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MUTUAL FUNDS REGULATIONS – SECTION 62

(S.I.s 18/2010, 41/2010 and 82/2019)

Commencement

[17 May 2010]

PRELIMINARY PROVISIONS

Short title

1. These Regulations may be cited as the Mutual Funds Regulations.

Interpretation

2. In these Regulations, unless the context otherwise requires—

“Act” means the Securities and Investment Business Act;

“Commission” means the Financial Services Commission established under section 3(1) of the Financial Services Commission Act; and

“fund property”, in relation to a private or professional fund, means—

- (a) where the fund is a BVI business company or a partnership, the assets of the fund; and
- (b) where the fund is a unit trust, the assets subject to the trust deed that constitutes the fund;

(Inserted by S.I. 82/2019)

“offering document” means a document that contains an invitation or offer to investors or potential investors to purchase or subscribe for fund interests in a private or professional fund, and includes an amended offering document.

Fund administration services

3. For the purposes of the definition of “fund administrator” in section 40(1) of the Act, “fund administration services” includes the following activities—

- (a) acting as registrar or transfer agent with respect to mutual funds; and
- (b) providing accounting services for, or with respect to, mutual funds, excluding the provision of audit and related services.

PART I

PRIVATE AND PROFESSIONAL FUNDS

Application for Recognition

Application for recognition as private or professional fund

4. (1) An application to the Commission for the recognition of a private or professional fund shall be in the approved form and shall specify the following—

- (a) the address of the fund's place of business in the Virgin Islands;
- (b) the name and address of each of the fund's directors;
- (c) the name and address of the fund's authorised representative;
- (d) if the fund is a unit trust, the name and address of the trustee;
- (e) the address of any place or places of business that the fund may have outside the Virgin Islands;
- (f) the name and address of the fund's auditor;
- (g) the name and address of each of the fund's functionaries;
- (h) whether the fund has issued, or intends to issue, an offering document;
- (i) in the case of a fund incorporated, constituted, formed or organised under the laws of a country outside the Virgin Islands, written details of the nature and scope of the fund's business; and
- (j) such other information as may be required by the approved form.

(2) An application under subregulation (1) shall be accompanied by the following—

- (a) a copy of the fund's constitutional documents;
- (b) a copy of the fund's certificate of incorporation, formation or registration or equivalent document, if any;
- (c) if application is made to exempt the fund from the requirement to appoint a custodian, an explanation as to—
 - (i) why it is not considered necessary for a custodian to be appointed; and
 - (ii) the arrangements made, or to be made, to ensure the safe custody of the fund property;
- (d) if application is made to exempt the fund from the requirement to appoint a manager, notification of the person who will fulfil the management function together with an explanation as to the arrangements made, or to be made, to ensure that the management function is adequately fulfilled;
- (e) if the mutual fund has issued, or intends to issue, an offering document, a copy of the offering document or the proposed offering document; *(Amended by S.I. 82/2019)*
- (f) if the mutual fund has not issued and does not intend to issue an offering document, an explanation as to why no offering document is to be issued including, in particular, how relevant information concerning the fund and any invitation or offer will be provided to investors and potential investors; and *(Amended by S.I. 82/2019)*
- (g) a copy of the fund's valuation policy. *(Inserted by S.I. 82/2019)*

(3) The Commission may require any documents submitted under subregulation (2)(a) and (b) to be certified in such manner as it considers appropriate.

Matters required to be prescribed, professional investor and professional fund

5. (1) For the purposes of the definition of “professional investor” in section 40(1) of the Act the specified sum is \$1,000,000.

(2) For the purposes of section 55(2)(c) of the Act, the minimum initial investment of each investor, other than an exempted investor, in a professional fund is \$100,000 or its equivalent in another currency.

(3) For the purposes of section 55(4) of the Act, the following are exempted investors with respect to a fund—

- (a) the manager, administrator, promoter or underwriter of the fund;
- (b) any employee of the manager or promoter of the fund; and
- (c) such other class or description of persons as the Commission may, by notice published in the *Gazette*, specify as exempted investors.

Obligations on Private and Professional Funds

Directors

6. (1) A private fund and a professional fund shall at all times have at least 2 directors, at least one of whom shall be an individual.

(2) Where a private or professional fund is in breach of subregulation (1), it shall immediately notify the Commission of that fact in writing.

Functionaries of private and professional funds

7. (1) Subject to subsection (2), a private fund and a professional fund shall at all times have—

- (a) a fund manager;
- (b) a fund administrator; and
- (c) a custodian.

