purpose of this regulation an application is deemed complete if the AIFM has at least submitted the information referred to in regulation 13(2)(a) to (d) and (3)(a) and (b).

(8) AIFMs may start managing AIFs with investment strategies described in the application in accordance with regulation 13(3)(a) as soon as the authorisation is granted, but not earlier than 1 month after having submitted any missing information referred to in regulation 13(2)(e) and (3)(c) to (e).

(9) This regulation shall be applied in accordance with any technical standards adopted by the European Commission in accordance with Article 8(6) of the AIFM Directive.

**Initial capital and own funds.**

15.(1) An AIFM which is an internally managed AIF must have an initial capital of at least €300,000.

(2) Where an AIFM is appointed as external manager of AIFs, the AIFM must have an initial capital of at least €125,000.

(3) Where the value of the portfolios of AIFs managed by the AIFM exceeds €250 million, the AIFM must provide an additional amount of own funds; and—

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- (a) that additional amount of own funds shall be equal to 0.02% of the amount by which the value of the portfolios of the AIFM exceeds €250 million, but
- (b) the required total of the initial capital and the additional amount shall not exceed €10 million.

(4) For the purpose of subregulation (3), AIFs managed by the AIFM, including AIFs for which the AIFM has delegated functions in accordance with regulation 26 but excluding AIF portfolios that the AIFM is managing under delegation, shall be deemed to be the portfolios of the AIFM.

(5) Irrespective of subregulation (3), the own funds of the AIFM may never be less than the amount required under Article 21 of Directive 2006/49/EC.

(6) The FSC may authorise an AIFM not to provide up to 50% of the additional amount of own funds referred to in subregulation (3) if it benefits from a guarantee of the same amount given by a credit institution or an insurance undertaking which has its registered office in—

- (a) Gibraltar or a Member State, or
- (b) a third country where it is subject to prudential rules considered by the FSC as equivalent to those laid down in European Union law.

(7) To cover potential professional liability risks resulting from activities AIFMs may carry out pursuant to these Regulations and the AIFM Directive, both internally managed AIFs and external AIFMs must either—

- (a) have additional own funds which are appropriate to cover potential liability risks arising from professional negligence; or
- (b) hold a professional indemnity insurance against liability arising from professional negligence which is appropriate to the risks covered.

(8) Own funds (including additional own funds under subregulation (7)(a))—

- (a) must be invested in liquid assets or assets readily convertible to cash in the short term, and
- (b) may not include speculative positions.

(9) This regulation shall be applied in accordance with any measures adopted by the European Commission for the purposes of Article 9 of the AIFM Directive (initial capital and own funds).

(10) This regulation does not apply to AIFMs which are also UCITS management companies, except for subregulations (7) and (8) and any relevant measures referred to in subregulation (9).

**Changes in the scope of authorisation.**

16.(1) An AIFM, before implementation, must notify the FSC of any material changes to the conditions for initial authorisation (including, in particular, material changes to the information provided in accordance with regulation 13).

(2) If the FSC decides to impose restrictions or reject those changes, it shall, within 1 month of receipt of that notification, inform the AIFM; and—

- (a) the FSC may prolong that period for up to 1 month where it considers it necessary because of the specific circumstances of the case and after having notified the AIFM; and
- (b) the changes may be implemented if the FSC does not oppose the changes within the relevant assessment period.

**Withdrawal of authorisation.**

17.(1) The FSC may withdraw the authorisation issued to an AIFM where any of the conditions in this regulation is satisfied.

(2) Condition 1 is that the AIFM—

- (a) does not make use of the authorisation within 12 months,
- (b) expressly renounces the authorisation, or
- (c) has ceased the activity covered by these Regulations for the preceding 6 months.

(3) Condition 2 is that the AIFM obtained the authorisation by making false statements or by any other irregular means.

(4) Condition 3 is that the AIFM no longer meets the conditions under which authorisation was granted.

(5) Condition 4 is that the AIFM no longer complies with Directive 2006/49/EC if its authorisation also covers the discretionary portfolio management service referred to in regulation 12(5)(a).

(6) Condition 5 is that the AIFM has seriously or systematically infringed these Regulations or other provisions adopted pursuant to the AIFM Directive.

(7) Condition 6 is that the AIFM falls within any other case where a provision of the law of Gibraltar (dealing with matters not addressed by the AIFM Directive) provides for withdrawal of authorisation under these Regulations.

## **PART 5 OPERATING CONDITIONS FOR AIFMs**

### *General requirements*

#### **General principles.**

18.(1) At all times AIFMs must—

- (a) act honestly, with due skill, care and diligence and fairly in conducting their activities;
- (b) act in the best interests of the AIFs or the investors of the AIFs they manage and the integrity of the market;
- (c) have and employ effectively the resources and procedures that are necessary for the proper performance of their business activities;
- (d) take all reasonable steps to avoid conflicts of interest and, when they cannot be avoided, to identify, manage and monitor and, where applicable, disclose, those conflicts of interest in order to prevent them from adversely affecting the interests of the AIFs and their investors and to ensure that the AIFs they manage are fairly treated;
- (e) comply with all regulatory requirements applicable to the conduct of their business activities so as to promote the best interests of the AIFs or the investors of the AIFs they manage and the integrity of the market;
- (f) treat all AIF investors fairly; in particular, no investor in an AIF may obtain preferential treatment, unless it is disclosed in the relevant AIF's rules or instruments of incorporation.

(2) In the case of an AIFM the authorisation of which also covers the discretionary portfolio management service referred to in regulation 12(5)(a), the AIFM must—

- (a) not be permitted to invest all or part of the client's portfolio in units or shares of the AIFs it manages, unless it receives prior general approval from the client, and
- (b) with regard to the services referred to in regulation 12(5), be subject to Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes.

(3) In determining whether an AIFM has complied with its obligations under this regulation the FSC shall use any measures adopted by the European Commission in accordance with Article 12(3) of the AIFM Directive.

**Remuneration.**

19.(1) AIFMs must have remuneration policies and practices for those categories of staff whose professional activities have a material impact on the risk profiles of the AIFMs or of the AIFs they manage; and—

- (a) for this purpose staff includes senior management, risk takers, control functions, and any employees receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers,
- (b) the policies and practices must be consistent with and promote sound and effective risk management and must not encourage risk-taking which is inconsistent with the risk profiles, rules or instruments of incorporation of the AIFs they manage, and
- (c) an AIFM must determine its remuneration policies and practices in accordance with Annex II to the AIFM Directive.

(2) AIFMs must have regard to guidelines on sound remuneration policies ensured by ESMA in accordance with Article 13(2) of the AIFM Directive.

**Conflicts of interest.**

20.(1) AIFMs must take all reasonable steps to identify conflicts of interest that arise in the course of managing AIFs between—

- (a) the AIFM, including its managers, employees or any person directly or indirectly linked to the AIFM by control, and the AIF managed by the AIFM or the investors in that AIF;
- (b) the AIF or the investors in that AIF, and another AIF or the investors in that AIF;
- (c) the AIF or the investors in that AIF, and another client of the AIFM;
- (d) the AIF or the investors in that AIF, and a UCITS managed by the AIFM or the investors in that UCITS; or
- (e) two clients of the AIFM.

(2) AIFMs must maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to identify, prevent, manage and monitor conflicts of interest in order to prevent them from adversely affecting the interests of the AIFs and their investors.

(3) AIFMs must segregate, within their own operating environment, tasks and responsibilities which may be regarded as incompatible with each other or which may potentially generate systematic conflicts of interest.

(4) AIFMs must assess whether their operating conditions may involve any other material conflicts of interest and disclose them to the investors of the AIFs.

(5) Where organisational arrangements made by an AIFM to identify, prevent, manage and monitor conflicts of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to investors' interests will be prevented, the AIFM must clearly disclose the general nature or sources of conflicts of interest to the investors before undertaking business on their behalf, and develop appropriate policies and procedures.

(6) Where the AIFM on behalf of an AIF uses the services of a prime broker, the terms shall be set out in a written contract; and—

- (a) in particular, any possibility of transfer and reuse of AIF assets must be provided for in that contract and must comply with the AIF rules or instruments of incorporation, and
- (b) the contract must provide that the depositary be informed of the contract.

(7) AIFMs must exercise due skill, care and diligence in the selection and appointment of prime brokers with whom a contract is to be concluded.

(8) This regulation shall be applied in accordance with any measures adopted by the European Commission in accordance with Article 14(4) of the AIFM Directive.

**Risk management.**

21.(1) AIFMs must functionally and hierarchically separate the functions of risk management from the operating units, including from the functions of portfolio management.

(2) The FSC shall review the functional and hierarchical separation of AIFMs in accordance with the principle of proportionality, on the understanding that an AIFM must, in any event, be able to demonstrate—

- (a) that specific safeguards against conflicts of interest allow for the independent performance of risk management activities, and
- (b) that the risk management process satisfies the requirements of Article 15 of the AIFM Directive and is consistently effective.

(3) AIFMs must implement adequate risk management systems in order to identify, measure, manage and monitor appropriately all risks relevant to each AIF investment strategy and to which each AIF is or may be exposed; and an AIFM must review its risk management systems with appropriate frequency at least once a year and adapt them whenever necessary.

(3A) AIFMs must not rely solely and mechanistically on credit ratings issued by credit rating agencies for assessing the creditworthiness of the AIF's assets.

(3B) The FSC shall—

- (a) monitor the adequacy of credit assessment processes of AIFMs;
- (b) assess the use of references to credit ratings issued by credit rating agencies in the AIF's investment policies; and
- (c) where appropriate, encourage mitigation of the impact of references referred to in paragraph (b);

taking into account the nature, scale and complexity of the AIF's activities, and with a view to reducing sole and mechanistic reliance on credit ratings.

(4) AIFMs must at least—

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- (a) implement an appropriate, documented and regularly updated due diligence process when investing on behalf of the AIF, according to the investment strategy, the objectives and risk profile of the AIF;
- (b) ensure that the risks associated with each investment position of the AIF and their overall effect on the AIF's portfolio can be properly identified, measured, managed and monitored on an ongoing basis, including through the use of appropriate stress testing procedures;
- (c) ensure that the risk profile of the AIF shall correspond to the size, portfolio structure and investment strategies and objectives of the AIF as laid down in the AIF rules or instruments of incorporation, prospectus and offering documents.

(5) AIFMs must set a maximum level of leverage which they may employ on behalf of each AIF they manage as well as the extent of the right to reuse collateral or guarantee that could be granted under the leveraging arrangement, taking into account, inter alia—

- (a) the type of the AIF;
- (b) the investment strategy of the AIF;
- (c) the sources of leverage of the AIF;
- (d) any other interlinkage or relevant relationships with other financial services institutions, which could pose systemic risk;
- (e) the need to limit the exposure to any single counterparty;
- (f) the extent to which the leverage is collateralised;
- (g) the asset-liability ratio;
- (h) the scale, nature and extent of the activity of the AIFM on the markets concerned.

(6) This regulation shall be applied in accordance with any measures adopted by the European Commission under Article 15(5) of the AIFM Directive.

**Liquidity management.**

22.(1) AIFMs must, for each AIF that they manage which is not an unleveraged closed-ended AIF, employ an appropriate liquidity management system and adopt procedures which enable them to monitor the liquidity risk of the AIF and to ensure that the liquidity profile of the investments of the AIF complies with its underlying obligations.

(2) AIFMs must regularly conduct stress tests, under normal and exceptional liquidity conditions, which enable them to assess the liquidity risk of the AIFs and monitor the liquidity risk of the AIFs accordingly.

(3) AIFMs must ensure that, for each AIF that they manage, the investment strategy, the liquidity profile and the redemption policy are consistent.

(4) This regulation shall be applied in accordance with any measures adopted by the European Commission in accordance with Article 16(3) of the AIFM Directive.

**Investment in securitisation positions.**

23. AIFMs must comply with any measures adopted by the European Commission under Article 17 of the AIFM Directive (investment in securitisation positions) in relation to—

- (a) the requirements that need to be met by the originator, the sponsor or the original lender, in order for an AIFM to be allowed to invest in securities or other financial instruments of this type issued after 1 January 2011 on behalf of AIFs, including requirements that ensure that the originator, the sponsor or the original lender retains a net economic interest of not less than 5 %; or
- (b) qualitative requirements that must be met by AIFMs which invest in these securities or other financial instruments on behalf of one or more AIFs.

*Organisational requirements*

**General principles.**

24.(1) AIFMs must use, at all times, adequate and appropriate human and technical resources that are necessary for the proper management of AIFs; and—

- (a) in particular, the FSC shall, in relation to each AIFM and having regard to the nature of the AIFs managed by it, require that the AIFM has sound administrative and accounting

procedures, control and safeguard arrangements for electronic data processing and adequate internal control mechanisms,

- (b) the mechanisms must include, in particular, rules for personal transactions by its employees or for the holding or management of investments in order to invest on its own account,
- (c) the mechanisms must ensure, at least, that each transaction involving the AIFs may be reconstructed according to its origin, the parties to it, its nature, and the time and place at which it was effected, and
- (d) the mechanisms must ensure that the assets of the AIFs managed by the AIFM are invested in accordance with the AIF rules or instruments of incorporation and the legal provisions in force.

(2) This regulation shall be applied in accordance with any measures adopted by the European Commission in accordance with Article 18(2) of the AIFM Directive.

#### **Valuation.**

25.(1) AIFMs must ensure that, for each AIF that they manage, appropriate and consistent procedures are established so that a proper and independent valuation of the assets of the AIF can be performed in accordance with—

- (a) Article 19 of the AIFM Directive;
- (b) any relevant law of Gibraltar;
- (c) the AIF rules or instruments of incorporation.

(2) AIFMs must also ensure that the net asset value per unit or share of AIFs is calculated and disclosed to the investors in accordance with—

- (a) Article 19 of the AIFM Directive;
- (b) any relevant law of Gibraltar;
- (c) the AIF rules or instruments of incorporation.

(3) The valuation procedures used shall ensure that the assets are valued and the net asset value per unit or share is calculated at least once a year.

(4) If the AIF is of the open-ended type, such valuations and calculations shall also be carried out at a frequency which is both appropriate to the assets held by the AIF and its issuance and redemption frequency.

(5) If the AIF is of the closed-ended type, such valuations and calculations shall also be carried out in case of an increase or decrease of the capital by the relevant AIF.

(6) The investors shall be informed of the valuations and calculations as set out in the relevant AIF rules or instruments of incorporation.

(7) Rules applicable to the valuation of assets and the calculation of the net asset value per unit or share of an AIF must be made—

- (a) by the Minister by regulations under the principal Act, or
- (b) subject to provision made in accordance with paragraph (a), in the AIF rules or instruments of incorporation.

(8) AIFMs must ensure that the valuation function is either performed by—

- (a) an external valuer, being a legal or natural person independent from the AIF, the AIFM and any other persons with close links to the AIF or the AIFM; or
- (b) the AIFM itself, provided that the valuation task is functionally independent from the portfolio management and the remuneration policy and other measures ensure that conflicts of interest are mitigated and that undue influence upon the employees is prevented.

(9) The depositary appointed for an AIF shall not be appointed as external valuer of that AIF, unless it has functionally and hierarchically separated the performance of its depositary functions from its tasks as external valuer and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF.

(10) Where an external valuer performs the valuation function, the AIFM must demonstrate that—

- (a) the external valuer is subject to mandatory professional registration recognised by law or to legal or regulatory provisions or rules of professional conduct;
- (b) the external valuer can provide sufficient professional guarantees to be able to perform effectively the relevant valuation function in accordance with this regulation; and

- (c) the appointment of the external valuer complies with the requirements of regulation 26(1) to (4) and the delegated acts referred to in regulation 26(10).

(11) An appointed external valuer may not delegate the valuation function to a third party.

(12) AIFMs must notify the appointment of the external valuer to the FSC, which may require that another external valuer be appointed instead, where the conditions laid down in subregulation (5) are not met.

(13) The valuation must be performed impartially and with all due skill, care and diligence.

(14) Where the valuation function is not performed by an independent external valuer, the FSC may require the AIFM to have its valuation procedures or valuations (or both) verified by an external valuer or, where appropriate, by an auditor.

(15) AIFMs are responsible for the proper valuation of AIF assets, the calculation of the net asset value and the publication of that net asset value; and—

- (a) an AIFM's liability towards the AIF and its investors shall, therefore, not be affected by the fact that the AIFM has appointed an external valuer; and
- (b) notwithstanding paragraph (a) and irrespective of any contractual arrangements providing otherwise, the external valuer shall be liable to the AIFM for any losses suffered by the AIFM as a result of the external valuer's negligence or intentional failure to perform its tasks.

(16) This regulation shall be applied in accordance with any measures adopted by the European Commission in accordance with Article 19(11) of the AIFM Directive.

*Delegation of AIFM functions*

**Delegation.**

26.(1) AIFMs which intend to delegate to third parties the task of carrying out functions on their behalf must notify the FSC before the delegation arrangements become effective.

