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**PUBLIC FUNDS CODE – SECTION 63**

*(S.I. 90/2010)*

**Commencement**

*[31 March 2011]*

PRELIMINARY PROVISIONS

**Citation**

1. This Code may be cited as the Public Funds Code.

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**EXPLANATORY NOTES**

**Introduction**

- (i) *Part III of the Securities and Investment Business Act [referred to in the Explanatory Notes as “SIBA”] establishes a mutual funds regime for the Virgin Islands [referred to in the Explanatory Notes as “the BVI”]. SIBA is supported by the Mutual Funds Regulations [referred to in the Explanatory Notes as the “MFR”]. Part 2 of the MFR, which applies to public funds, covers a number of key matters, including—*
  - (a) *the registration of public funds;*
  - (b) *prospectus requirements;*
  - (c) *certain requirements concerning directors and key functionaries;*
  - (d) *accounting and audit standards; and*
  - (e) *notification requirements.*
- (ii) *However, international standards relating to public funds cover other matters, many of which are technical, complex and detailed and not well suited to incorporation in either primary legislation, or regulations. Furthermore, it is important that the regulatory framework for public funds is able to readily evolve as international standards change and the funds sector in the BVI develops and matures. It is impracticable and undesirable for primary legislation to be changed frequently and, for these reasons, SIBA enables the Commission to issue a Public Funds Code [referred to in the Explanatory Notes as “the Code”], containing more detailed requirements that support the general framework for public funds established by SIBA and the MFR.*
- (iii) *SIBA [in section 63(1)(b)] enables the MFR to specify matters that may be contained in the Public Funds Code. Regulation 18 of the MFR provides that a number of matters relating to public funds may be contained in the Code, including the following—*
  - (a) *the management, control and administration of public funds, the persons who may be appointed as the functionary of a mutual fund and the duties of functionaries;*
  - (b) *custodial arrangements;*

- (c) *the issue and redemption of fund interests;*
- (d) *the rights of investors;*
- (e) *income of public funds;*
- (f) *investments and borrowing;*
- (g) *pricing and dealing;*
- (h) *the suspension and termination by a mutual fund of its operation or business;*
- (i) *the valuation of assets and liabilities; and*
- (j) *record keeping.*

(iv) *Not all of these matters are covered by the Code.*

#### **Status of the Public Funds Code**

(v) *As the Public Funds Code is made by the Commission under powers given to it under SIBA, it has the status of delegated or subsidiary legislation. As subsidiary legislation, the Code has the status of “law” in the BVI. A requirement in the Code—*

- (a) *must therefore be complied with by every person to whom it applies;*
- (b) *has effect as law and therefore has the same legal force as if it had been contained in SIBA or the MFR; and*
- (c) *is enforceable by the Commission [see “Enforcement of the Code” below].*

(vi) *As far as possible, the Code is to be interpreted purposively. The purposive approach to interpretation requires legislation to be interpreted in accordance with the purpose or objectives of the legislation. Public funds and their functionaries should be prepared, therefore, to look beyond the literal meaning of the text, especially if this seems to be contrary to the intended purpose.*

#### **Enforcement of the Code**

(vii) *A public fund is a licensee within the meaning of the Financial Services Commission Act [referred to in the Explanatory Notes as “the FSC Act”]. The FSC Act gives the Commission power to take enforcement action against a licensee if the licensee has contravened, or is in contravention of any regulatory legislation. SIBA and its subsidiary legislation [including the Public Funds Code] fall within the definition of “regulatory legislation”. The Public Funds Code is therefore enforceable under the FSC Act.*

(viii) *Where the Commission is entitled to take enforcement action against a public fund, the FSC Act provides the Commission with a range of enforcement powers. These include issuing a directive, requiring a public fund to appoint a qualified person to advise it, undertaking an investigation into a public fund’s business and imposing administrative penalties on the fund. Any contravention of the Code will also be taken into account by the Commission in assessing whether a public fund is “fit and proper” to continue to be registered as a public fund.*

### **Status of the Explanatory Notes**

- (ix) *With the objective of making the Code as user friendly as possible, the Code is supplemented by Explanatory Notes which are set out immediately following the paragraphs of the Code to which they apply. As specified in section 3 of the Code, the Explanatory Notes are not part of the Code and do not, therefore, have the force of law. Nevertheless, the Explanatory Notes should be read together with the Code as they are used, for example, to set out—*
- (a) *important background or explanatory information;*
  - (b) *the factors that the Commission will take into account in considering whether or not a requirement in the Code, SIBA or the MFR has been complied with; and*
  - (c) *guidance on how the Commission expects public funds and their functionaries to ensure compliance with the Code.*
- (x) *To distinguish them from the Code, the Explanatory Notes are indented and printed in italics.*