(2) The Commission may, on written application made by or on behalf of a private or professional fund, exempt the fund from the requirement to appoint a custodian or a fund manager.

(3) An application under subregulation (2) may be made together with the application for recognition or at any subsequent time.

(4) The custodian of a private or professional fund shall—

- (a) be a person who is functionally independent from the fund manager and the fund administrator; or
- (b) where the custodian is the same person as the fund manager or fund administrator, be a company having systems and controls that ensure that the persons fulfilling the custodial function are functionally independent from the persons fulfilling the fund management or fund administration functions.

(5) Subject to subregulation (6), no person shall be appointed as a functionary of a private or professional fund unless at least 7 days prior notification of the proposed appointment has been given to the Commission.

(6) The Commission may agree to accept a shorter period of notice than that specified in subregulation (5).

Functionary ceasing to hold office

8. (1) Written notice shall be given to the Commission by a private or professional fund within—

- (a) 7 days after a functionary of the fund resigns, his or her appointment is terminated or he or she otherwise ceases to act as functionary of the fund; or
- (b) such longer period as the Commission may specify.

(2) The notice provided under subregulation (1) shall include a statement of the reason for the person ceasing to act as functionary of the fund and a written notice shall be deemed not to be provided under that subregulation if it does not include such a statement.

(3) Where a functionary of a private or professional fund resigns, has his or her appointment terminated or otherwise ceases to act as functionary of the fund, the fund does not contravene regulation 7(1) if another person is appointed to act as functionary within 7 days of the original functionary ceasing to act.

Investment warning

9. (1) No offer or invitation shall be made to an investor or potential investor to purchase or subscribe for fund interests in a private or professional fund unless the investor or potential investor is provided with an investment warning that complies with these Regulations.

(2) Where a private or professional fund issues an offering document, the investment warning shall be included in a prominent place in the offering document.

(3) Where a private or professional fund does not issue an offering document, the investment warning shall be provided to each investor as a separate document.

(4) The investment warning required to be provided to an investor or potential investor shall clearly indicate that the fund has been established as a private or professional fund, as the case may be, and that—

- (a) in the case of a private fund, the fund is suitable for private investors only and that the fund is limited to 50 investors or any invitation to subscribe for fund interests may be made on a private basis only;
- (b) in the case of a professional fund—
 - (i) the fund is only suitable for professional investors, as defined in the Act; and
 - (ii) a minimum initial investment of \$100,000 (or such larger sum as may apply with respect to the fund) is required; (*Amended by S.I. 41/2010*)
- (c) the fund is not subject to supervision by the Commission or by a regulator outside the Virgin Islands and that requirements considered

necessary for the protection of investors that apply to public funds do not apply to private or professional funds;

- (d) an investor in a private or professional fund is solely responsible for determining whether the fund is suitable for his or her investment needs;
- (e) by reason of the above, investment in a private or professional fund may present a greater risk to an investor than investment in a public fund.

Valuation of fund property

9A. (1) A private or professional fund shall maintain a clear and comprehensive policy for the valuation of fund property with procedures that are sufficient to ensure that the valuation policy is effectively implemented.

(2) A private or professional fund shall ensure that its administrator or such other person having responsibility for the valuation of fund property, values fund property in accordance with the valuation policy.

(3) The valuation policy and procedures of a private or professional fund shall—

- (a) be appropriate for the nature, size, complexity, structure and diversity of the fund and fund property;
- (b) be consistent with the provisions concerning valuation contained in its constitutional documents and offering document;
- (c) require valuations to be undertaken at least on an annual basis;
- (d) include procedures for preparing reports on the valuation of fund property; and
- (e) specify the mechanisms in place for disseminating valuation information and reports to investors.

(4) Subject to sub-regulation (5), a private or professional fund shall ensure that the fund's manager, or such other person having responsibility for the investment function, is independent from the fund's administrator, or such other person having responsibility for the valuation process.

(5) Where a private or professional fund determines that the fund's manager, or such other person having responsibility for the investment function, must be the same as the administrator or such other person having responsibility for the valuation of fund property, the private or professional fund shall—

- (a) identify, manage and monitor any potential conflicts of interest that may arise; and
- (b) disclose to investors in the fund—
 - (i) that the fund's manager or such other person having responsibility for the investment function is the same as the fund's administrator or such other person having responsibility for the valuation function; and
 - (ii) details of how any potential conflicts of interest will be managed.