- (2) The following conditions shall be met—

- (a) the AIFM must be able to justify its entire delegation structure on objective grounds;
  - (b) the delegate must dispose of sufficient resources to perform the respective tasks and the persons who effectively conduct the business of the delegate must be of sufficiently good repute and sufficiently experienced;
  - (c) where the delegation concerns portfolio management or risk management, it must be conferred only on undertakings which are authorised or registered for the purpose of asset management and subject to supervision or, where that condition cannot be met, only subject to prior approval by the FSC;
  - (d) where the delegation concerns portfolio management or risk management and is conferred on a third-country undertaking, in addition to the requirements in paragraph (c), cooperation between the FSC and the supervisory authority of the undertaking must be ensured;
  - (e) the delegation must not prevent the effectiveness of supervision of the AIFM, and, in particular, must not prevent the AIFM from acting, or the AIF from being managed, in the best interests of its investors;
  - (f) the AIFM must be able to demonstrate that the delegate is qualified and capable of undertaking the functions in question, that it was selected with all due care and that the AIFM is in a position to monitor effectively at any time the delegated activity, to give at any time further instructions to the delegate and to withdraw the delegation with immediate effect when this is in the interest of investors.
- (3) The AIFM must review the services provided by each delegate on an ongoing basis.
- (4) No delegation of portfolio management or risk management shall be conferred on—
- (a) the depositary or a delegate of the depositary; or
  - (b) any other entity whose interests may conflict with those of the AIFM or the investors of the AIF, unless that entity has functionally and hierarchically separated the performance of its portfolio management or risk management tasks from its other potentially conflicting tasks, and the potential conflicts of

interest are properly identified, managed, monitored and disclosed to the investors of the AIF.

(5) The AIFM's liability towards the AIF and its investors shall not be affected by the fact that the AIFM has delegated functions to a third party, or by any further sub-delegation, nor shall the AIFM delegate its functions to the extent that, in essence, it can no longer be considered to be the manager of the AIF and to the extent that it becomes a letter-box entity.

(6) The third party may sub-delegate any of the functions delegated to it provided that the following conditions are met—

- (a) the AIFM consented prior to the sub-delegation;
- (b) the AIFM notified the FSC before the sub-delegation arrangements became effective;
- (c) the conditions set out in subregulation (2), on the understanding that all references to the 'delegate' are read as references to the 'sub-delegate'.

(7) No sub-delegation of portfolio management or risk management shall be conferred on—

- (a) the depositary or a delegate of the depositary, or
- (b) any other entity whose interests may conflict with those of the AIFM or the investors of the AIF, unless such entity has functionally and hierarchically separated the performance of its portfolio management or risk management tasks from its other potentially conflicting tasks, and the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF.

(8) The relevant delegate shall review the services provided by each sub-delegate on an ongoing basis.

(9) Where the sub-delegate further delegates any of the functions delegated to it, the conditions set out in subregulation (6) shall apply (with any necessary modifications).

(10) This regulation shall be applied in accordance with any measures adopted by the European Commission in accordance with Article 20(7) of the AIFM Directive.

*Depositary*

**Depository.**

27.(1) For each AIF it manages, an AIFM must ensure that a single depository is appointed in accordance with this regulation.

(2) The appointment of the depository shall be evidenced by written contract which must, in particular, regulate the flow of information deemed necessary to allow the depository to perform its functions for the AIF for which it has been appointed as depository, as set out in these Regulations and in any other relevant laws, regulations or administrative provisions.

(3) The depository shall be—

- (a) a credit institution which has its registered office in the European Union and authorised in accordance with Directive 2006/48/EC; or
- (b) an investment firm which—
  - (i) has its registered office in the European Union,
  - (ii) is subject to capital adequacy requirements in accordance with Article 20(1) of Directive 2006/49/EC including capital requirements for operational risks,
  - (iii) is authorised in accordance with Directive 2004/39/EC,
  - (iv) also provides the ancillary service of safe-keeping and administration of financial instruments for the account of clients in accordance with point (1) of Section B of Annex I to Directive 2004/39/EC, and
  - (v) has own funds not less than the amount of initial capital referred to in Article 9 of Directive 2006/49/EC; or
- (c) another category of institution which—
  - (i) is subject to prudential regulation and ongoing supervision, and
  - (ii) on 21 July 2011, falls within the categories of institution determined by Member States to be eligible to be a depository under Article 23(3) of Directive 2009/65/EC.

(4) For non-EU AIFs only (and without prejudice to subregulation (9)(c)) the depository may also be a credit institution or any other entity of the same nature as the entities referred to in subregulation (3)(a) and (b), provided

that the prudential regulation and supervision conditions in subregulation (10)(b) are met.

(5) Subregulation (6) applies in relation to AIFs which—

- (a) have no redemption rights exercisable during the period of 5 years from the date of the initial investments, and
- (b) in accordance with their core investment policy, generally do not invest in assets that are required by subregulation 15(a) to be held in custody or generally invest in issuers or non-listed companies in order to potentially acquire control over such companies in accordance with regulation 32.

(6) In relation to AIFs to which this subregulation applies the depositary may be an entity which—

- (a) carries out depositary functions as part of its professional or business activities in respect of which it is subject to mandatory professional registration recognised by law or to legal or regulatory provisions or rules of professional conduct, and
- (b) can provide sufficient financial and professional guarantees to enable it to perform effectively the relevant depositary functions and meet the commitments inherent in those functions.

(7) In order to avoid conflicts of interest between the depositary, the AIFM, the AIF or its investors (or any combination)—

- (a) an AIFM must not act as depositary;
- (b) a prime broker acting as counterparty to an AIF shall not act as depositary for that AIF, unless—
  - (i) it has functionally and hierarchically separated the performance of its depositary functions from its tasks as prime broker, and
  - (ii) the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF.

(8) Delegation by the depositary to a prime broker of its custody tasks in accordance with subregulations (20) to (23) is allowed if the relevant conditions are met.

- (9) The depositary must be established in one of the following locations—
- (a) Gibraltar, in the case of an EU AIF for which Gibraltar is its home Member State,
  - (b) in the case of any other EU AIF, its home Member State;
  - (c) for non-EU AIFs, the third country where the AIF is established, the home Member State of the AIFM managing the AIF or the Member State of reference of the AIFM managing the AIF.
- (10) Without prejudice to the requirements set out in subregulations (3) to (6), the appointment of a depositary established in a third country must, at all times, be subject to the following conditions—
- (a) the competent authorities of the Member States in which the units or shares of the non-EU AIF are intended to be marketed, and, in so far as different, of the home Member State of the AIFM, have signed cooperation and exchange of information arrangements with the competent authorities of the depositary;
  - (b) the depositary is subject to effective prudential regulation, including minimum capital requirements, and supervision which have the same effect as European Union law and are effectively enforced;
  - (c) the third country where the depositary is established is not listed as a Non-Cooperative Country and Territory by FATF;
  - (d) the Member States in which the units or shares of the non- EU AIF are intended to be marketed, and, in so far as different, the home Member State of the AIFM, have signed an agreement with the third country where the depositary is established which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters including any multilateral tax agreements;
  - (e) the depositary must by contract be liable to the AIF or to the investors of the AIF, consistently with subregulations (24) and (25), and must expressly agree to comply with subregulations (20) to (23).
- (11) If the FSC disagrees with the assessment made on the application of subregulation (10)(a), (c) or (e) by the competent authorities of the home

Member State of the AIFM, the FSC may refer the matter to ESMA to act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

(12) The provisions of this regulation relating to prudential regulation and supervision of a third country shall be applied in accordance with any implementing acts adopted under Article 21(6) of the AIFM Directive.

(13) The depositary must in general ensure that the AIF's cash flows are properly monitored; in particular, it must—

- (a) ensure that all payments made by or on behalf of investors upon the subscription of units or shares of an AIF have been received;
- (b) ensure that all cash of the AIF has been booked in cash accounts opened in the name of the AIF or in the name of the AIFM acting on behalf of the AIF or in the name of the depositary acting on behalf of the AIF at an entity referred to in Article 18(1)(a) to (c) of Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, or another entity of the same nature, in the relevant market where cash accounts are required, provided that the entity is subject to effective prudential regulation and supervision which have the same effect as European Union law and are effectively enforced and in accordance with the principles set out in Article 16 of Directive 2006/73/EC.

(14) Where the cash accounts are opened in the name of the depositary acting on behalf of the AIF, no cash of the entity referred to in subregulation (13)(b) and none of the depositary's own cash shall be booked on such accounts.

(15) The assets of the AIF or the AIFM acting on behalf of the AIF must be entrusted to the depositary for safe-keeping, as follows—

- (a) for financial instruments that can be held in custody—
  - (i) the depositary shall hold in custody all financial instruments that can be registered in a financial instruments account opened in the depositary's books and all financial instruments that can be physically delivered to the depositary;

(ii) for that purpose, the depositary shall ensure that all those financial instruments that can be registered in a financial instruments account opened in the depositary's books are registered in the depositary's books within segregated accounts in accordance with the principles set out in Article 16 of Directive 2006/73/EC, opened in the name of the AIF or the AIFM acting on behalf of the AIF, so that they can be clearly identified as belonging to the AIF in accordance with the applicable law at all times;

(b) for other assets—

(i) the depositary shall verify the ownership of the AIF or the AIFM acting on behalf of the AIF of such assets and shall maintain a record of those assets for which it is satisfied that the AIF or the AIFM acting on behalf of the AIF holds the ownership of such assets;

(ii) the assessment whether the AIF or the AIFM acting on behalf of the AIF holds the ownership shall be based on information or documents provided by the AIF or the AIFM and, where available, on external evidence;

(iii) the depositary shall keep its record up to date.

(16) In addition to the tasks referred to in subregulations (13) to (15), the depositary must—

(a) ensure that the sale, issue, re-purchase, redemption and cancellation of units or shares of the AIF are carried out in accordance with the law of Gibraltar and the AIF rules or instruments of incorporation;

(b) ensure that the value of the units or shares of the AIF is calculated in accordance with the law of Gibraltar, the AIF rules or instruments of incorporation and the procedures laid down in regulation 25;

(c) carry out the instructions of the AIFM, unless they conflict with the law of Gibraltar, the AIF rules or the instruments of incorporation;

(d) ensure that in transactions involving the AIF's assets any consideration is remitted to the AIF within the usual time limits;

- (e) ensure that an AIF's income is applied in accordance with the law of Gibraltar and the AIF rules or instruments of incorporation.

(17) In the context of their respective roles, the AIFM and the depositary must act honestly, fairly, professionally, independently and in the interest of the AIF and the investors of the AIF.

(18) A depositary may not carry out activities with regard to the AIF or the AIFM on behalf of the AIF that may create conflicts of interest between the AIF, the investors in the AIF, the AIFM and itself, unless—

- (a) the depositary has functionally and hierarchically separated the performance of its depositary tasks from its other potentially conflicting tasks, and
- (b) the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF.

(19) The assets referred to in subregulation (15) may not be reused by the depositary without the prior consent of the AIF or the AIFM acting on behalf of the AIF.

(20) The depositary shall not delegate to third parties its functions as described in this regulation, save for those referred to in subregulation (15).

(21) The depositary may delegate to third parties the functions referred to in subregulation (15) subject to the following conditions—

- (a) the tasks are not delegated with the intention of avoiding the requirements of these Regulations;
- (b) the depositary can demonstrate that there is an objective reason for the delegation;
- (c) the depositary has exercised all due skill, care and diligence in the selection and the appointment of any third party to whom it wants to delegate parts of its tasks, and keeps exercising all due skill, care and diligence in the periodic review and ongoing monitoring of any third party to whom it has delegated parts of its tasks and of the arrangements of the third party in respect of the matters delegated to it; and
- (d) the depositary ensures that the third party meets the following conditions at all times during the performance of the tasks delegated to it—

- (i) the third party has the structures and the expertise that are adequate and proportionate to the nature and complexity of the assets of the AIF or the AIFM acting on behalf of the AIF which have been entrusted to it;
- (ii) for custody tasks referred to in subregulation (15)(a), the third party is subject to effective prudential regulation, including minimum capital requirements, and supervision in the jurisdiction concerned and the third party is subject to an external periodic audit to ensure that the financial instruments are in its possession;
- (iii) the third party segregates the assets of the depositary's clients from its own assets and from the assets of the depositary in such a way that they can at any time be clearly identified as belonging to clients of a particular depositary;
- (iv) the third party does not make use of the assets without the prior consent of the AIF or the AIFM acting on behalf of the AIF and prior notification to the depositary; and
- (v) the third party complies with the general obligations and prohibitions set out in subregulations (15), (17), (18) and (19).

(22) Notwithstanding subregulation (21)(d)(ii), where the law of a third country requires that certain financial instruments be held in custody by a local entity and no local entities satisfy the delegation requirements laid down in that subregulation, the depositary may delegate its functions to such a local entity only to the extent required by the law of the third country and only for as long as there are no local entities that satisfy the delegation requirements, subject to the following requirements—

- (a) the investors of the relevant AIF must be duly informed that such delegation is required due to legal constraints in the law of the third country and of the circumstances justifying the delegation, prior to their investment; and
- (b) the AIF, or the AIFM on behalf of the AIF, must instruct the depositary to delegate the custody of such financial instruments to such local entity.

(22A) The third party may, in turn, sub-delegate those functions, subject to the same requirements (and subregulation (25) shall apply, with any necessary modifications, to the relevant parties).

(23) For the purposes of this regulation, the provision of services as specified by Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, by securities settlement systems as designated for the purposes of that Directive or the provision of similar services by third-country securities settlement systems shall not be considered a delegation of custody functions.

(24) The depositary is liable to the AIF or to the investors of the AIF, for the loss by the depositary or a third party to whom the custody of financial instruments held in custody in accordance with subregulation (15)(a) has been delegated; and—

- (a) in the case of such a loss of a financial instrument held in custody, the depositary must return a financial instrument of identical type or the corresponding amount to the AIF or the AIFM acting on behalf of the AIF without undue delay;
- (b) the depositary shall not be liable if it can prove that the loss has arisen as a result of an external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary;
- (c) the depositary shall also be liable to the AIF, or to the investors of the AIF, for all other losses suffered by them as a result of the depositary's negligent or intentional failure to properly fulfil its obligations pursuant to these Regulations.

(25) The depositary's liability shall not be affected by any delegation referred to in subregulations (20) to (23); but in the case of a loss of financial instruments held in custody by a third party pursuant to those subregulations, the depositary may discharge itself of liability if it can prove that—

- (a) all requirements for the delegation of its custody tasks set out in subregulation 21 are met;
- (b) a written contract between the depositary and the third party expressly transfers the liability of the depositary to that third party and makes it possible for the AIF or the AIFM acting on behalf of the AIF to make a claim against the third party in respect of the loss of financial instruments or for the depositary to make such a claim on their behalf; and
- (c) a written contract between the depositary and the AIF or the AIFM acting on behalf of the AIF, expressly allows a discharge of the depositary's liability and establishes the objective reason to contract such a discharge.

(26) In addition, where the law of a third country requires that certain financial instruments are held in custody by a local entity and there are no local entities that satisfy the delegation requirements laid down in subregulation (21)(d)(ii), the depositary can discharge itself of liability provided that the following conditions are met—

- (a) the rules or instruments of incorporation of the AIF concerned expressly allow for such a discharge under the conditions set out in this subregulation;
- (b) the investors of the relevant AIF have been duly informed of that discharge and of the circumstances justifying the discharge prior to their investment;
- (c) the AIF or the AIFM on behalf of the AIF instructed the depositary to delegate the custody of such financial instruments to a local entity;
- (d) there is a written contract between the depositary and the AIF or the AIFM acting on behalf of the AIF, which expressly allows such a discharge; and
- (e) there is a written contract between the depositary and the third party that expressly transfers the liability of the depositary to that local entity and makes it possible for the AIF or the AIFM acting on behalf of the AIF to make a claim against that local entity in respect of the loss of financial instruments or for the depositary to make such a claim on their behalf.

(27) Liability to the investors of the AIF may be invoked directly or indirectly through the AIFM, depending on the legal nature of the relationship between the depositary, the AIFM and the investors.

(28) The depositary must make available to the FSC, on request, all information which it has obtained while performing its duties and that may be necessary for the FSC or the other supervising authorities of the AIF or the AIFM; where the FSC is not the competent authority of the AIF or the AIFM, the FSC shall share the information received without delay with the competent authorities of the AIF and the AIFM.

(29) This regulation shall be applied in accordance with any measures adopted by the European Commission under Article 21(17) of the AIFM Directive.

*Transparency requirements*

**Annual report.**

28.(1) An AIFM must, for each of the EU AIFs it manages and for each of the AIFs it markets in the European Union, make available an annual report for each financial year no later than 6 months following the end of the financial year; and—

- (a) the annual report shall be provided to investors on request;
- (b) the annual report shall be made available to the FSC and, where applicable, the home Member State of the AIF.

(2) Where the AIF is required to make public an annual financial report in accordance with Directive 2004/109/EC only the additional information referred to in subregulation (3) needs to be provided to investors on request, either—

- (a) separately, or
- (b) as an additional part of the annual financial report, in which case the annual financial report shall be made public no later than 4 months following the end of the financial year.

(3) The annual report must at least contain the following—

- (a) a balance-sheet or a statement of assets and liabilities;
- (b) an income and expenditure account for the financial year;
- (c) a report on the activities of the financial year;
- (d) any material changes in the information listed in regulation 29 during the financial year covered by the report;
- (e) the total amount of remuneration for the financial year, split into fixed and variable remuneration, paid by the AIFM to its staff, and number of beneficiaries, and, where relevant, carried interest paid by the AIF;
- (f) the aggregate amount of remuneration broken down by senior management and members of staff of the AIFM whose actions have a material impact on the risk profile of the AIF.

(4) The accounting information given in the annual report shall be prepared in accordance with the accounting standards of—

- (a) Gibraltar,

- (b) the home Member State of the AIF, or
- (c) the third country where the AIF is established.

(5) The accounting information given in the annual report shall be prepared in accordance with the accounting rules laid down in the AIF rules or instruments of incorporation.

(6) The accounting information given in the annual report shall be audited by one or more persons empowered by law to audit accounts in accordance with Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts.

(7) The auditor's report, including any qualifications, shall be reproduced in full in the annual report.

(8) AIFMs marketing non-EU AIFs may subject the annual reports of those AIFs to an audit meeting international auditing standards in force in the country where the AIF has its registered office.

(9) This regulation shall be applied in accordance with any measures adopted by the European Commission in accordance with Article 22(4) of the AIFM Directive.

**Disclosure to investors.**

29.(1) AIFMs shall for each of the EU AIFs that they manage, and for each of the AIFs that they market in the European Union, make available to AIF investors, in accordance with the AIF rules or instruments of incorporation, the following information—

- (a) a description of the investment strategy and objectives of the AIF,
- (b) information on where any master AIF is established and where the underlying funds are established if the AIF is a fund of funds,
- (c) a description of the types of assets in which the AIF may invest,
- (d) the techniques it may employ and all associated risks,
- (e) any applicable investment restrictions,

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- (f) the circumstances in which the AIF may use leverage, the types and sources of leverage permitted and the associated risks, any restrictions on the use of leverage and any collateral and asset reuse arrangements, and the maximum level of leverage which the AIFM are entitled to employ on behalf of the AIF;
- (g) a description of the procedures by which the AIF may change its investment strategy or investment policy, or both;
- (h) a description of the main legal implications of the contractual relationship entered into for the purpose of investment, including information on jurisdiction, on the applicable law and on the existence or not of any legal instruments providing for the recognition and enforcement of judgments in Gibraltar or the territory where the AIF is established;
- (i) the identity of the AIFM, the AIF's depositary, auditor and any other service providers and a description of their duties and the investors' rights;
- (j) a description of how the AIFM is complying with the requirements of regulation 15(7);
- (k) a description of any delegated management function as referred to in Annex I to the AIFM Directive by the AIFM and of any safe-keeping function delegated by the depositary, the identification of the delegate and any conflicts of interest that may arise from such delegations;
- (l) a description of the AIF's valuation procedure and of the pricing methodology for valuing assets, including the methods used in valuing hard-to-value assets in accordance with regulation 25;
- (m) a description of the AIF's liquidity risk management, including the redemption rights both in normal and in exceptional circumstances, and the existing redemption arrangements with investors;
- (n) a description of all fees, charges and expenses and of the maximum amounts thereof which are directly or indirectly borne by investors;
- (o) a description of how the AIFM ensures a fair treatment of investors and, whenever an investor obtains preferential treatment or the right to obtain preferential treatment, a description of that preferential treatment, the type of investors

who obtain such preferential treatment and, where relevant, their legal or economic links with the AIF or AIFM;

- (p) the latest annual report referred to in regulation 28;
- (q) the procedure and conditions for the issue and sale of units or shares;
- (r) the latest net asset value of the AIF or the latest market price of the unit or share of the AIF, in accordance with regulation 25;
- (s) where available, the historical performance of the AIF;
- (t) the identity of the prime broker and—
  - (i) a description of any material arrangements of the AIF with its prime brokers,
  - (ii) the way the conflicts of interest in relation thereto are managed,
  - (iii) the provision in the contract with the depositary on the possibility of transfer and reuse of AIF assets, and  
  
information about any transfer of liability to the prime broker that may exist;and
- (u) a description of how and when the other information required under subregulations (7) and (8) will be disclosed.

(2) Information must be made available under subregulation (1) to investors before they invest in the AIF.

(3) Investors must also be informed about any material changes to the information provided under subregulation (1).

(4) The AIFM must inform the investors before they invest in the AIF of any arrangement made by the depositary to contractually discharge itself of liability in accordance with regulation 27(25).

(5) The AIFM must also inform investors of any changes with respect to depositary liability without delay.

(6) Where the AIF is required to publish a prospectus in accordance with Directive 2003/71/EC of the European Parliament and of the Council of 4

November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, or in accordance with the law of Gibraltar, only such information referred to in subregulations (1), (4) and (5) as is in addition to that contained in the prospectus needs to be disclosed separately or as additional information in the prospectus.

(7) AIFMs shall, for each of the EU AIFs that they manage and for each of the AIFs that they market in the European Union, periodically disclose to investors—

- (a) the percentage of the AIF's assets which are subject to special arrangements arising from their illiquid nature;
- (b) any new arrangements for managing the liquidity of the AIF;
- (c) the current risk profile of the AIF and the risk management systems employed by the AIFM to manage those risks.

(8) AIFMs managing EU AIFs employing leverage or marketing in the European Union AIFs employing leverage shall, for each such AIF disclose, on a regular basis—

- (a) any changes to the maximum level of leverage which the AIFM may employ on behalf of the AIF as well as any right of the reuse of collateral or any guarantee granted under the leveraging arrangement; and
- (b) the total amount of leverage employed by that AIF.

(9) This regulation shall be applied in accordance with any measures adopted by the European Commission in accordance with Article 23(6) of the AIFM Directive; and those measures shall be adapted to the type of AIFM to which they apply.

#### **Reporting obligations to competent authorities.**

30.(1) An AIFM must regularly report to the FSC on the principal markets and instruments in which it trades on behalf of the AIFs it manages.

(2) In particular, an AIFM must provide information on—

- (a) the main instruments in which it is trading,
- (b) markets of which it is a member or where it actively trades, and

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- (c) the principal exposures and most important concentrations of each of the AIFs it manages.

(3) An AIFM must, for each of the EU AIFs it manages and for each of the AIFs it markets in the European Union, provide the following to the FSC—

- (a) the percentage of the AIF's assets which are subject to special arrangements arising from their illiquid nature;
- (b) any new arrangements for managing the liquidity of the AIF;
- (c) the current risk profile of the AIF and the risk management systems employed by the AIFM to manage the market risk, liquidity risk, counterparty risk and other risks including operational risk;
- (d) information on the main categories of assets in which the AIF invested; and
- (e) the results of the stress tests performed in accordance with regulations 21(4) and 22(2).

(4) The AIFM must, on request, provide the following documents to the FSC—

- (a) an annual report of each EU AIF managed by the AIFM and of each AIF marketed by it in the European Union, for each financial year, in accordance with regulation 28; and
- (b) for the end of each quarter, a detailed list of all AIFs which the AIFM manages.

(5) An AIFM managing AIFs employing leverage on a substantial basis shall make available to the FSC—

- (a) information about the overall level of leverage employed by each AIF it manages,
- (b) a break-down between leverage arising from borrowing of cash or securities and leverage embedded in financial derivatives, and
- (c) information about the extent to which the AIF's assets have been reused under leveraging arrangements.

(6) That information shall include the identity of the five largest sources of borrowed cash or securities for each of the AIFs managed by the AIFM, and the amounts of leverage received from each of those sources for each of those AIFs.

(7) For non-EU AIFMs, the reporting obligations referred to in this regulation are limited to EU AIFs managed by them and non-EU AIFs marketed by them in the European Union.

(8) Where necessary for the effective monitoring of systemic risk, the FSC may require information in addition to that described in this regulation, on a periodic as well as on an ad-hoc basis; and the FSC shall inform ESMA about the additional information requirements.

(9) The FSC shall comply with any request made by ESMA, in accordance with Article 24(5) of the AIFM Directive, to impose additional reporting requirements.

(10) This regulation shall be applied in accordance with any measures adopted by the European Commission in accordance with Article 24(6) of the AIFM Directive.

## **PART 6 SPECIAL CASE AIFMs**

### *AIFMs managing leveraged AIFs*

#### **Use of information by competent authorities, supervisory cooperation and limits to leverage.**

31.(1) The FSC shall use the information to be gathered under regulation 30 for the purposes of identifying the extent to which the use of leverage contributes to—

- (a) the build-up of systemic risk in the financial system,
- (b) risks of disorderly markets, or
- (c) risks to the long-term growth of the economy.

(2) The FSC shall ensure that all information gathered under regulation 30 in respect of all AIFMs that it supervises, and the information gathered under regulation 13 is made available to competent authorities of relevant Member States, ESMA and the ESRB by means of the procedures set out in Article 50 of the AIFM Directive (supervisory cooperation).

(3) The FSC shall, without delay, also provide information by means of those procedures, and bilaterally to the competent authorities of Member States directly concerned, if an AIFM under their responsibility, or an AIF managed by that AIFM, could potentially constitute an important source of counterparty risk to a credit institution or other systemically relevant institutions in Member States.

(4) An AIFM must demonstrate that the leverage limits set by it for each AIF it manages are reasonable and that it complies with those limits at all times; and—

- (a) the FSC shall assess the risks that the use of leverage by an AIFM with respect to the AIFs it manages could entail, and,
- (b) where deemed necessary in order to ensure the stability and integrity of the financial system, the FSC, after having notified ESMA, the ESRB and the competent authorities of the relevant AIF, shall impose limits to the level of leverage that an AIFM are entitled to employ or other restrictions on the management of the AIF with respect to the AIFs under its management to limit the extent to which the use of leverage contributes to the build-up of systemic risk in the financial system or risks of disorderly markets.

(5) The FSC shall duly inform ESMA, the ESRB and the competent authorities of the AIF, of actions taken under this regulation, through the procedures set out in Article 50 of the AIFM Directive; and the notification—

- (a) must be made not less than 10 working days before the proposed measure is intended to take effect or to be renewed, and
- (b) must include details of the proposed measure, the reasons for the measure and when the measure is intended to take effect.

(6) In exceptional circumstances, the FSC may decide that a proposed measure is to take effect within the period referred to in subregulation (5)(a).

(7) The FSC shall—

- (a)
  - (a) cooperate with ESMA in its facilitation and coordination role generally and in relation to measures proposed by competent authorities, under Article 25(5) of the AIFM Directive;

- (b) take account of any advice issued by ESMA under Article 25(6) of the AIFM Directive; and
- (c) give effect to any determination of ESMA under Article 25(7) of the AIFM Directive.

(8) If the FSC proposes to take action contrary to ESMA's advice it must inform ESMA, stating its reasons.

(9) This regulation shall be applied in accordance with any measures adopted by the European Commission in accordance with Article 25(9) of the AIFM Directive.

*Obligations for AIFMs managing AIFs which acquire control of non-listed companies and issuers*

**Application of regulations 33 to 36.**

32.(1) Regulations 33 to 36 shall apply to the following—

- (a) AIFMs managing one or more AIFs which either individually or jointly on the basis of an agreement aimed at acquiring control, acquire control of a non-listed company in accordance with subregulation (5);
- (b) AIFMs cooperating with one or more other AIFMs on the basis of an agreement pursuant to which the AIFs managed by those AIFMs jointly, acquire control of a non-listed company in accordance with subregulation (5).

(2) Regulations 33 to 36 shall not apply where the non-listed companies concerned are—

- (a) small and medium-sized enterprises within the meaning of Article 2(1) of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises; or
- (b) special purpose vehicles with the purpose of purchasing, holding or administering real estate.

(3) Without prejudice to subregulations (1) and (2), regulation 33(1) shall also apply to AIFMs managing AIFs that acquire a non-controlling participation in a non-listed company.

(4) Regulations 34(1) to (4) and 36 shall apply also to AIFMs managing AIFs that acquire control over issuers; and for that purpose subregulations (1) and (2) above shall apply with any necessary modifications.

(5) For the purpose of regulations 33 to 36, for non-listed companies, control shall mean more than 50% of the voting rights of the companies; and

(a) when calculating the percentage of voting rights held by the relevant AIF, in addition to the voting rights held directly by the relevant AIF, the voting rights of the following shall be taken into account, subject to control as referred to above being established—

(i) an undertaking controlled by the AIF; and

(ii) a natural or legal person acting in its own name but on behalf of the AIF or on behalf of an undertaking controlled by the AIF;

(b) the percentage of voting rights shall be calculated on the basis of all the shares to which voting rights are attached even if the exercise thereof is suspended; and

(c) notwithstanding regulation 4, for the purpose of regulations 34(1) to (4) and 36 in regard to issuers control shall be determined in accordance with Article 5(3) of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.

(6) Regulations 33 to 36 shall apply—

(a) subject to the conditions and restrictions set out in Article 6 of Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation; and

(b) without prejudice to any stricter rules adopted by Gibraltar with respect to the acquisition of holdings in issuers and non-listed companies in their territories.

**Notification of the acquisition of major holdings and control of non-listed companies.**

33.(1) When an AIF acquires, disposes of or holds shares of a non-listed company, the AIFM managing such an AIF must notify the FSC of the proportion of voting rights of the non-listed company held by the AIF any time when that proportion reaches, exceeds or falls below the thresholds of 10%, 20%, 30%, 50% and 75%.

(2) When an AIF acquires, individually or jointly, control over a non-listed company pursuant to regulation 32(1), the AIFM managing such an AIF must notify the following of the acquisition of control by the AIF–

- (a) the non-listed company;
- (b) the shareholders of which the identities and addresses are available to the AIFM or can be made available by the non-listed company or through a register to which the AIFM has or can obtain access; and
- (c) the FSC.

(3) The notification required under subregulation (2) must contain the following additional information–

- (a) the resulting situation in terms of voting rights;
- (b) the conditions subject to which control was acquired, including information about the identity of the different shareholders involved, any natural person or legal entity entitled to exercise voting rights on their behalf and, if applicable, the chain of undertakings through which voting rights are effectively held;
- (c) the date on which control was acquired.

(4) In its notification to the non-listed company, the AIFM must request the board of directors of the company to inform the employees' representatives or, where there are none, the employees themselves, without undue delay of the acquisition of control by the AIF managed by the AIFM and of the information referred to in subregulation (3); and the AIFM must use its best efforts to ensure that the employees' representatives or, where there are none, the employees themselves, are duly informed by the board of directors in accordance with this regulation.

(5) The notifications referred to in this regulation shall be made as soon as possible, but no later than 10 working days after the date on which the AIF has reached, exceeded or fallen below the relevant threshold or has acquired control over the non-listed company.

**Disclosure in case of acquisition of control.**

34.(1) When an AIF acquires, individually or jointly, control of a non-listed company or an issuer pursuant to regulation 32(1) and (5), the AIFM managing such AIF shall make the information referred to in subregulation (2) below available to—

- (a) the company concerned;
- (b) the shareholders of the company of which the identities and addresses are available to the AIFM or can be made available by the company or through a register to which the AIFM has or can obtain access; and
- (c) the FSC.

(2) The AIFM must make available—

- (a) the identity of the AIFMs which either individually or in agreement with other AIFMs manage the AIFs that have acquired control;
- (b) the policy for preventing and managing conflicts of interest, in particular between the AIFM, the AIF and the company, including information about the specific safeguards established to ensure that any agreement between the AIFM and/or the AIF and the company is concluded at arm's length; and
- (c) the policy for external and internal communication relating to the company in particular as regards employees.

(3) In its notification to the company under subregulation (1)(a) the AIFM must request the board of directors of the company to inform the employees' representatives or, where there are none, the employees themselves, without undue delay of the information referred to in subregulation (2); and the AIFM must use its best efforts to ensure that the employees' representatives or, where there are none, the employees themselves, are duly informed by the board of directors in accordance with this regulation.

(4) When an AIF acquires, individually or jointly, control of a non-listed company pursuant to regulation 32(1) and (5) the AIFM managing such AIF must ensure that the AIF, or the AIFM acting on behalf of the AIF, disclose its intentions with regard to the future business of the non-listed company and the likely repercussions on employment, including any material change in the conditions of employment, to—

- (a) the non-listed company; and

- (b) the shareholders of the non-listed company of which the identities and addresses are available to the AIFM or can be made available by the non-listed company or through a register to which the AIFM has or can obtain access;

and the AIFM managing the relevant AIF shall request and use its best efforts to ensure that the board of directors of the non-listed company makes available the information set out in this subregulation to the employees' representatives or, where there are none, the employees themselves, of the non-listed company.

(5) When an AIF acquires control of a non-listed company pursuant to regulation 32(1) and (5) the AIFM managing such an AIF must provide the FSC and the AIF's investors with information on the financing of the acquisition.

**Specific provisions regarding the annual report of AIFs exercising control of non-listed companies.**

35.(1) When an AIF acquires, individually or jointly, control of a non-listed company pursuant to regulation 32(1) and (5) the AIFM managing such an AIF shall either—

- (a) request and use its best efforts to ensure that the annual report of the non-listed company drawn up in accordance with subregulation (2) below is made available by the board of directors of the company to the employees' representatives or, where there are none, to the employees themselves within the period such annual report has to be drawn up in accordance with the law of Gibraltar; or
- (b) for each such AIF, include in the annual report provided for in regulation 28 the information referred to in subregulation (2) below relating to the relevant non-listed company.

(2) The additional information to be included in the annual report of the company or the AIF must include at least a fair review of the development of the company's business representing the situation at the end of the period covered by the annual report; and the report shall also give an indication of—

- (a) any important events that have occurred since the end of the financial year;
- (b) the company's likely future development; and

- (c) the information concerning acquisitions of own shares prescribed by Article 22(2) of Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.

(3) The AIFM managing the relevant AIF shall either—

- (a) request and use its best efforts to ensure that the board of directors of the non-listed company makes available the information referred to in subregulation (1)(b) relating to the company concerned to the employees' representatives of the company concerned or, where there are none, to the employees themselves within the period referred to in regulation 28(1); or
- (b) make available the information referred to in subregulation (1)(a) to the investors of the AIF, in so far as already available, within the period referred to in regulation 28(1) and, in any event, no later than the date on which the annual report of the non-listed company is drawn up in accordance with the law of Gibraltar.