(Inserted by S.I. 82/2019)

*Financial Statement and Audit***Preparation and audit of financial statements**

10. (1) Subject to subregulation (2), a private fund and a professional fund shall—
- (a) prepare financial statements for each financial year that comply with—
 - (i) one of the accounting standards specified with respect to public funds in regulation 17(1)(a) to (d); or
 - (ii) internationally recognised and generally accepted accounting standards equivalent to the accounting standards referred to in subparagraph (i); and
 - (b) appoint, and at all times have, an auditor for the purposes of auditing its financial statements.
- (2) The Commission may, on written application made by or on behalf of a private or professional fund, exempt the fund from the requirement to appoint an auditor.
- (3) The auditor of a private or professional fund shall—
- (a) audit the fund's financial statements and prepare his or her report in accordance with—
 - (i) US Generally Accepted Auditing Standards;
 - (ii) International Standards on Auditing (UK);
 - (iii) International Standards on Auditing;
 - (iv) Hong Kong Standards on Auditing;
 - (v) Canadian Auditing Standards; or
 - (vi) such other recognised international auditing standards as may be approved by the Commission on a case by case basis;
(Substituted by S.I. 82/2019)
 - (b) certify the fund's compliance with such obligations and matters as may be specified in the Act and these Regulations;
 - (c) provide such certifications or confirmations as may be specified by the Commission in a written notice sent to the fund and the auditor; and
 - (d) carry out such other duties as may be required of the auditor by the Act or these Regulations.
- (4) A private or professional fund shall provide a copy of its audited financial statements to the Commission within 6 months after the financial year end for the financial statements or such extended period not exceeding 15 months as, subject to subsection (5), the Commission may approve in writing.
- (5) The Commission shall not grant an extension under subregulation (4) of more than 9 months unless it is satisfied that a further extension is justified by exceptional circumstances.

Notifications

11. (1) A private fund and a professional fund shall provide written notice to the Commission in accordance with this regulation of—

- (a) the appointment of a director, authorised representative or auditor;
 - (b) a director, authorised representative or auditor ceasing, for whatever reason, to hold office;
 - (c) any change in the address of the fund's place of business, whether in or outside the Virgin Islands;
 - (d) any material change in the nature and scope of the fund's business, in the case of a fund incorporated, constituted, formed or organised under the laws of a country outside the Virgin Islands;
 - (e) any amendment to its constitutional documents;
 - (f) the issuance of an offering document that was not provided to the Commission with the fund's application for recognition; (*Amended by S.I. 82/2019*)
 - (g) the amendment of any offering document previously provided to the Commission, whether with its application or in accordance with paragraph (f); and (*Amended by S.I. 82/2019*)
 - (h) any amendment to the fund's valuation policy. (*Inserted by S.I. 82/2019*)
- (2) Notification of the matters specified in subregulation (1) shall be provided as follows—
- (a) in the case of a notice provided in accordance with subregulation (1)(a), (b) or (c), within 14 days after the date of the occurrence of the matter to be notified;
 - (b) in the case of a notice provided in accordance with subregulation (1)(d), as soon as reasonably practicable after the change;
 - (c) in the case of a notice provided in accordance with sub-regulation (1)(e), (f), (g) or (h), no more than 14 days after the occurrence of the matter in respect of which notice is given. (*Substituted by S.I. 82/2019*)

PART II

PUBLIC FUNDS

Registration

Application for registration of public fund

12. (1) An application to the Commission for the registration of a public fund shall be in the approved form and shall specify the following—

- (a) the address of the place of business of the fund in the Virgin Islands;
- (b) the name and address of the fund's authorised representative;
- (c) if the fund is a BVI business company, the name and address of the fund's directors;
- (d) if the fund is a unit trust, the name and address of the trustee;
- (e) the name and address of any promoters of the fund;

- (f) the address of any place or places of business that the fund may have outside the Virgin Islands;
 - (g) the name and address of the fund's auditor;
 - (h) the name and address of each of the fund's functionaries;
 - (i) the place or places where the fund's financial and other records will be kept; and
 - (j) such other information as may be required by the approved form.
- (2) An application for the registration of a public fund shall be accompanied by the following—
- (a) a copy of the fund's constitutional documents;
 - (b) a copy of the fund's certificate of incorporation, formation or registration or equivalent document, if any;
 - (c) a statement setting out the nature and scope of the business to be carried on by the fund in or from within the Virgin Islands, including the name of any other country where the fund is carrying on or intends to carry on business;
 - (d) if application is made to exempt the fund from the requirement to appoint a custodian, an explanation as to—
 - (i) why it is not considered necessary for a custodian to be appointed; and
 - (ii) the arrangements made, or to be made, to ensure the safe custody of the fund property;
 - (e) a copy of the prospectus issued or proposed to be issued by or on behalf of the fund; and
 - (f) a copy of each functionary agreement.
- (3) The Commission may require any documents submitted under subregulation (2)(a) or (b) to be certified in such manner as it considers appropriate.