**Asset stripping.**

36.(1) When an AIF, individually or jointly, acquires control of a non-listed company or an issuer pursuant to regulation 32(1) and (5) the AIFM managing such an AIF, for a period of 24 months following the acquisition of control of the company by the AIF—

- (a) may not facilitate, support or instruct any distribution, capital reduction, share redemption or acquisition of own shares by the company as described in subregulation (2);
- (b) in so far as the AIFM is authorised to vote on behalf of the AIF at the meetings of the governing bodies of the company, may not vote in favour of a distribution, capital reduction, share redemption or acquisition of own shares by the company as described in subregulation (2); and
- (c) must in any event use its best efforts to prevent distributions, capital reductions, share redemptions and the acquisition of own shares by the company as described in subregulation (2).

(2) The obligations imposed on AIFMs pursuant to subregulation (1) shall relate to the following—

- (a) any distribution to shareholders made when on the closing date of the last financial year the net assets as set out in the company's annual accounts are, or following such a distribution would become, lower than the amount of the subscribed capital plus those reserves which may be not distributed under the law or the statutes, on the understanding that where the uncalled part of the subscribed capital is not included in the assets shown in the balance sheet, this amount shall be deducted from the amount of subscribed capital;
- (b) any distribution to shareholders the amount of which would exceed the amount of the profits at the end of the last financial year plus any profits brought forward and sums drawn from reserves available for this purpose, less any losses brought forward and sums placed to reserve in accordance with the law or the statutes;
- (c) to the extent that acquisitions of own shares are permitted, the acquisitions by the company, including shares previously acquired by the company and held by it, and shares acquired by a person acting in his own name but on the company's behalf, that would have the effect of reducing the net assets below the amount mentioned in paragraph (a).

(3) For the purposes of subregulation (2)—

- (a) the term 'distribution' includes, in particular, the payment of dividends and of interest relating to shares;
- (b) the provisions on capital reductions shall not apply on a reduction in the subscribed capital, the purpose of which is to offset losses incurred or to include sums of money in a non-distributable reserve provided that, following that operation, the amount of such reserve is not more than 10% of the reduced subscribed capital; and
- (c) the restriction referred to in subregulation (2)(c) is subject to Article 20(1)(b) to (h) of Directive 77/91/EEC.

**PART 7  
RIGHTS OF EU AIFMs**

*Marketing and managing EU AIFs in EU*

**Marketing of units or shares of EU AIFs in the home Member State of the AIFM.**

37.(1) An EU AIFM authorised by the FSC may market units or shares of any EU AIF that it manages to professional investors in Gibraltar as soon as the conditions laid down in this regulation are met.

(2) Where the EU AIF is a feeder AIF, the right to market is subject to the condition that the master AIF is also an EU AIF which is managed by an authorised EU AIFM.

(3) The AIFM must submit a notification to the FSC in respect of each EU AIF that it intends to market.

(4) The notification shall comprise the documentation and information set out in Annex III to the AIFM Directive.

(5) Within 20 working days following receipt of a complete notification filed pursuant to subregulation (4), the FSC shall inform the AIFM whether it may start marketing the AIF identified in the notification.

(6) The FSC shall prevent the marketing of the AIF only if—

- (a) the AIFM's management of the AIF does not or will not comply with these Regulations (or the AIFM Directive), or
- (b) the AIFM otherwise does not or will not comply with these Regulations (or the AIFM Directive).

(7) In the case of a positive decision, the AIFM may start marketing the AIF in Gibraltar from the date of the notification by the FSC to that effect.

(8) The FSC shall also inform the competent authorities of the AIF (if not the FSC) that the AIFM may start marketing units or shares of the AIF.

(9) In the event of a material change to any of the particulars communicated in accordance with this regulation, the AIFM must give written notice of that change to the FSC—

- (a) at least 1 month before implementing the change as regards any changes planned by the AIFM, or
- (b) immediately after an unplanned change has occurred.

(10) If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with these Regulations (or the AIFM Directive) or the AIFM would otherwise no longer comply with these Regulations (or the

AIFM Directive), the FSC shall inform the AIFM without undue delay that it is not to implement the change.

(11) If a planned change is implemented notwithstanding subregulations (9) and (10) or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF no longer complies with these Regulations (or the AIFM Directive) or the AIFM otherwise no longer complies with these Regulations (or the AIFM Directive), the FSC shall take all due measures in accordance with regulation 55, including, if necessary, the express prohibition of marketing of the AIF.

(12) This regulation shall be applied in accordance with any technical standards adopted by the European Commission in accordance with Article 31(5) of the AIFM Directive.

(13) Without prejudice to regulation 49(1), AIFs managed and marketed by AIFMs may be marketed only to professional investors.

#### **Marketing of units or shares of EU AIFs in Member States.**

38.(1) An EU AIFM authorised by the FSC may market units or shares of an EU AIF that it manages to professional investors outside Gibraltar in Member States as soon as the conditions laid down in this regulation are met.

(2) Where the EU AIF is a feeder AIF the right to market is subject to the condition that the master AIF is also an EU AIF and is managed by an authorised EU AIFM.

(3) The AIFM must submit a notification to the FSC in respect of each EU AIF that it intends to market.

(4) The notification shall comprise the documentation and information set out in Annex IV to the AIFM Directive.

(5) The FSC shall, no later than 20 working days after the date of receipt of the complete notification transmit the complete notification file to the competent authorities of the Member States where it is intended that the AIF be marketed.

(6) That transmission may occur only if the AIFM's management of the AIF complies with and will continue to comply with these Regulations (and the AIFM Directive) and if the AIFM otherwise complies with these Regulations (and the AIFM Directive).

(7) The FSC shall enclose a statement to the effect that the AIFM concerned is authorised to manage AIFs with a particular investment strategy.

(8) Upon transmission of the notification file, the FSC shall, without delay, notify the AIFM about the transmission.

(9) The AIFM may start marketing the AIF in the host Member State of the AIFM as of the date of that notification.

(10) The FSC shall also inform the competent authorities of the AIF (if not the FSC) that the AIFM may start marketing the units or shares of the AIF in the host Member State of the AIFM.

(11) Arrangements referred to in point (h) of Annex IV to the AIFM Directive shall be subject to the laws and supervision of the host Member State of the AIFM.

(12) The notification letter by the AIFM and the statement referred to above must be provided in a language customary in the sphere of international finance.

(13) The FSC shall accept electronic transmission and filing of the documents referred to in this regulation.

(14) In the event of a material change to any of the particulars communicated in accordance with this regulation, the AIFM must give written notice of that change to the FSC—

- (a) at least 1 month before implementing a planned change, or
- (b) immediately after an unplanned change has occurred.

(15) If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with these Regulations (or the AIFM Directive) or the AIFM would otherwise no longer comply with these Regulations (or the AIFM Directive), the FSC shall inform the AIFM without undue delay that it is not to implement the change.

(16) If a planned change is implemented notwithstanding subregulations (14) and (15) or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF would no longer comply with these Regulations (or the AIFM Directive) or the AIFM otherwise would no longer comply with these Regulations (or the AIFM Directive), the FSC shall take all due measures in accordance with regulation 55, including, if necessary, the express prohibition of marketing of the AIF.

(17) If the changes are acceptable because they do not affect the compliance of the AIFM's management of the AIF with these Regulations (or the AIFM Directive), or the compliance by the AIFM with these Regulations (or the AIFM Directive) otherwise, the FSC shall, without delay, inform the competent authorities of the host Member State of the AIFM of those changes.

(18) This regulation shall be applied in accordance with any technical standards adopted by the European Commission in accordance with Article 32(8) of the AIFM Directive.

(19) Without prejudice to regulation 49(1), the AIFs managed and marketed by the AIFM may be marketed only to professional investors.

(20) Where the FSC receives notification from the competent authorities of the home Member State of an EU AIFM that it has met the conditions laid down in Article 32 of the AIFM Directive—

- (a) the FSC shall acknowledge receipt of the notification; and
- (b) nothing in or under the Financial Services (Collective Investment Schemes) Act 2011, or in any other enactment, prevents the EU AIFM from marketing to professional investors in Gibraltar in accordance with that Article.

**Conditions for managing EU AIFs established in Member States and for providing services in Member States.**

39.(1) An EU AIFM authorised by the FSC may, directly or by establishing a branch—

- (a) manage EU AIFs established outside Gibraltar in a Member State, provided that the AIFM is authorised to manage that type of AIF;
- (b) provide outside Gibraltar in a Member State the services referred to in regulation 12(5) for which it is authorised.

(2) An AIFM intending to provide the activities or services referred to in sub-regulation (1) for the first time shall communicate the following information to the FSC—

- (a) the Member State in which it intends to—
  - (i) manage AIFs directly or establish a branch; or
  - (ii) provide the services referred to in regulation 12(5); and

- (b) a programme of operations stating in particular the services which it intends to perform or identifying the AIFs that it intends to manage (as the case may be).

(3) If the AIFM intends to establish a branch, it shall provide the following additional information—

- (a) the organisational structure of the branch;
- (b) the address in the home Member State of the AIF from which documents may be obtained;
- (c) the names and contact details of the persons responsible for the management of the branch.

(4) The FSC shall, within 1 month of receiving complete documentation under subregulation (2) or within 2 months of receiving complete documentation under subregulation (3), transmit the complete documentation to the competent authorities of the host Member State of the AIFM.

(5) That transmission may occur only if the AIFM's management of the AIF complies, and will continue to comply, with these Regulations (and the AIFM Directive) and the AIFM otherwise complies with these Regulations (and the AIFM Directive).

(6) The FSC shall enclose a statement to the effect that the AIFM concerned is authorised by them.

(7) The FSC shall immediately notify the AIFM about the transmission.

(8) Upon receipt of the transmission notification the AIFM may start to provide its services in its host Member State.

(9) The host Member State of the AIFM must not impose any additional requirements on the AIFM concerned in respect of the matters covered by these Regulations.

(10) In the event of a change to any of the information communicated in accordance with subregulation (2) or (3), an AIFM must give written notice of that change to the FSC—

- (a) at least 1 month before implementing planned changes, or
- (b) immediately after an unplanned change has occurred.

(11) If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with these Regulations (or the AIFM Directive) or the AIFM would otherwise no longer comply with these Regulations (or the AIFM Directive), the FSC shall inform the AIFM without undue delay that it is not to implement the change.

(12) If a planned change is implemented notwithstanding subregulations (10) and (11) or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF would no longer comply with these Regulations (or the AIFM Directive) or the AIFM otherwise would no longer comply with these Regulations (or the AIFM Directive), the FSC must take all due measures in accordance with regulation 55.

(13) If the changes are acceptable because they do not affect the compliance of the AIFM's management of the AIF with these Regulations (or the AIFM Directive), or the compliance by the AIFM with these Regulations (or the AIFM Directive) otherwise, the FSC shall, without undue delay, inform the competent authorities of the host Member States of the AIFM of those changes.

(14) This regulation shall be applied in accordance with any technical standards adopted by the European Commission in accordance with Article 33(7) or (8) of the AIFM Directive.

(15) Where the FSC receives notification from the competent authorities of the home Member State of an EU AIFM that it has met the conditions laid down in Article 33 of the AIFM Directive—

- (a) the FSC shall acknowledge receipt of the notification; and
- (b) nothing in or under the Financial Services (Collective Investment Schemes) Act 2011, or in any other enactment, prevents the EU AIFM from managing EU AIFs established in Gibraltar (either directly or by establishing a branch) in accordance with that Article.

## **PART 8**

### **SPECIFIC RULES IN RELATION TO THIRD COUNTRIES**

#### **Conditions for EU AIFMs which manage non-EU AIFs which are not marketed in Member States.**

40.(1) An EU AIFM authorised by the FSC may manage non-EU AIFs which are not marketed in the European Union provided that—

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- (a) the AIFM complies with all the requirements established in these Regulations except for regulations 27 and 28 in respect of those AIFs; and
- (b) appropriate cooperation arrangements are in place between the FSC and the supervisory authorities of the third country where the non-EU AIF is established in order to ensure at least an efficient exchange of information that allows the FSC to carry out its duties in accordance with these Regulations.

(2) This regulation shall be applied in accordance with—

- (a) any measures adopted by the European Commission in accordance with Article 34(2) of the AIFM Directive; and
- (b) any guidelines developed by ESMA in accordance with Article 34(3) of that Directive.

(3) This regulation comes into force in accordance with provision made in accordance with regulation 2(2).

**Conditions for the marketing in the European Union with a passport of a non-EU AIF managed by an EU AIFM.**

41.(1) An authorised EU AIFM may market to professional investors in the European Union units or shares of non-EU AIFs it manages and of EU feeder AIFs that do not fulfil the requirements referred to in regulation 37(2) as soon as the conditions laid down in this regulation are met.

(2) AIFMs shall comply with all the requirements established in these Regulations, with the exception of Part 7.

(3) In addition the following conditions shall be met—

- (a) appropriate cooperation arrangements must be in place between the FSC and the supervisory authorities of the third country where the non-EU AIF is established in order to ensure at least an efficient exchange of information, taking into account regulation 57(4) to (7), that allows the FSC to carry out their duties in accordance with these Regulations;
- (b) the third country where the non-EU AIF is established is not listed as a Non-Cooperative Country and Territory by FATF;
- (c) the third country where the non-EU AIF is established has signed an agreement with Gibraltar and with each Member State outside Gibraltar in which the units or shares of the non-

EU AIF are intended to be marketed, which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including any multilateral tax agreements.

(4) Where a competent authority of a Member State disagrees with the assessment made on the application of subregulation (3)(a) and (b) by the FSC, the FSC may initiate, and shall cooperate with, a reference of the matter to ESMA to act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

(5) If an AIFM intends to market units or shares of non-EU AIFs in Gibraltar, the AIFM shall submit a notification to the FSC in respect of each non-EU AIF that it intends to market.

(6) That notification shall comprise the documentation and information set out in Annex III to the AIFM Directive.

(7) No later than 20 working days after receipt of a complete notification pursuant to subregulation (5), the FSC shall inform the AIFM whether it may start marketing the AIF identified in the notification in its territory.

(8) The FSC shall prevent the marketing of the AIF only if the AIFM's management of the AIF does not or will not comply with these Regulations (or the AIFM Directive) or the AIFM otherwise does not or will not comply with these Regulations (or the AIFM Directive).

(9) In the case of a positive decision, the AIFM may start marketing the AIF in Gibraltar as of the date of the notification by the FSC to that effect.

(10) The FSC shall also inform ESMA that the AIFM may start marketing the units or shares of the AIF in Gibraltar.

(11) If an AIFM intends to market units or shares of non-EU AIFs in a Member State other than Gibraltar, the AIFM shall submit a notification to the FSC in respect of each non-EU AIF that it intends to market.

(12) That notification shall comprise the documentation and information set out in Annex IV to the AIFM Directive.

(13) The FSC shall, no later than 20 working days after the date of receipt of the complete notification file referred to in subregulation (11), transmit that complete notification file to the competent authorities of the Member State where the AIF is intended to be marketed.

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(14) Such transmission will occur only if the AIFM's management of the AIF complies and will continue to comply with these Regulations (and the AIFM Directive) and that the AIFM otherwise complies with these Regulations (and the AIFM Directive).

(15) The FSC shall enclose a statement to the effect that the AIFM concerned is authorised to manage AIFs with a particular investment strategy.

(16) Upon transmission of the notification file, the FSC shall, without delay, notify the AIFM about the transmission.

(17) The AIFM may start marketing the AIF in the relevant host Member States of the AIFM as of the date of that notification by the FSC.

(18) The FSC shall also inform ESMA that the AIFM may start marketing the units or shares of the AIF in the host Member States of the AIFM.

(19) Arrangements referred to in point (h) of Annex IV to the AIFM Directive shall be subject to the laws and supervision of the host Member States of the AIFM.

(20) The notification letter of the AIFM referred to in subregulation (11) and the statement referred to in subregulation (15) must be provided in a language customary in the sphere of international finance.

(21) The FSC must accept electronic transmission and filing of documents of the kind referred to in subregulations (11) and (15).

(22) In the event of a material change to any of the particulars communicated in accordance with this regulation, the AIFM must give written notice of that change to the FSC—

- (a) at least 1 month before implementing a planned change, or
- (b) immediately after an unplanned change has occurred.

(23) If pursuant to a planned change, the AIFM's management of the AIF would no longer comply with these Regulations (or the AIFM Directive) or the AIFM would no longer comply with these Regulations (or the AIFM Directive), the FSC shall inform the AIFM without undue delay that it is not to implement the change.

(24) If a planned change is implemented notwithstanding this regulation, or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF would no longer comply with these Regulations (or the AIFM Directive) or the AIFM otherwise would no longer comply with

these Regulations (or the AIFM Directive), the FSC shall take all due measures in accordance with regulation 55, including, if necessary, the express prohibition of marketing of the AIF.

(25) If the changes are acceptable because they do not affect the compliance of the AIFM's management of the AIF with these Regulations (or the AIFM Directive), or the compliance by the AIFM with these Regulations (or the AIFM Directive) otherwise, the FSC shall, without delay, inform ESMA in so far as the changes concern the termination of the marketing of certain AIFs or additional AIFs marketed and, if applicable, the competent authorities of the host Member States of the AIFM of those changes.

(26) This regulation shall be applied in accordance with—

- (a) any measures adopted by the European Commission in accordance with Article 35(11) of the AIFM Directive;
- (b) any guidelines developed by ESMA in accordance with Article 35(12) of the AIFM Directive; and
- (c) technical standards adopted by the European Commission in accordance with Article 35(13), (14) or (16) of the AIFM Directive.

(27) In the case of disputed requests to exchange information in accordance with the regulatory technical standards adopted under Article 35(14) of the AIFM Directive, the FSC or another competent authority may refer the matter to ESMA to act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

(28) Without prejudice to regulation 49, the AIFs managed and marketed by the AIFM may be marketed only to professional investors.

(28A) Where the FSC receives notification from the competent authorities of the home Member State of an EU AIFM that it has met the conditions laid down in Article 35 of the AIFM Directive—

- (a) the FSC shall acknowledge receipt of the notification; and
- (b) nothing in or under the Financial Services (Collective Investment Schemes) Act 2011, or in any other enactment, prevents the EU AIFM from marketing to professional investors in Gibraltar the AIFs it manages in accordance with that Article.

(29) This regulation comes into force in accordance with provision made in accordance with regulation 2(2).

**Conditions for the marketing in Member States without a passport of non-EU AIFs managed by an EU AIFM.**

42.(1) Without prejudice to regulation 41, an authorised EU AIFM may market to professional investors, in Gibraltar, units or shares of non-EU AIFs it manages and of EU feeder AIFs that do not fulfil the requirements referred to in regulation 37(2), provided that—

- (a) the AIFM complies with all the requirements established in these Regulations (and the AIFM Directive) with the exception of regulation 27;
- (b) the AIFM ensures that one or more entities are appointed to carry out the duties referred to in regulation 27(13) to (16);
- (c) the AIFM does not perform those functions;
- (d) the AIFM provides the FSC with information about the identity of those entities responsible for carrying out the duties referred to in regulation 27(13) to (16);
- (e) appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards are in place between the FSC and the supervisory authorities of the third country where the non-EU AIF is established in order to ensure an efficient exchange of information that allows the FSC to carry out its duties in accordance with these Regulations;
- (f) the third country where the non-EU AIF is established is not listed as a Non-Cooperative Country and Territory by FATF.

(2) The Minister may by regulations under the principal Act impose stricter rules on the AIFM in respect of the marketing of units or shares of non-EU AIFs to investors in Gibraltar for the purpose of this regulation.

(2A) The following provisions apply (with any modifications provided by regulations under subregulation (2) and with any other necessary modifications) to an AIFM in its reliance on this regulation as they apply to small AIFMs in their reliance on regulation 11A(1)—

- (a) regulation 11A(2) (requirement to notify FSC);

- (b) regulation 11A(3) (requirement to provide information to FSC);
  - (c) regulation 11A(5) (requirement to notify material changes);
  - (d) regulation 11C (FSCs power to revoke entitlement to market); and
  - (e) regulation 11D (FSC's power to suspend entitlement to market).
- (3) This regulation shall be applied in accordance with—
- (a) any measures adopted by the European Commission in accordance with Article 36(3) of the AIFM Directive; and
  - (b) any guidelines developed by ESMA in accordance with Article 36(4) of the AIM Directive.

**Authorisation of non-EU AIFMs intending to manage EU AIFs and/or market AIFs managed by them in the European Union in accordance with regulations 45 or 46.**

43.(1) Non-EU AIFMs intending to manage EU AIFs or to market AIFs managed by them in the European Union in accordance with regulation 45 or 46 must acquire prior authorisation by the FSC, if Gibraltar is their Member State of reference, in accordance with this regulation.

(2) A non-EU AIFM intending to obtain prior authorisation as referred to in subregulation (1) must comply with these Regulations (and the AIFM Directive), with the exception of Part 7 (and Chapter VI of the Directive).

(3) If and to the extent that compliance with a provision of these Regulations (or the AIFM Directive) is incompatible with compliance with the law to which the non-EU AIFM or the non-EU AIF marketed in the European Union is subject, the AIFM need not comply with that provision of these Regulations (or the AIFM Directive) if it can demonstrate that—

- (a) it is impossible to combine such compliance with compliance with a mandatory provision in the law to which the non-EU AIFM or the non-EU AIF marketed in the European Union is subject (or both);
- (b) the law to which the non-EU AIFM or the non-EU AIF is subject provides for an equivalent rule having the same regulatory purpose and offering the same level of protection to the investors of the relevant AIF; and

- (c) the non-EU AIFM or the non-EU AIF (or both) comply with that equivalent rule.
- (4) A non-EU AIFM intending to obtain prior authorisation must have a legal representative established in Gibraltar; and—
- (a) the legal representative shall be the contact point of the AIFM in the European Union and any official correspondence between the competent authorities and the AIFM and between the EU investors of the relevant AIF and the AIFM for the purposes of these Regulations (or the AIFM Directive) shall take place through that legal representative;
  - (b) the legal representative shall perform the compliance function relating to the management and marketing activities performed by the AIFM under these Regulations (or the AIFM Directive) together with the AIFM.
- (5) The Member State of reference of a non-EU AIFM shall be determined as follows (in accordance with Article 37(4) of the AIFM Directive)—
- (a) if the non-EU AIFM intends to manage only one EU AIF, or several EU AIFs established in the same Member State, and does not intend to market any AIF in accordance with regulation 45 or 46 in the European Union, the home Member State of that or those AIFs is the Member State of reference, and the competent authorities of that Member State are competent for the authorisation procedure and for the supervision of the AIFM;
  - (b) if the non-EU AIFM intends to manage several EU AIFs established in different Member States and does not intend to market any AIF in accordance with regulation 45 or 46 in the European Union, the Member State of reference is either—
    - (i) the Member State where most of the AIFs are established; or
    - (ii) the Member State where the largest amount of assets is being managed;
  - (c) if the non-EU AIFM intends to market only one EU AIF in only one Member State, the Member State of reference is determined as follows—

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- (i) if the AIF is authorised or registered in a Member State, the home Member State of the AIF or the Member State where the AIFM intends to market the AIF;
  - (ii) if the AIF is not authorised or registered in a Member State, the Member State where the AIFM intends to market the AIF;
- (d) if the non-EU AIFM intends to market only one non-EU AIF in only one Member State, the Member State of reference is that Member State;
- (e) if the non-EU AIFM intends to market only one EU AIF, but in different Member States, the Member State of reference is determined as follows—
- (i) if the AIF is authorised or registered in a Member State, the home Member State of the AIF or one of the Member States where the AIFM intends to develop effective marketing; or
  - (ii) if the AIF is not authorised or registered in a Member State, one of the Member States where the AIFM intends to develop effective marketing;
- (f) if the non-EU AIFM intends to market only one non-EU AIF, but in different Member States, the Member State of reference is one of those Member States;
- (g) if the non-EU AIFM intends to market several EU AIFs in the Union, the Member State of reference is determined as follows—
- (i) in so far as those AIFs are all registered or authorised in the same Member State, the home Member State of those AIFs or the Member State where the AIFM intends to develop effective marketing for most of those AIFs;
  - (ii) in so far as those AIFs are not all registered or authorised in the same Member State, the Member State where the AIFM intends to develop effective marketing for most of those AIFs;
- (h) if the non-EU AIFM intends to market several EU and non- EU AIFs, or several non-EU AIFs in the Union, the Member State of reference is the Member State where it intends to develop effective marketing for most of those AIFs.

(6) Where more than one Member State of reference is possible in accordance with Article 37(4) of the AIFM Directive, the non-EU AIFM intending to manage EU AIFs without marketing them or market AIFs managed by it in the European Union in accordance with regulation 45 or 46 must submit a request to the competent authorities of all of the Member States that are possible Member States of reference.

(7) The FSC shall cooperate with other competent authorities in endeavouring to comply with the requirement in Article 37(4) of the AIFM Directive to jointly decide the Member State of reference for the non-EU AIFM, within 1 month of receipt of the request.

(8) If the FSC is appointed as the Member State of reference in accordance with subregulation (7) it shall, without undue delay, inform the non-EU AIFM of that appointment.

(9) If the non-EU AIFM is not duly informed of the decision made by the relevant competent authorities within 7 days of the decision or if the relevant competent authorities have not made a decision within the 1-month period, the non-EU AIFM may choose Gibraltar or any Member State as its Member State of reference based on the criteria set out in this regulation.

(10) The AIFM shall be able to prove its intention to develop effective marketing in a particular Member State by disclosure of its marketing strategy to the FSC or the other competent authorities of the Member State indicated by it.

(11) A non-EU AIFM intending to manage EU AIFs without marketing them or to market AIFs managed by it in the European Union (or both) in accordance with regulation 45 or 46 must submit a request for authorisation to the FSC if Gibraltar is its Member State of reference.

(12) After receiving the application for authorisation, the FSC shall assess whether the determination by the AIFM as regards its Member State of reference complies with the criteria laid down in subregulation (5); and—

- (a) if the FSC considers that this is not the case it shall—
  - (i) refuse the authorisation request of the non-EU AIFM, and
  - (ii) explain the reasons for its refusal, and
- (b) if it considers that the criteria in subregulation (5) have been complied with, it shall—

- (i) notify ESMA requesting advice on the assessment (in accordance with Article 37(5) of the AIFM), and
- (ii) in its notification to ESMA, it shall provide ESMA with the justification by the AIFM of its assessment regarding the Member State of reference and with information on the marketing strategy of the AIFM.

(13) The term referred to in regulation 14(8) shall be suspended during ESMA's deliberation in accordance with subregulation (12).

(14) If the FSC proposes to grant authorisation contrary to ESMA's advice—

- (a) it shall inform ESMA, stating its reasons;
- (b) if the AIFM intends to market units or shares of AIFs managed by it in Member States other than the Member State of reference, the FSC shall also inform the competent authorities of those Member States of its proposal to grant authorisation, stating its reasons;
- (c) in so far as applicable, the FSC shall also inform the competent authorities of the home Member States of the AIFs managed by the AIFM of its proposal to grant authorisation, stating its reasons.

(15) In the case of a dispute between the FSC and a competent authority of a Member State about the determination of the Member State of reference by an AIFM, the FSC may initiate or cooperate with the reference of the matter to ESMA (to act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010).

(16) Without prejudice to subregulation (19), no authorisation shall be granted unless the following additional conditions are met—

- (a) the Member State of reference is indicated by the AIFM in accordance with the criteria set out in subregulation (5) and supported by the disclosure of the marketing strategy, and the procedure set out above has been followed by the FSC or the other relevant competent authorities;
- (b) the AIFM has appointed a legal representative established in the Member State of reference;
- (c) the legal representative shall, together with the AIFM, be the contact person of the non-EU AIFM for the investors of the relevant AIFs, for ESMA and for the competent authorities as

regards the activities for which the AIFM is authorised in the European Union and shall at least be sufficiently equipped to perform the compliance function pursuant to these Regulations;

- (d) appropriate cooperation arrangements are in place between the competent authorities of the Member State of reference, the competent authorities of the home Member State of the EU AIFs concerned and the supervisory authorities of the third country where the non-EU AIFM is established in order to ensure at least an efficient exchange of information that allows the competent authorities to carry out their duties in accordance with these Regulations;
- (e) the third country where the non-EU AIFM is established is not listed as a Non-Cooperative Country and Territory by FATF;
- (f) the third country where the non-EU AIFM is established has signed an agreement with the Member State of reference, which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters, including any multilateral tax agreements;
- (g) the effective exercise by the competent authorities of their supervisory functions under the AIFM Directive is neither prevented by the laws, regulations or administrative provisions of a third country governing the AIFM, nor by limitations in the supervisory and investigatory powers of that third country's supervisory authorities.

(17) In the case of a dispute between the FSC and a competent authority of a Member State about the assessment made on the application of subregulation (16) by the FSC or another competent authority, the FSC may initiate, or cooperate in, the reference of the matter to ESMA (to act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010).

(18) Where a competent authority of an EU AIF does not enter into the required cooperation arrangements under subregulation (16)(d) within a reasonable period of time, the FSC may refer the matter to ESMA to act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.

(19) The authorisation shall be given in accordance with Part 4 which shall apply (with any necessary modifications) subject to the following criteria—

- (a) the information referred to in regulation 13(2) shall be supplemented by—
- (i) a justification by the AIFM of its assessment regarding the Member State of reference in accordance with the criteria set out in subregulation (5) with information on the marketing strategy;
  - (ii) a list of the provisions of these Regulations (or the AIFM Directive) for which compliance by the AIFM is impossible as compliance by the AIFM with those provisions is, in accordance with subregulation (3) incompatible with compliance with a mandatory provision in the law to which the non-EU AIFM or the non-EU AIF marketed in the European Union is subject;
  - (iii) written evidence based on the regulatory technical standards developed by ESMA that the relevant third country law provides for a rule equivalent to the provisions for which compliance is impossible, which has the same regulatory purpose and offers the same level of protection to the investors of the relevant AIFs and that the AIFM complies with that equivalent rule; such written evidence being supported by a legal opinion on the existence of the relevant incompatible mandatory provision in the law of the third country and including a description of the regulatory purpose and the nature of the investor protection pursued by it; and  
  
the name of the legal representative of the AIFM and the place where it is established;
- (b) the information referred to in regulation 13(3) may be limited to the EU AIFs the AIFM intends to manage and to those AIFs managed by the AIFM that it intends to market in the European Union with a passport;
- (c) regulation 14(1)(a) shall be without prejudice to subregulations (2) and (3) of this regulation;
- (d) regulation 14(1)(e) shall not apply;
- (e) regulation 14(8) shall be read as including a reference to the information referred to in paragraph (a) above.

(20) In the case of a dispute between the FSC and a competent authority of a Member State about the authorisation granted by the FSC or the

competent authorities of the Member State of reference of the AIFM, the FSC may initiate, or cooperate in, the reference of the matter to ESMA (to act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010).

(21) If the FSC considers that an AIFM may rely on subregulation (3) to be exempted from compliance with certain provisions of the AIFM Directive, it shall—

- (a) without undue delay, notify ESMA, and
- (b) support the assessment by the information provided by the AIFM in accordance with subregulation (19)(a)(ii) and (iii).

(22) The FSC must have regard to advice issued by ESMA in accordance with Article 37(9) of the AIFM Directive.

(23) The term referred to in regulation 14(8) shall be suspended during ESMA's review.

(24) If the FSC proposes to grant authorisation contrary to ESMA's advice—

- (a) it shall inform ESMA, stating its reasons, and
- (b) if the AIFM intends to market units or shares of AIFs managed by it in Member States other than the Member State of reference, the FSC shall also inform the competent authorities of those Member States of its proposal to grant authorisation, stating its reasons.

(25) In the case of a dispute between the FSC and a competent authority of a Member State about the assessment made on the application of subregulations (21) to (25) by the FSC or the competent authority of the Member State of reference of the AIFM, the FSC may initiate, or cooperate in, the reference of the matter to ESMA (to act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010).

(26) The FSC shall, without undue delay, inform ESMA of the outcome of the initial authorisation process, about any changes in the authorisation of the AIFM and any withdrawal of authorisation.

(27) The FSC shall inform ESMA about the applications for authorisation that it has rejected, providing data about the AIFM having asked for authorisation and the reasons for the rejection.

(28) The FSC shall treat as confidential information disclosed to it by ESMA in accordance with Article 37(10) of the AIFM Directive.

(29) The FSC's determination of the Member State of reference shall not be affected by the further business development of the AIFM in the European Union; but—

- (a) where the AIFM changes its marketing strategy within 2 years of its initial authorisation, and that change would have affected the FSC's determination if the modified marketing strategy had been the initial marketing strategy, the AIFM shall notify the competent authorities of the original Member State of reference of the change before implementing it and indicate its Member State of reference in accordance with the criteria in subregulation (5) and based on the new strategy;
- (b) the AIFM shall justify its assessment by disclosing its new marketing strategy to its original Member State of reference;
- (c) at the same time the AIFM shall provide information on its legal representative, including its name and the place where it is established;
- (d) the legal representative shall be established in the new Member State of reference;
- (e) the FSC, if the original Member State of reference was Gibraltar, shall assess whether the determination of the AIFM in accordance with this regulation is correct and shall notify ESMA;
- (f) the FSC shall receive any advice issued by ESMA on the assessment made by it or other the competent authorities in accordance with Article 37(11) of the AIFM Directive;
- (g) in its notification to ESMA, the FSC shall provide the AIFM's justification of its assessment regarding the Member State of reference and information on the AIFM's new marketing strategy;
- (h) after receipt of ESMA's advice the FSC, if the original Member State of reference was Gibraltar, shall inform the non-EU AIFM, its original legal representative and ESMA of its decision;
- (i) if the FSC, where the original Member State of reference was Gibraltar, agree with the assessment made by the AIFM, it

shall also inform the competent authorities of the new Member State of reference of the change and shall, without undue delay, transfer a copy of the authorisation and the supervision file relating to the AIFM to the new Member State of reference.

(30) Where Gibraltar is the new Member State of reference, from the date of transmission of the authorisation and supervision file under Article 37(11) of the AIFM Directive, the FSC shall be competent for authorising and supervising the AIFM.

(31) Where the FSC and other competent authorities' final assessment is contrary to ESMA's advice—

- (a) the competent authorities shall inform ESMA, stating reasons;
- (b) where the AIFM markets units or shares of AIFs managed by it in Member States other than the original Member State of reference, the FSC, if Gibraltar is the original Member State of reference, shall inform the competent authorities of those Member States, stating reasons; and
- (c) where applicable, the FSC, if Gibraltar is the Member State of reference, shall also inform the competent authorities of the home Member States of the AIFs managed by the AIFM, stating reasons.