Prospectus

Content of prospectus of public fund

13. A prospectus issued by a public fund shall—

- (a) state prominently at the head of the first page or on the cover that it is a prospectus prepared in accordance with the Act, these Regulations and the Public Funds Code;
- (b) contain the information specified in the Public Funds Code;
- (c) be accompanied by, or contain reference to, the availability of the financial statements for the last financial year of the fund and the auditor's report on those accounts, if the fund has completed a financial year in operation;

- (d) be accompanied by such other documents as may be specified in the Public Funds Code; and
- (e) contain such other matters as the Commission may require.

Other Requirements

Directors

14. (1) A public fund that is a BVI business company shall at all times have at least 2 directors.
- (2) Only an individual shall be appointed as the director of a public fund.
 - (3) Where a public fund is in breach of subregulation (1), it shall—
 - (a) immediately notify the Commission of that fact in writing; and
 - (b) within 21 days of the breach, submit an application to the Commission for the appointment of one or more new directors pursuant to section 54 of the Act in order to ensure compliance with subregulation (1).

Unit trust to have a trustee

15. A public fund that is a unit trust shall at all times have a trustee that is a body corporate.

Functionaries of public fund

16. (1) Subject to subregulation (2), a public fund shall at all times have—
- (a) a fund manager;
 - (b) a fund administrator; and
 - (c) a custodian.
- (2) The Commission may, on written application made by or on behalf of a public fund, exempt the fund from the requirement to appoint a custodian.
- (3) An application under subregulation (2) may be made together with the application for registration or at any subsequent time.
- (4) Each functionary of a public fund shall be functionally independent from every other functionary of the fund.

Prescribed accounting and audit standards

17. (1) The following accounting standards are specified for the purposes of Part IV of the Act in relation to public funds—
- (a) the International Financial Reporting Standards, promulgated by the International Accounting Standards Board;
 - (b) UK GAAP;
 - (c) US GAAP;
 - (d) Canadian GAAP; or

- (e) such other recognised international accounting standards as may be approved by the Commission on a case by case basis.
- (2) The auditor of a public fund shall—
- (a) audit the fund's financial statements and prepare his or her report in accordance with—
 - (i) US Generally Accepted Auditing Standards;
 - (ii) International Standards on Auditing (UK);
 - (iii) International Standards on Auditing;
 - (iv) Hong Kong Standards on Auditing;
 - (v) Canadian Auditing Standards; or
 - (vi) such other recognised international auditing standards as may be approved by the Commission on a case by case basis;
(Substituted by S.I. 82/2019)
 - (b) certify the fund's compliance with such obligations and matters as may be specified in the Act and these Regulations;
 - (c) provide such certifications or confirmations as may be specified by the Commission in a written notice sent to the fund and the auditor; and
 - (d) carry out such other duties as may be required of the auditor by the Act or these Regulations.

Notifications

18. (1) A public fund shall provide written notice to the Commission in accordance with this regulation of—

- (a) the appointment of a director, authorised representative or auditor;
- (b) a director, authorised representative or auditor ceasing, for whatever reason, to hold office;
- (c) any change in the address of the fund's place of business, whether in or outside the Virgin Islands;
- (d) any change in the place or places where the fund's financial and other records are kept;
- (e) any material change in the nature and scope of the fund's business, in the case of a fund incorporated, constituted, formed or organised under the laws of a country outside the Virgin Islands;
- (f) any proposed amendment to its constitutional documents;
- (g) its intention to issue an offering document not provided to the Commission with the funds application for registration; and
- (h) its intention to amend any offering document provided to the Commission with its application or in accordance with paragraph (g).

(2) Notification of the matters specified in subregulation (1) shall be provided as follows—

- (a) in the case of a notice provided in accordance with subregulation (1)(a), (b), (c) or (d), within 14 days after the date of the occurrence of the matter to be notified;
- (b) in the case of a notice provided in accordance with subregulation (1)(e), as soon as reasonably practicable after the change;
- (c) in the case of a notice provided in accordance with subregulation (1)(f), (g) or (h), no less than 21 days prior to the issue of the proposed offering document or the proposed amendment, as the case may be, or such shorter period as the Commission may approve in writing.