(32) Where it appears from the actual course of the business development of the AIFM in the European Union within 2 years after its authorisation that the marketing strategy as presented by the AIFM at the time of its authorisation was not followed, the AIFM made false statements in relation thereto or the AIFM has failed to comply with subregulations (29) to (31) when changing its marketing strategy—

- (a) the FSC, if Gibraltar was the original Member State of reference, shall request that the AIFM indicate the Member State of reference based on its actual marketing strategy;
- (b) the procedure set out in those subregulations shall apply (with any necessary modifications); and
- (c) if the AIFM does not comply with the FSC's request, it shall withdraw its authorisation.

(33) Where an AIFM changes its marketing strategy after the period referred to in subregulation (29) and intends to change its Member State of reference on the basis of its new marketing strategy—

- (a) it may submit a request to change its Member State of reference to the FSC (where the original Member State of reference is Gibraltar);
- (b) the procedure referred to in subregulations (29) to (31) shall apply (with any necessary modifications).

(34) In the case of a dispute between the FSC and a competent authority of a Member State about the assessment made on the determination of the Member State of reference under this regulation, the FSC may initiate, or cooperate in, the reference of the matter to ESMA (to act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010).

(35) Any disputes arising between the FSC and the AIFM shall be settled in accordance with the law of and subject to the jurisdiction of Gibraltar (if the Member State of reference).

(36) Any disputes between the AIFM or the AIF and EU investors of the relevant AIF may be settled in accordance with the law of and subject to the jurisdiction of Gibraltar.

(37) This regulation shall be applied in accordance with—

- (a) any implementing acts adopted by the European Commission under Article 37(14) of the AIFM Directive;
- (b) any measures adopted by the European Commission under Article 37(15) of the AIFM Directive;
- (c) any guidelines developed by ESMA under Article 37(16) of the AIFM Directive;
- (d) any regulatory technical standards adopted by the European Commission in accordance with Article 37(17), (18), (22) or (23) of the AIFM Directive.

(38) In any case where a competent authority rejects a request to exchange information in accordance with the regulatory technical standards referred to in subregulation (37), the FSC may initiate, or cooperate in, the reference of the matter to ESMA (to act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010).

(39) The FSC shall have regard to, and cooperate with, any action taken by ESMA in accordance with Article 37(20) or (21) of the AIFM Directive.

(40) This regulation comes into force in accordance with provision made in accordance with regulation 2(2).

**ESMA's peer review of authorisation and supervision of non-EU AIFMs.**

44.(1) The FSC shall take account of, and cooperate with, action taken by ESMA under Article 38(1) of the AIFM Directive (peer review of authorisation and supervision of non-EU AIFMs); and, in particular, the FSC—

- (a) shall make every effort to comply with guidelines and recommendations under that Article,
- (b) within 2 months of the issuance of a guideline or recommendation, shall confirm whether it complies or intends to comply with that guideline or recommendation and, if it does not comply or intend to comply, it shall inform ESMA, stating its reasons.

(2) This regulation comes into force in accordance with provision made in accordance with regulation 2(2).

**Conditions for the marketing in the European Union with a passport of EU AIFs managed by a non-EU AIFM.**

45.(1) A duly authorised non-EU AIFM may market the units or shares of an EU AIF it manages to professional investors in the European Union with a passport as soon as the conditions laid down in this regulation are met.

(2) If the AIFM intends to market units or shares of the EU AIF in Gibraltar (being its Member State of reference), the AIFM shall submit a notification to the FSC in respect of each EU AIF that it intends to market.

(3) That notification shall comprise the documentation and information set out in Annex III to the AIFM Directive.

(4) No later than 20 working days after receipt of a complete notification the FSC shall inform the AIFM whether it may start marketing the AIF identified in the notification in Gibraltar.

(5) The FSC may prevent the marketing of the AIF only if the AIFM's management of the AIF does not or will not comply with these Regulations (or the AIFM Directive) or if the AIFM otherwise does not or will not comply with these Regulations (or the AIFM Directive).

(6) In the case of a positive decision, the AIFM may start marketing the AIF in Gibraltar as of the date of the notification by the FSC.

(7) The FSC shall also inform ESMA and the competent authorities of the AIF that the AIFM may start marketing units or shares of the AIF in Gibraltar.

(8) If the AIFM intends to market units or shares of the EU AIF in Member States other than Gibraltar (being its Member State of reference), the AIFM shall submit a notification to the FSC in respect of each EU AIF that it intends to market.

(9) That notification shall comprise the documentation and information set out in Annex IV to the AIFM Directive.

(10) The FSC shall, no later than 20 working days after the date of receipt of the complete notification file under subregulation (8), transmit the complete notification file to the competent authorities of the Member States where the units or shares of the AIF are intended to be marketed.

(11) Such transmission shall be effected only if the AIFM's management of the AIF complies and will continue to comply with these Regulations (and the AIFM Directive) and if the AIFM otherwise complies with these Regulations (and the AIFM Directive).

(12) The FSC shall enclose a statement to the effect that the AIFM concerned is authorised to manage AIFs with a particular investment strategy.

(13) Upon transmission of the notification file, the FSC shall, without delay, notify the AIFM about the transmission.

(14) The AIFM may start marketing the AIF in the relevant host Member States as of the date of that notification.

(15) The FSC shall also inform ESMA and the competent authorities of the AIF that the AIFM may start marketing the units or shares of the AIF in the host Member States of the AIFM.

(16) The arrangements referred to in point (h) of Annex IV to the AIFM Directive shall be subject to the laws and supervision of the relevant host Member States.

(17) The notification letter by the AIFM under this regulation and the statement referred to in subregulation (12) must be provided in a language customary in the sphere of international finance.

(18) The FSC shall accept electronic transmission and filing of the documents referred to in this regulation.

(19) In the event of a material change to any of the particulars communicated in accordance with this regulation the AIFM shall give written notice of that change to the FSC at least 1 month before implementing a planned change, or immediately after an unplanned change has occurred.

(20) If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with these Regulations (or the AIFM Directive) or the AIFM would otherwise no longer comply with these Regulations (or the AIFM Directive), the FSC shall inform the AIFM, without undue delay, that it is not to implement the change.

(21) If a planned change is implemented notwithstanding subregulations (19) and (20), or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF no longer complies with these Regulations (or the AIFM Directive) or the AIFM otherwise no longer complies with these Regulations (or the AIFM Directive), the FSC shall take all due measures in accordance with regulation 55, including, if necessary, the express prohibition of marketing of the AIF.

(22) If the changes are acceptable because they do not affect compliance of the AIFM's management of the AIF with these Regulations (or the AIFM Directive), or compliance by the AIFM with these Regulations (or the AIFM Directive) otherwise, the FSC shall, without delay, inform ESMA in so far as the changes concern the termination of the marketing of certain AIFs or additional AIFs being marketed and, in so far as applicable, the competent authorities of the host Member States of those changes.

(23) This regulation shall be applied in accordance with any technical standards adopted by the European Commission in accordance with Article 39(10) of the AIFM Directive.

(24) Without prejudice to regulation 49, the AIFs managed and marketed by the AIFM may be marketed only to professional investors.

(24A) Where the FSC receives notification from the competent authorities of the Member State of Reference of a non-EU AIFM that it has met the conditions laid down in Article 39 of the AIFM Directive—

- (a) the FSC shall acknowledge receipt of the notification; and
- (b) nothing in or under the Financial Services (Collective Investment Schemes) Act 2011, or in any other enactment, prevents the non-EU AIFM from marketing units or shares to professional investors in Gibraltar in accordance with that Article.

(25) This regulation comes into force in accordance with provision made in accordance with regulation 2(2).

**Conditions for the marketing in the European Union with a passport of non-EU AIFs managed by a non-EU AIFM.**

46.(1) A duly authorised non-EU AIFM (for which Gibraltar is the Member State of Reference) may market units or shares of a non-EU AIF it manages to professional investors in the European Union with a passport as soon as the conditions laid down in this regulation are met.

(2) In addition to the requirements in these Regulations in relation to EU-AIFMs, for non-EU AIFMs the following conditions shall be met—

- (a) appropriate cooperation arrangements are in place between the FSC and the supervisory authority of the third country where the non-EU AIF is established in order to ensure at least an efficient exchange of information that allows the competent authorities to carry out their duties in accordance with these Regulations;
- (b) the third country where the non-EU AIF is established is not listed as a Non-Cooperative Country and Territory by FATF;
- (c) the third country where the non-EU AIF is established has signed an agreement with Gibraltar and with each Member State in which the units or shares of the non-EU AIF are intended to be marketed which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters including any multilateral tax agreements.

(3) Where a competent authority of a Member State disagrees with the assessment made on the application of subregulation (2)(a) and (b) by the FSC, the FSC may initiate, or cooperate in, the reference to the matter to the ESMA (to act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010).

(4) The AIFM shall submit a notification to the FSC in respect of each non-EU AIF that it intends to market in Gibraltar.

(5) That notification shall comprise the documentation and information set out in Annex III to the AIFM Directive.

(6) No later than 20 working days after receipt of a complete notification the FSC shall inform the AIFM whether it may start marketing the AIF identified in the notification in Gibraltar.

(7) The FSC may prevent the marketing of the AIF only if the AIFM's management of the AIF does not or will not comply with these Regulations (or the AIFM Directive) or the AIFM otherwise does not or will not comply with these Regulations (or the AIFM Directive).

(8) In the case of a positive decision, the AIFM may start marketing the AIF in Gibraltar from the date of the notification by the FSC to that effect.

(9) The FSC shall also inform ESMA that the AIFM may start marketing units or shares of the AIF in Gibraltar.

(10) If the AIFM intends to market the units or shares of a non-EU AIF also in Member States other than Gibraltar, the AIFM shall submit a notification to the FSC in respect of each non-EU AIF that it intends to market.

(11) That notification shall comprise the documentation and information set out in Annex IV to the AIFM Directive.

(12) The FSC shall, no later than 20 working days after the date of receipt of the complete notification file transmit it to the competent authorities of the Member States where the units or shares of the AIF are intended to be marketed.

(13) Such transmission shall occur only if the AIFM's management of the AIF complies and will continue to comply with these Regulations (and the AIFM Directive) and that in general the AIFM complies with these Regulations (and the AIFM Directive).

(14) The FSC shall enclose a statement to the effect that the AIFM concerned is authorised to manage AIFs with a particular investment strategy.

(15) Upon transmission of the notification file, the FSC shall, without delay, notify the AIFM of the transmission.

(16) The AIFM may start marketing the AIF in the relevant host Member States of the AIFM as of the date of that notification.

(17) The FSC shall also inform ESMA that the AIFM may start marketing the units or shares of the AIF in the host Member States of the AIFM.

(18) Arrangements referred to in point (h) of Annex IV to the AIFM Directive shall be subject to the laws and supervision of the host Member States of the AIFM, in so far as different from Gibraltar.

(19) The notification letter by the AIFM referred to in subregulation (10) and the statement referred to in subregulation (14) must be provided in a language customary in the sphere of international finance.

(20) The FSC shall accept electronic transmission and filing of the documents referred to in this regulation.

(21) In the event of a material change to any of the particulars communicated in accordance with this regulation, the AIFM shall give written notice of that change to the FSC—

- (a) at least 1 month before implementing a planned change, or
- (b) immediately after an unplanned change has occurred.

(22) If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with these Regulations (or the AIFM Directive), or the AIFM would otherwise no longer comply with these Regulations (or the AIFM Directive), the FSC shall inform the AIFM, without undue delay, that it is not to implement the change.

(23) If the planned change is implemented notwithstanding subregulations (21) and (22), or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF no longer complies with these Regulations (or the AIFM Directive) or the AIFM otherwise no longer complies with these Regulations (or the AIFM Directive), the FSC shall take all due measures in accordance with regulation 55, including, if necessary, the express prohibition of marketing of the AIF.

(24) If the changes are acceptable because they do not affect the compliance of the AIFM's management of the AIF with these Regulations (or the AIFM Directive) or the compliance by the AIFM with these Regulations (or the AIFM Directive) otherwise, the FSC shall, without delay, inform ESMA in so far as the changes concern the termination of the marketing of certain AIFs or additional AIFs being marketed and, in so far as applicable, the competent authorities of the host Member States of the AIFM of those changes.

(25) This regulation shall be applied in accordance with—

- (a) any measures adopted by the European Commission in accordance with Article 40(11) of the AIFM Directive;

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- (b) any guidelines developed by ESMA in accordance with Article 40(12) of the AIFM Directive;
- (c) any regulatory technical standards adopted by the European Commission in accordance with Article 40(13), (14) or (16) of the AIFM Directive.

(26) If a competent authority rejects a request to exchange information in accordance with the regulatory technical standards referred to in subregulation (25), the FSC may initiate, or cooperate in, the reference of the matter to ESMA (to act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010).

(27) Without prejudice to regulation 49(1), the AIFs managed and marketed by the AIFM may be marketed only to professional investors.

(27A) In a case where Gibraltar is not the Member State of Reference of a non-EU AIFM and the FSC receives notification from the competent authorities of the Member State of Reference of the AIFM that it has met the conditions laid down in Article 40 of the AIFM Directive—

- (a) the FSC shall acknowledge receipt of the notification; and
- (b) nothing in or under the Financial Services (Collective Investment Schemes) Act 2011, or in any other enactment, prevents the non-EU AIFM from marketing units or shares to professional investors in Gibraltar in accordance with that Article.

(28) This regulation comes into force in accordance with provision made in accordance with regulation 2(2).

**Conditions for managing AIFs established in Member States other than the Member State of reference by non- EU AIFMs.**

47.(1) A non-EU AIFM for which Gibraltar is the Member State of Reference and which is authorised by the FSC as such may manage EU AIFs established outside Gibraltar in a Member State either directly or via the establishment of a branch, provided that the AIFM is authorised to manage that type of AIF.

(2) Any non-EU AIFM intending to manage EU AIFs established outside Gibraltar in a Member State for the first time shall communicate the following information to the FSC—

- (a) the Member State in which it intends to manage AIFs directly or establish a branch;

- (b) a programme of operations stating in particular the services which it intends to perform and identifying the AIFs it intends to manage.

(3) If the non-EU AIFM intends to establish a branch, it shall provide, in addition to the information required in subregulation (2), the following information—

- (a) the organisational structure of the branch;
- (b) the address in the home Member State of the AIF from which documents may be obtained;
- (c) the names and contact details of persons responsible for the management of the branch.

(4) The FSC shall, within 1 month of receiving the complete documentation in accordance with subregulation (2), or within 2 months of receiving the complete documentation in accordance with subregulation (3), transmit that documentation to the competent authorities of the host Member States of the AIFM.

(5) Such transmission shall occur only if the AIFM's management of the AIF complies and will continue to comply with these Regulations (and the AIFM Directive) and the AIFM otherwise complies with these Regulations (and the AIFM Directive).

(6) The FSC shall enclose a statement to the effect that the AIFM concerned is authorised by it.

(7) The FSC shall immediately notify the AIFM about the transmission.

(8) Upon receipt of the transmission notification the AIFM may start to provide its services in the host Member States of the AIFM.

(9) The FSC shall also inform ESMA that the AIFM may start managing the AIF in the host Member States of the AIFM.

(10) The FSC, as host Member State of the AIFM, may not impose any additional requirements on the AIFM concerned in respect of the matters covered by these Regulations (or the AIFM Directive).

(11) In the event of a change to any of the information communicated in accordance with this regulation an AIFM shall give written notice of that change to the FSC—

- (a) at least 1 month before implementing a planned change, or
- (b) immediately after an unplanned change has occurred.

(12) If, pursuant to a planned change, the AIFM's management of the AIF would no longer comply with these Regulations (or the AIFM Directive) or the AIFM would otherwise no longer comply with these Regulations (or the AIFM Directive), the FSC shall inform the AIFM without undue delay that it is not to implement the change.

(13) If a planned change is implemented notwithstanding subregulations (11) and (12) or if an unplanned change has taken place pursuant to which the AIFM's management of the AIF no longer complies with these Regulations (or the AIFM Directive) or the AIFM otherwise no longer complies with these Regulations (or the AIFM Directive), the FSC shall take all due measures in accordance with regulation 55, including, if necessary, the express prohibition of marketing of the AIF.

(14) If the changes are acceptable because they do not affect the compliance of the AIFM's management of the AIF with these Regulations (or the AIFM Directive) or the compliance by the AIFM with these Regulations (or the AIFM Directive) otherwise, the FSC shall without undue delay inform the competent authorities of the host Member States of the AIFM of those changes.

(15) This regulation shall be applied in accordance with any technical standards adopted by the European Commission in accordance with Article 41(7) or (8) of the AIFM Directive.

(15A) In a case where Gibraltar is not the Member State of Reference of a non-EU AIFM and the FSC receives notification from the competent authorities of the Member State of Reference of the AIFM that it has met the conditions laid down in Article 41 of the AIFM Directive—

- (a) the FSC shall acknowledge receipt of the notification; and
- (b) nothing in or under the Financial Services (Collective Investment Schemes) Act 2011, or in any other enactment, prevents the non-EU AIFM from managing EU AIFs (either directly or via the establishment of a branch) in accordance with that Article.

(16) This regulation comes into force in accordance with provision made in accordance with regulation 2(2).

**Conditions for the marketing in Member States without a passport of AIFs managed by a non-EU AIFM.**

48.(1) Without prejudice to regulations 43, 45 and 46, non-EU AIFMs may market to professional investors, in Gibraltar, units or shares of AIFs they manage subject to the following conditions—

- (a) the non-EU AIFM complies with regulations 28, 29 and 30 in respect of each AIF marketed by it pursuant to this regulation and with regulations 32 to 36 where an AIF marketed by it pursuant to this regulation falls within the scope of regulation 32 (for which purpose competent authorities and AIF investors referred to in those regulations shall be deemed those of the Member States where the AIFs are marketed);
- (b) appropriate cooperation arrangements for the purpose of systemic risk oversight and in line with international standards are in place between the competent authorities of the Member States where the AIFs are marketed, in so far as applicable, the competent authorities of the EU AIFs concerned and the supervisory authorities of the third country where the non-EU AIFM is established and, in so far as applicable, the supervisory authorities of the third country where the non-EU AIF is established in order to ensure an efficient exchange of information that allows competent authorities of the relevant Member States to carry out their duties in accordance with these Regulations (and the AIFM Directive);
- (c) the third country where the non-EU AIFM or the non-EU AIF is established is not listed as a Non-Cooperative Country and Territory by FATF.

(2) Where a competent authority of an EU AIF does not enter into the required cooperation arrangements as set out in subregulation (1)(b) within a reasonable period of time, the FSC may refer the matter to ESMA (to act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010).

(3) The Minister may by regulations under the principal Act impose stricter rules on a non-EU AIFM in respect of the marketing of units or shares of AIFs to investors in Gibraltar for the purpose of this regulation.

(4) This regulation shall be applied in accordance with—

- (a) any measures adopted by the European Commission in accordance with Article 42(3) of the AIFM Directive; and
- (b) any guidelines developed by ESMA in accordance with Article 42(4) of the AIFM Directive.

“(3A)The following provisions apply (with any modifications provided by regulations under subregulation (3) and with any other necessary modifications) to a non-EU AIFM in its reliance on this regulation as they apply to small AIFMs in their reliance on regulation 11A(1)—

- (a) regulation 11A(2) (requirement to notify FSC);
- (b) regulation 11A(3) (requirement to provide information to FSC);
- (c) regulation 11A(5) (requirement to notify material changes);
- (d) regulation 11C (FSCs power to revoke entitlement to market); and
- (e) regulation 11D (FSC’s power to suspend entitlement to market).

**PART 9  
MARKETING TO RETAIL INVESTORS**

**Marketing to retail investors: experienced investors.**

49.(1) AIFMs may market to experienced investors in Gibraltar units or shares of AIFs that they manage in accordance with these Regulations (irrespective of whether the AIFs are marketed on a domestic or cross-border basis or whether they are EU or non-EU AIFs).

(1A) In this regulation “experienced investor” means an experienced investor within the meaning of the Financial Services (Experienced Investor Funds) Regulations 2012.

(2) For the purpose of subregulation (1) the Minister may, by regulations under the principal Act, impose stricter requirements on the AIFM or the AIF than the requirements applicable to AIFs marketed to professional investors in Gibraltar in accordance with these Regulations.

(2A) The following provisions shall apply to an AIFM for the purposes of reliance on subregulation (1): regulations 11, 11A, 11B, 37, 38, 41, 42, 45, 46 and 48.

(2B) Those provisions shall apply—

- (a) as if references to professional investors were references to experienced investors; and

(b) with any other necessary modifications.

(3) Subregulation (2) may not be relied upon in order to impose stricter or additional requirements on EU AIFs established outside Gibraltar in a Member State and marketed on a cross-border basis than on AIFs marketed in Gibraltar.

(4) The FSC shall, by 22 July 2014, inform the European Commission and ESMA of—

- (a) the types of AIF which AIFMs may market to retail investors in their territory;
- (b) any additional requirements imposed in accordance with this regulation for the marketing of AIFs to retail investors.

(5) The FSC shall also inform the European Commission and ESMA of any subsequent changes.

**Marketing to other retail investors.**

49A.(1) AIFMs may, if they obtain approval from the FSC, market to retail investors in Gibraltar units or shares of AIFs that they manage in accordance with these Regulations (irrespective of whether the AIFs are marketed on a domestic or cross-border basis or whether they are EU or non-EU AIFs).

(2) The following provisions shall apply to an AIFM for the purposes of reliance on subregulation (1): regulations 11, 11A, 11B, 37, 38, 41, 42, 45, 46 and 48.

(3) Those provisions shall apply—

- (a) as if references to professional investors were references to retail investors; and
- (b) with any other necessary modifications.

(4) The FSC shall refuse an application for approval under this regulation if it considers refusal appropriate on any grounds.

(5) This regulation applies to retail investors who are not experienced investors within the meaning of regulation 49.

(6) Subregulations (2) to (5) of regulation 49 apply for the purposes of this regulation with any necessary modifications.

**PART 10  
ADMINISTRATION AND ENFORCEMENT**

*Administration*

**FSC designated as competent authority.**

50. The FSC is designated as the competent authority for Gibraltar for the purposes of carrying out the duties of the AIFM Directive (including the functions conferred by these Regulations).

**Duty to monitor compliance.**

51.(1) The FSC shall establish appropriate methods to monitor that AIFMs comply with their obligations under these Regulations and the AIFM Directive.

(2) The FSC shall, where relevant, have regard to guidelines developed by ESMA under Article 44 of the AIFM Directive.

**Responsibility for AIFMs.**

52.(1) The prudential supervision of a Gibraltar AIFM in accordance with these Regulations and the AIFM Directive shall be the responsibility of the FSC.

(2) Subregulation (1) applies—

- (a) whether or not the AIFM manages or markets AIFs outside Gibraltar in a Member State, and
- (b) without prejudice to those provisions of these Regulations or the AIFM Directive which confer the responsibility for supervision on the competent authorities of the host Member State of the AIFM.

(3) The supervision of a non-Gibraltar AIFM's compliance with regulations 18 and 20 shall be the responsibility of the FSC where the AIFM manages or markets AIFs through a branch in Gibraltar.

**Information.**

53.(1) The FSC may require a non-Gibraltar AIFM managing or marketing AIFs in Gibraltar, whether or not through a branch, to provide the information necessary for the supervision of the AIFM's compliance with the applicable rules for which the FSC is responsible.

(2) Requirements under subregulation (1) may not be more stringent than those which the FSC imposes on Gibraltar AIFMs for the monitoring of their compliance with the same rules.

**Notifications.**

53A. A notification which is to be given to the FSC in accordance with these Regulations must—

- (a) be made in such manner as the FSC may direct; and
- (b) contain or be accompanied by such information as the FSC may direct.

**Action in relation to breaches of rules.**

54.(1) Where the FSC ascertains that a non-Gibraltar AIFM managing or marketing AIFs in Gibraltar, whether or not through a branch, is in breach of one of the rules in relation to which the FSC has responsibility for supervising compliance, the FSC shall—

- (a) require the AIFM to put an end to the breach, and
- (b) inform the competent authorities of the AIFM's home Member State.

(2) If the AIFM concerned refuses to provide the FSC with information falling under its responsibility, or fails to take the necessary steps to put an end to the breach referred to in subregulation (1), the FSC shall inform the competent authorities of its home Member State.

(3) The FSC shall, at the earliest opportunity—

- (a) take all appropriate measures to ensure that an AIFM provides information requested by the competent authorities of its host Member State pursuant to Article 45 of the AIFM Directive or puts an end to any breaches referred to in that Article,
- (b) communicate those measures to the competent authorities of the host Member State, and
- (c) request any necessary information from the relevant supervisory authorities in third countries.

(4) If, despite measures taken by competent authorities of the home Member State of a non-Gibraltar AIFM or because such measures prove to

be inadequate or are not available in that Member State, the AIFM continues to refuse to provide information requested by the FSC under Article 45(3) of the AIFM Directive, or persists in breaching legal or regulatory provisions in force in Gibraltar pursuant to Article 45(4) of the AIFM Directive, the FSC may, after informing the competent authorities of the home Member State of the non-Gibraltar AIFM—

- (a) take appropriate measures, including those laid down in regulations 55 and 60, to prevent or penalise further irregularities and, in so far as necessary, to prevent that AIFM from initiating any further transactions in Gibraltar, and
- (b) where the function carried out in Gibraltar is the management of AIFs, require the AIFM to cease managing those AIFs.

(5) Where the FSC has clear and demonstrable grounds for believing that a non-Gibraltar AIFM is in breach of the obligations arising from rules in relation to which the FSC has no responsibility for supervising compliance, it shall refer those findings to the competent authorities of the home Member State of the AIFM (to take appropriate measures, including, if necessary, request additional information from the relevant supervisory authorities in third countries).

(6) Where the FSC receives findings from the competent authorities of a Member State in relation to a Gibraltar AIFM in accordance with Article 45(7) of the AIFM Directive, the FSC shall take appropriate measures, including, if necessary, requesting additional information from the relevant supervisory authorities in third countries.

(7) If despite the measures taken by the competent authorities of the home Member State of a non-Gibraltar AIFM or because such measures prove to be inadequate, or because the home Member State of the AIFM fails to act within a reasonable timeframe, the AIFM persists in acting in a manner that is clearly prejudicial to the interests of the investors of the relevant AIF, the financial stability or the integrity of the market in Gibraltar, the FSC may, after informing the competent authorities of the home Member State of the AIFM, take all appropriate measures needed in order to protect the investors of the relevant AIF, the financial stability and the integrity of the market in Gibraltar, including the possibility of preventing the AIFM concerned to further market the units or shares of the relevant AIF in Gibraltar.

(8) The procedure laid down in subregulations (5) to (7) shall also apply in the event that the FSC has clear and demonstrable grounds for disagreement with the authorisation of a non-EU AIFM by the Member State of reference.

(9) Where competent authorities disagree on any of the measures taken under this regulation or Article 45 of the AIFM Directive, the FSC may

initiate, or cooperate in, bringing the matter to the attention of ESMA (to act in accordance with the powers conferred to it under Article 19 of Regulation (EU) No. 1095/2010).

(10) The FSC shall cooperate with any action taken by ESMA to facilitate the negotiation and conclusion of cooperation arrangements required by the AIFM Directive in accordance with Article 45(11) of that Directive.

#### **Powers of FSC.**

55.(1) For the purpose of supervising or investigating compliance with these Regulations or the AIFM Directive the FSC may—

- (a) exercise any power that the FSC has under an Act that confers supervisory responsibilities on the FSC;
- (b) act directly or in collaboration with other competent authorities;
- (c) delegate tasks under its responsibility;
- (d) institute legal proceedings.

(2) The FSC may—

- (a) require the provision of documents in any form and retain copies;
- (b) require information from any person related to the activities of an AIFM or AIF and if necessary to summon and question a person with a view to obtaining information;
- (c) carry out on-site inspections with or without prior announcements;
- (d) require existing telephone and existing data traffic records;
- (e) require the cessation of any practice that is contrary to the provisions of these Regulations or the AIFM Directive;
- (f) request the freezing or the sequestration of assets;
- (g) request the temporary prohibition of professional activity;
- (h) require authorised AIFMs, depositaries or auditors to provide information;

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- (i) adopt any type of measure to ensure that AIFMs or depositaries continue to comply with the requirements of these Regulations or the AIFM Directive;
- (j) require the suspension of the issue, repurchase or redemption of units in the interest of the unit-holders or of the public;
- (k) withdraw the authorisation granted to an AIFM or a depositary;
- (l) appoint a liquidator or make other provision for the winding down of an AIF;
- (m) refer matters for criminal prosecution;
- (n) request that auditors or experts carry out verifications or investigations.

(3) Where the FSC, as the competent authority of the Member State of reference, considers that an authorised non-EU AIFM is in breach of its obligations under these Regulations (or the AIFM Directive), it shall notify ESMA, setting out full reasons as soon as possible.

(4) The FSC may take any action it considers necessary in order to ensure the orderly functioning of markets in those cases where the activity of one or more AIFs in the market for a financial instrument could jeopardise the orderly functioning of that market.

(5) In particular, the FSC may, whether or not at the request of ESMA in accordance with Article 47(4) of the AIFM Directive, take any of the following actions—

- (a) prohibit the marketing of units or shares of AIFs managed by non-EU AIFMs or of non-EU AIFs managed by EU AIFMs without the authorisation required in regulation 43 or without the notification required in regulations 41, 45 and 46 or without being allowed to do so in accordance with regulation 48;
- (b) impose restrictions on non-EU AIFMs relating to the management of an AIF in case of excessive concentration of risk in a specific market on a cross-border basis;
- (c) impose restrictions on non-EU AIFMs relating to the management of an AIF where its activities potentially constitute an important source of counterparty risk to a credit institution or other systemically relevant institutions.

(6) The powers under subregulation (5) shall be exercised so as to—

- (a) effectively address the threat to the orderly functioning and the integrity of the financial market or to the stability of the whole or a part of the financial system in Gibraltar or significantly improve the ability of the FSC to monitor the threat;
- (b) avoid a risk of regulatory arbitrage;
- (c) avoid a detrimental effect on the efficiency of the financial markets, including reducing liquidity in those markets or creating uncertainty for market participants, in a way that is disproportionate to the benefits of the measures.

(7) The FSC shall inform the European Commission of any use made of a derogation or option in accordance with Article 6, 9, 21, 22, 28, 43 or 61(5) of the AIFM Directive, and of any subsequent changes; (and the information will be made public by the European Commission in accordance with Article 60 of the AIFM Directive).

(8) For the purpose of the review referred to in Article 69(1) of the AIFM Directive, the FSC shall provide the European Commission annually with information on the AIFMs that are managing or marketing AIFs (or both) under the FSC's supervision, either under the passport regime provided for in the Directive, or under these Regulations, with an indication of the date on which the passport regime has been transposed and, if relevant, applied, in Gibraltar; and the information shall include the matters specified in Article 69(2) of the Directive.

(9) The FSC shall charge such fees in relation to authorisations or other matters arising under these Regulations as the Minister may prescribe by Regulations made under the principal Act; and—

- (a) different levels of fees may be prescribed for different circumstances or classes of case; and
- (b) the FSC may suspend or cancel an authorisation, or take such other action as it considers appropriate, if a prescribed fee is not paid.

#### **Powers and competences of ESMA.**

56.(1) The FSC, and any other relevant authorities, shall have regard to any guidelines issued by ESMA, in accordance with Article 47 of the AIFM Directive, in relation to the authorisation powers and reporting obligations under these Regulations and the AIFM Directive.

(2) The FSC shall treat as confidential information exchanged under these Regulations or the AIFM Directive, in accordance with the requirements of Article 47(3) of the AIFM Directive (and subject to the exceptions specified in that Article).

(3) The FSC may request ESMA to reconsider a decision under Article 47 of the AIFM Directive.

(4) For the purposes of subregulation (3) the procedure set out in the second subparagraph of Article 44(1) of Regulation (EU) No 1095/2010 shall apply.

(5) The FSC shall take any necessary account of, and cooperate with, action taken by ESMA, and measures adopted by the European Commission, in accordance with—

- (a) Articles 67 of the AIFM Directive (delegated act on the application of Article 35 and Articles 37 to 41; dealing, in particular, with the date when the rules set out in those articles become applicable in all Member States);
- (b) Article 68 of the AIFM Directive (delegated act on the termination of the application of Articles 36 and 42).

(6) For the purpose of Article 67(3) of the AIFM Directive, as from the entry into force of these Regulations and until the issuance of the ESMA opinion referred to in Article 67(1)(a) of that Directive, the FSC shall, quarterly, provide ESMA with information on the AIFMs that are managing or marketing AIFs (or both) under the FSC's supervision, either under the application of the passport regime provided for in the AIFM Directive or under these Regulations, together with such information needed for the assessment of the elements referred to in Article 67(2) of that Directive.

(7) For the purpose specified in Article 68(3) of the AIFM Directive, as from the entry into force of the delegated act referred to in Article 67(6) of that Directive and until the issuance of the ESMA opinion referred to in Article 68(1)(a), the FSC shall, quarterly, provide ESMA with information on the AIFMs that are managing or marketing AIFs (or both) under the FSC's supervision, either under the application of the passport regime provided for in the AIFM Directive or under these Regulations.

**General duty of cooperation between different competent authorities.**

57.(1) The FSC shall cooperate with competent authorities of Member States, ESMA and the ESRB whenever necessary for the purpose of—

- (a) carrying out duties under these Regulations or the AIFM Directive,
- (b) exercising powers under these Regulations or the AIFM Directive, or
- (c) the law of Gibraltar or a Member State in relation to matters to which these Regulations or the AIFM Directive relates.

(2) Any public authority of Gibraltar shall facilitate the cooperation required under subregulation (1).

(3) The FSC, may use any power under the law of Gibraltar for the purpose of the cooperation required under subregulation (1), even in cases where the conduct under investigation does not constitute an infringement of the law of Gibraltar.

(4) The FSC shall immediately supply competent authorities of Member States, and ESMA, with the information required for the purposes of carrying out duties under these Regulations or the AIFM Directive.

(5) The FSC shall forward a copy of the relevant cooperation arrangements entered into by them in accordance with regulations 40, 41, 43 and 46 to the host Member States of the AIFM concerned.

(6) The FSC shall, in accordance with procedures relating to the applicable regulatory technical standards referred to in Article 35(14), 37(17) or 40(14) of the AIFM Directive, forward the information received from third-country supervisory authorities in accordance with cooperation arrangements with such supervisory authorities in respect of an AIFM, or, where relevant, pursuant to Article 45(6) or (7) of that Directive, to the competent authorities of the host Member State of the AIFM concerned.