Public Funds Code

19. The following matters may be provided for in the Public Funds Code—

- (a) the management, control and administration of public funds, the persons who may be appointed as functionaries of a public fund and the duties of those functionaries;
- (b) the custodial arrangements to be put in place with respect to public funds;
- (c) the reporting of information and the submission of documents to the Commission, including periodic returns, and the verification of the information or documents, and returns to be submitted to the Commission by and in respect of public funds;
- (d) the issue and redemption of fund interests in public funds;
- (e) the rights of investors in public funds;
- (f) conflicts of interests;
- (g) title to, and the transfer of, public fund property;
- (h) segregation of assets;
- (i) the income of a public fund;
- (j) meetings of investors of public funds;
- (k) the retention of records by public funds and the functionaries of public funds;
- (l) requirements and restrictions with respect to—
 - (i) the constitutional documents of a public fund;
 - (ii) investments and borrowing;
 - (iii) pricing and dealing;
 - (iv) the suspension and termination by a public fund of its operation or business;
 - (v) the valuation of assets and liabilities of a public fund; and
 - (vi) payments made, and benefits provided, to the functionaries of a public fund.

PART III

MISCELLANEOUS PROVISIONS

Registers

20. (1) The Registers maintained by the Commission and the information contained in any document filed may be kept in such manner as the Commission considers fit including, either wholly or partly, by means of a device or facility—

- (a) that records or stores information magnetically, electronically or by other means; and
- (b) that permits the information recorded or stored to be inspected and reproduced in legible and usable form.

(2) The registers required to be maintained under the Act shall—

- (a) specify the following information with respect to each fund—
 - (i) the address of the place of business and address for service in the Virgin Islands of the person who applied for registration or recognition (“the applicant”);
 - (ii) the applicant’s authorised representative;
 - (iii) the address of the place of business that the applicant may have outside the Virgin Islands;
 - (iv) the date of registration or recognition of the fund;
 - (v) the status of the registration or recognition, if cancelled, and the date of cancellation;
 - (vi) whether fees payable by the fund for the current year have been paid and the date on which they were paid; and
 - (vii) such other information as the Commission considers to be appropriate; and
- (b) be open to public inspection.

Transitional provisions

21. The transitional provisions specified in the Schedule shall have effect.

SCHEDULE

(Regulation 21)

TRANSITIONAL PROVISIONS**Interpretation**

1. In this Schedule—

“commencement date” means the date the Act is brought into force;

“existing private fund” means a mutual fund that, immediately before the commencement date, was recognised as a private fund under the former Act;

“existing professional fund” means a mutual fund that, immediately before the commencement date, was recognised as a professional fund under the former Act;

“existing public fund” means a mutual fund that, immediately before the commencement date, was registered as a public fund under the former Act;

“first transition date” means 31 December, 2010;

“former Act” means the Mutual Funds Act, 1996 repealed under the Act;

“second transition date” means the date the Public Funds Code comes into effect; and

“transitioning mutual fund” means a person who, immediately prior to the coming into force of the Mutual Funds (Amendment) Regulations, 2019, was recognised as a private or professional fund or registered as a public fund under the Act.

(Amended by S.I. 41/2010)

Private and Professional Funds

2. The following provisions of these Regulations shall not take effect until the first transition date with respect to an existing private or professional fund:

- (a) regulation 6;
- (b) regulation 7 (1) and (4); and
- (c) regulation 9.

Financial statements and audit re private and professional funds

3. (1) For the purposes of this regulation, “current financial year”, in relation to an existing private or professional fund, means the financial year of the fund that commenced before, and ends after, the commencement date.

(2) Regulation 10(1) and (4) do not have effect with respect to the current financial year of an existing private or professional fund, or any financial statements prepared in respect of the current financial year.

(3) Regulation 10(3) does not have effect in relation to the auditor of an existing private or professional fund appointed in respect of the current financial year.

Public funds

4. The following provisions of these Regulations shall not take effect until the first transition date with respect to an existing public fund:

- (a) regulation 14;
- (b) regulation 16 (1) and (4); and
- (b) subject to paragraph 6 (2), regulation 17.

Prospectus of public fund

5. Regulation 13 shall not take effect until the second transition date.

Audit of financial statements re public funds

6. (1) For the purposes of this regulation, “current financial year”, in relation to an existing public fund, means the financial year of the fund that commenced before, and ends after, the commencement date.

(2) Regulation 17(2) does not have effect in relation to the auditor of an existing public fund appointed in respect of the current financial year.

Effective Date

7. The provisions of the Mutual Funds (Amendment) Regulations, 2019 shall take effect in relation to a transitioning mutual fund on 1st July 2020.

(Inserted by S.I. 82/2019)