(7) Where there is a dispute between the FSC and the competent authority of a Member State as to the contents of the cooperation arrangement entered into in accordance with Article 35, 37 or 40 of the AIFM Directive, the FSC may initiate, or cooperate in, the reference of the matter to ESMA (to act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010) under Article 50(4) of the AIFM Directive.

(8) If the FSC has clear and demonstrable grounds to suspect that acts contrary to these Regulations or the AIFM Directive are being or have been carried out by an AIFM not subject to FSC supervision, it shall notify ESMA and the competent authorities of any home and host Member States of the AIFM concerned in as specific a manner as possible.

(9) If the FSC receives notification from the competent authorities of a Member State pursuant to Article 50(5) of the AIFM Directive (which makes provision similar to subregulation (8)) the FSC shall, without prejudice to the competences of the notifying authority—

- (a) take appropriate action, and
- (b) inform ESMA and the notifying competent authorities of the outcome of that action and, to the extent possible, of significant interim developments.

(10) This regulation shall be applied in accordance with any technical standards adopted by the European Commission under Article 50(6) of the AIFM Directive.

**Cooperation in supervisory activities.**

58.(1) The FSC may request the cooperation of the competent authorities of a Member State, and shall respond to requests for cooperation of other competent authorities, in a supervisory activity or for an on-the-spot verification or in an investigation in Gibraltar or the other authorities' territory within the framework of their powers pursuant to these Regulations and the AIFM Directive.

(2) Where the FSC receives a request with respect to an on-the-spot verification or an investigation, it shall—

- (a) carry out the verification or investigation itself;
- (b) allow the requesting authority to carry out the verification or investigation;
- (c) allow auditors or experts to carry out the verification or investigation.

(3) In a case falling under subregulation (2)(a) the FSC, or the other competent authority, may ask that members of its own personnel assist in carrying out the verification or investigation; but the verification or investigation shall, however, be the subject of the overall control of—

- (a) the FSC, in the case of a verification or investigation carried out in Gibraltar, or
- (b) the Member State on whose territory the verification or investigation is conducted.

(4) In a case falling under subregulation (2)(b) the competent authority of the Member State on whose territory the verification or investigation is carried out may request that members of its own personnel assist in carrying out the verification or investigation.

(5) The FSC, and other competent authorities, may refuse to exchange information or to act on a request for cooperation in carrying out an investigation or on-the-spot verification only in the following cases—

- (a) the investigation, on-the-spot verification or exchange of information might adversely affect the sovereignty, security or public order of Gibraltar;
- (b) judicial proceedings have already been initiated in respect of the same actions and the same persons before the authorities of Gibraltar;
- (c) final judgment has already been delivered in Gibraltar in respect of the same persons and the same actions.

(6) The FSC shall inform the requesting competent authorities of any decision taken under subregulation (5), stating its reasons.

(7) This regulation shall be applied in accordance with any technical standards adopted by the European Commission in accordance with Article 54(4) of the AIFM Directive.

**Disputes between competent authorities: general.**

59. In case of disagreement between the FSC and the competent authorities of a Member State on an assessment, action or omission of the FSC or the other competent authority in areas where these Regulations (or the AIFM Directive) requires cooperation or coordination between competent authorities, the FSC may initiate, or cooperate in, the reference of the matter to ESMA (to act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010).

**Administrative provision and penalties.**

60.(1) The Minister may, by regulations under the principal Act, make such provision as he may deem appropriate (being effective, proportionate and dissuasive) to enable the FSC to obtain the information needed to assess the compliance of AIFMs and AIFs with the provisions of these Regulations and the AIFM Directive.

(2) Without prejudice to the generality of subregulation (1), regulations may provide for such offences and penalties as the Minister may deem appropriate.

(3) The FSC may publish any measure or penalty that is imposed for infringement of these Regulations (or the AIFM Directive), unless such disclosure would—

- (a) seriously jeopardise the financial markets,
- (b) be detrimental to the interests of investors, or
- (c) cause disproportionate damage to the parties involved.

(4) The FSC shall provide ESMA with any information necessary for the purpose of drawing up ESMA's annual report, on administration and penalties in connection with the AIFM Directive, in accordance with Article 48(3) of the AIFM Directive.

**Reasons.**

61.(1) The FSC shall give, and communicate to applicants, written reasons for—

- (a) any decision to refuse or withdraw authorisation of AIFMs to manage or market AIFs, and
- (b) any negative decision taken in the implementation of these Regulations.

(2) Any decision taken under or by virtue of these Regulations must be properly reasoned, and the reasons must be recorded.

**Appeal.**

62.(1) Regulations made in accordance with regulation 60(1) must include provision giving a right of appeal to a court in relation to any decision taken by the FSC under or by virtue of these Regulations.

(2) That right to appeal to the courts must include an appeal where, in respect of an application for authorisation which provides all the information required, no decision is taken within 6 months of the submission of the application.

*Information*

**Transfer and retention of personal data.**

63.(1) With regard to transfer of personal data between competent authorities, the FSC shall apply Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, as the same may be amended from time to time.

(2) Data shall be retained for a maximum period of 5 years.

**Disclosure of information to third countries.**

64.(1) The FSC may transfer to a third country data and the analysis of data on a case-by-case basis where—

- (a) the conditions laid down in Article 25 or 26 of Directive 95/46/EC are met, and
- (b) the FSC is satisfied that the transfer is necessary for the purpose of these Regulations or the AIFM Directive (and the third country shall not transfer the data to another third country without the express written authorisation of the FSC).

(2) The FSC shall only disclose information received from a competent authority of a Member State to a supervisory authority of a third country where—

- (a) the competent authority of the Member State concerned has obtained express agreement of the competent authority which transmitted the information, and
- (b) where applicable, the information is disclosed solely for the purposes for which that competent authority gave its agreement.

**Exchange of information relating to the potential systemic consequences of AIFM activity.**

65.(1) The FSC shall communicate information to the competent authorities of Member States where this is relevant for monitoring and responding to the potential implications of the activities of individual AIFMs or AIFMs collectively for the stability of systemically relevant financial institutions and the orderly functioning of markets on which AIFMs are active.

(2) ESMA and ESRB shall also be informed (so as to forward this information to the competent authorities of Member States).

(3) Subject to the conditions laid down in Article 35 of Regulation (EU) No 1095/2010, aggregated information relating to the activities of AIFMs under their responsibility shall be communicated by the FSC to ESMA and the ESRB.

(4) This regulation shall be applied in accordance with delegated and implementing acts adopted by the European Commission in accordance with Article 53(3) or (4) of the AIFM Directive.

## **PART 11 FINAL PROVISIONS**

### **Review.**

66. The FSC shall provide the European Commission with information required in accordance with Article 69 of the AIFM Directive (review).

### **AIFM Directive Annexes.**

67. The Schedule to these Regulations sets out the text of the Annexes to the AIFM Directive.

### **Transitional provision.**

68.(1) AIFMs performing activities to which these Regulations apply before 22 July 2013 must take all necessary measures to comply with these Regulations and must submit an application for authorisation within 1 year of that date.

(2) Regulations 37, 38 and 39 shall not apply to the marketing of units or shares of AIFs that are subject to a current offer to the public under a prospectus that has been drawn up and published in accordance with Directive 2003/71/EC before 22 July 2013 for the duration of validity of that prospectus.

(3) July 2013 which do not make any additional investments after 22 July 2013 may however continue to manage such AIFs without authorisation under these Regulations.

(4) AIFMs in so far as they manage AIFs of the closed-ended type whose subscription period for investors has closed prior to the entry into force of the AIFM Directive (which occurred, in accordance with Article 70, on 21 July 2011) and are constituted for a period of time which expires at the latest 3 years after 22 July 2013, may, however, continue to manage such AIFs without needing to comply with these Regulations except for regulation 28 and, where relevant, regulations 32 to 36, or to submit an application for authorisation under these Regulations.

(5) The FSC, as the competent authority of the home Member State of an AIF or, in a case where the AIF is not regulated, as the competent authority of the home Member State of an AIFM, may allow institutions referred to in regulation 27(3)(a) and established in a Member State to be appointed as a depositary until 22 July 2017.

(6) Subregulation (5) is without prejudice to the full application of regulation 27, with the exception of regulation 27(9)(a) on the place where the depositary is to be established.

(7) Regulation 2(2) makes provision for the commencement of regulations 40, 41 and 43 to 47.

(8) The Minister shall, by regulations under the principal Act, make provision (which may include provision modifying, amending or repealing a provision of these Regulations) for the purpose of giving effect to Articles 66(4) and 68(6) of the AIFM Directive (cessation of national regime set out in Articles 36 and 42 of the AIFM Directive and passport regime provided for in Article 35 and Articles 37 to 41 to become sole and mandatory regime applicable in all Member States).

**Consequential amendment.**

69. In section 3(2)(b) of the Financial Services (Occupational Pensions Institutions) Act 2006 (scope: institutions to which Act does not apply) after “under the Insurance Companies Act” insert “or the Financial Services (Alternative Investment Fund Managers) Regulations 2013”.

**SCHEDULE**

Regulation 67

**TEXT OF ANNEXES TO THE AIFM DIRECTIVE**

**ANNEX I**

1. Investment management functions which an AIFM shall at least perform when managing an AIF:

- (a) portfolio management;
- (b) risk management.

2. Other functions that an AIFM may additionally perform in the course of the collective management of an AIF:

- (a) Administration:
  - (i) legal and fund management accounting services;
  - (ii) customer inquiries;
  - (iii) valuation and pricing, including tax returns;
  - (iv) regulatory compliance monitoring;
  - (v) maintenance of unit-/shareholder register;
  - (vi) distribution of income;
  - (vii) unit/shares issues and redemptions;
  - (viii) contract settlements, including certificate dispatch;
  - (ix) record keeping;
- (b) Marketing;
- (c) Activities related to the assets of AIFs, namely services necessary to meet the fiduciary duties of the AIFM, facilities management, real estate administration activities, advice to undertakings on capital structure, industrial strategy and related matters, advice and services relating to mergers and the purchase of undertakings and other services connected to the

management of the AIF and the companies and other assets in which it has invested.

## **ANNEX II**

### **REMUNERATION POLICY**

1. When establishing and applying the total remuneration policies, inclusive of salaries and discretionary pension benefits, for those categories of staff, including senior management, risk takers, control functions and any employee receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on the risk profiles of the AIFMs or of AIFs they manage, AIFMs shall comply with the following principles in a way and to the extent that is appropriate to their size, internal organisation and the nature, scope and complexity of their activities:

- (a) the remuneration policy is consistent with and promotes sound and effective risk management and does not encourage risk-taking which is inconsistent with the risk profiles, rules or instruments of incorporation of the AIFs they manage;
- (b) the remuneration policy is in line with the business strategy, objectives, values and interests of the AIFM and the AIFs it manages or the investors of such AIFs, and includes measures to avoid conflicts of interest;
- (c) the management body of the AIFM, in its supervisory function, adopts and periodically reviews the general principles of the remuneration policy and is responsible for its implementation;
- (d) the implementation of the remuneration policy is, at least annually, subject to central and independent internal review for compliance with policies and procedures for remuneration adopted by the management body in its supervisory function;
- (e) staff engaged in control functions are compensated in accordance with the achievement of the objectives linked to their functions, independent of the performance of the business areas they control;
- (f) the remuneration of the senior officers in the risk management and compliance functions is directly overseen by the remuneration committee;
- (g) where remuneration is performance related, the total amount of remuneration is based on a combination of the assessment of

the performance of the individual and of the business unit or AIF concerned and of the overall results of the AIFM, and when assessing individual performance, financial as well as non-financial criteria are taken into account;

- (h) the assessment of performance is set in a multi-year framework appropriate to the life-cycle of the AIFs managed by the AIFM in order to ensure that the assessment process is based on longer term performance and that the actual payment of performance-based components of remuneration is spread over a period which takes account of the redemption policy of the AIFs it manages and their investment risks;
- (i) guaranteed variable remuneration is exceptional, occurs only in the context of hiring new staff and is limited to the first year;
- (j) fixed and variable components of total remuneration are appropriately balanced and the fixed component represents a sufficiently high proportion of the total remuneration to allow the operation of a fully flexible policy, on variable remuneration components, including the possibility to pay no variable remuneration component;
- (k) payments related to the early termination of a contract reflect performance achieved over time and are designed in a way that does not reward failure;
- (l) the measurement of performance used to calculate variable remuneration components or pools of variable remuneration components includes a comprehensive adjustment mechanism to integrate all relevant types of current and future risks;
- (m) subject to the legal structure of the AIF and its rules or instruments of incorporation, a substantial portion, and in any event at least 50% of any variable remuneration consists of units or shares of the AIF concerned, or equivalent ownership interests, or share-linked instruments or equivalent non-cash instruments, unless the management of AIFs accounts for less than 50% of the total portfolio managed by the AIFM, in which case the minimum of 50% does not apply.

The instruments referred to in this point shall be subject to an appropriate retention policy designed to align incentives with the interests of the AIFM and the AIFs it manages and the investors of such AIFs. Member States or their competent authorities may place restrictions on the types and designs of those instruments or ban certain instruments as appropriate.

This point shall be applied to both the portion of the variable remuneration component deferred in line with point (n) and the portion of the variable remuneration component not deferred;

- (n) a substantial portion, and in any event at least 40%, of the variable remuneration component, is deferred over a period which is appropriate in view of the life cycle and redemption policy of the AIF concerned and is correctly aligned with the nature of the risks of the AIF in question.

The period referred to in this point shall be at least three to 5 years unless the life cycle of the AIF concerned is shorter; remuneration payable under deferral arrangements vests no faster than on a pro-rata basis; in the case of a variable remuneration component of a particularly high amount, at least 60% of the amount is deferred;

- (o) the variable remuneration, including the deferred portion, is paid or vests only if it is sustainable according to the financial situation of the AIFM as a whole, and justified according to the performance of the business unit, the AIF and the individual concerned.

The total variable remuneration shall generally be considerably contracted where subdued or negative financial performance of the AIFM or of the AIF concerned occurs, taking into account both current compensation and reductions in payouts of amounts previously earned, including through malus or clawback arrangements;

- (p) the pension policy is in line with the business strategy, objectives, values and long-term interests of the AIFM and the AIFs it manages.

If the employee leaves the AIFM before retirement, discretionary pension benefits shall be held by the AIFM for a period of 5 years in the form of instruments defined in point (m). In the case of an employee reaching retirement, discretionary pension benefits shall be paid to the employee in the form of instruments defined in point (m), subject to a 5 year retention period;

- (q) staff are required to undertake not to use personal hedging strategies or remuneration- and liability-related insurance to undermine the risk alignment effects embedded in their remuneration arrangements;

- (r) variable remuneration is not paid through vehicles or methods that facilitate the avoidance of the requirements of this Directive.

2. The principles set out in paragraph 1 shall apply to remuneration of any type paid by the AIFM, to any amount paid directly by the AIF itself, including carried interest, and to any transfer of units or shares of the AIF, made to the benefits of those categories of staff, including senior management, risk takers, control functions and any employee receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on their risk profile or the risk profiles of the AIF that they manage.

3. AIFMs that are significant in terms of their size or the size of the AIFs they manage, their internal organisation and the nature, the scope and the complexity of their activities shall establish a remuneration committee. The remuneration committee shall be constituted in a way that enables it to exercise competent and independent judgment on remuneration policies and practices and the incentives created for managing risk.

The remuneration committee shall be responsible for the preparation of decisions regarding remuneration, including those which have implications for the risk and risk management of the AIFM or the AIF concerned and which are to be taken by the management body in its supervisory function. The remuneration committee shall be chaired by a member of the management body who does not perform any executive functions in the AIFM concerned. The members of the remuneration committee shall be members of the management body who do not perform any executive functions in the AIFM concerned.

### **ANNEX III**

#### **DOCUMENTATION AND INFORMATION TO BE PROVIDED IN CASE OF INTENDED MARKETING IN THE HOME MEMBER STATE OF THE AIFM**

- (a) A notification letter, including a programme of operations identifying the AIFs the AIFM intends to market and information on where the AIFs are established;
- (b) the AIF rules or instruments of incorporation;
- (c) identification of the depositary of the AIF;
- (d) a description of, or any information on, the AIF available to investors;

- (e) information on where the master AIF is established if the AIF is a feeder AIF;
- (f) any additional information referred to in Article 23(1) for each AIF the AIFM intends to market;
- (g) where relevant, information on the arrangements established to prevent units or shares of the AIF from being marketed to retail investors, including in the case where the AIFM relies on activities of independent entities to provide investment services in respect of the AIF.

#### ANNEX IV

#### **DOCUMENTATION AND INFORMATION TO BE PROVIDED IN THE CASE OF INTENDED MARKETING IN MEMBER STATES OTHER THAN THE HOME MEMBER STATE OF THE AIFM**

- (a) A notification letter, including a programme of operations identifying the AIFs the AIFM intends to market and information on where the AIFs are established;
- (b) the AIF rules or instruments of incorporation;
- (c) identification of the depositary of the AIF;
- (d) a description of, or any information on, the AIF available to investors;
- (e) information on where the master AIF is established if the AIF is a feeder AIF;
- (f) any additional information referred to in Article 23(1) for each AIF the AIFM intends to market;
- (g) the indication of the Member State in which it intends to market the units or shares of the AIF to professional investors;
- (h) information about arrangements made for the marketing of AIFs and, where relevant, information on the arrangements established to prevent units or shares of the AIF from being marketed to retail investors, including in the case where the AIFM relies on activities of independent entities to provide investment services in respect of the AIF.