### **Amendment of Code**

- (xi) *The Commission may, with the approval of the Board of Commissioners, amend the Code [SIBA s. 63(2)]. Where the Code is amended, public funds to whom the additional or modified requirements apply will usually be given a reasonable period of time within which to comply with the new or modified requirements.*

### **Commencement**

- (xii) *The Commission recognises that elements of the Code are new. Although most public funds should already be broadly compliant, it is important that public funds, their functionaries and advisors have sufficient time to bring public funds into full compliance. In relation to existing public funds that were given a transition period of up to 31 December, 2010 to comply with matters relative to prospectuses and invitations to the public to subscribe for or purchase fund interests (sections 46 and 50(3) of SIBA, this period has been extended to 30 June, 2011 by virtue of the Securities and Investment Business (Amendment of Schedule 8) (No. 2) Order, 2010. However, the Code will apply to all public funds registered on or after 31 March, 2011.*

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### **Definitions**

2. The following definitions apply for the purposes of this Code—

“Act” means the Securities and Investment Business Act;

“asset” includes a financial instrument;

“board”, in relation to a BVI business company, means—

- (a) the board of directors, committee of management, council or other governing authority of the company; or
- (b) if the company has only one director, that director;

“Code” means the Public Funds Code;

“FSC Act” means the Financial Services Commission Act;

“fund” means a public fund;

“fund property”, in relation to a public fund, means—

- (a) where the fund is a BVI business company, 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;

“governing body” means—

- (a) in the case of a company, the board; and
- (b) in the case of a unit trust, the trustee;

“hard-to-value asset” means an asset for which there is no readily available market price;

“NAV” or “net asset value” means the value of the fund property, including accrued interest, dividends and other receivables, less the value of the total liabilities of the fund, including accrued expenses, accrued fees and other payables;

“NAV function” means the function of calculating the NAV of a fund, in accordance with the valuation policy;

“procedures” includes systems and controls;

“Regulations” means the Mutual Fund Regulations;

“valuation function” means the valuation of the fund property in accordance with the valuation policy; and

“valuation policy”, in relation to a public fund, means the policy for the valuation of the fund property established and maintained in accordance with section 15 and, where more than one such policy is established and maintained, includes all those policies.

### **General interpretative provisions**

3. (1) The Explanatory Notes provided under any sections of this Code do not represent legal interpretations of the sections concerned, but are provided merely to serve as a guide and to afford clarity in better understanding the sections and the overall requirements of, or obligations under, the Act, the Regulations and this Code.

(2) Notwithstanding subsection (1), a court or the Commission may, in dealing with any matter under or in relation to this Code, have regard to the Explanatory Notes provided in this Code.

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### **EXPLANATORY NOTES**

#### **Definitions**

- (i) *As the Code has the status of subsidiary legislation made under SIBA, any terms defined in SIBA have the same meaning in the Code, unless the Code expressly provides otherwise, in which case the specific definition in the Code prevails. The definitions in SIBA are not generally repeated in the Code although, where it is considered helpful, the definitions are referred to in the Explanatory Notes.*
- (ii) *A number of terms, defined in SIBA, are particularly important for the Code, for example, “public fund”, “BVI business company”, “director”, “fund manager” and “fund administrator”. These are not repeated in the Code.*

### **Director and Board**

- (iii) *The definition of “board” in the Code is substantively the same as the definition in the BVI Business Companies Act.*

*In effect, the board is the directors of the company acting together. The definition provides, as the BVI Business Companies Act does, that if the company only has one director, “board” means that director. This is necessary in order to ensure that obligations imposed by this Code on the governing body of a public fund are imposed on the director, should the fund for any reason have a single director. However, the MFR provide that a public fund must at all times have at least two directors. The definition of “board” should not, therefore, be taken as permitting a public fund to have a single director. A fund with a single director would be in breach of the MFR and subject to enforcement action by the Commission.*

### **IOSCO**

- (iv) *The terms “IOSCO” and “IOSCO Objectives and Principles” are used in the Explanatory Notes, but not the Code itself.*

*“IOSCO” is the acronym for the International Organization of Securities Commissions, which is the body responsible for setting international standards with respect to investment business and securities. The BVI Government and the Commission are committed to implementing the standards set by IOSCO as far as relevant and applicable to public funds.*

- (v) *The term “IOSCO Objectives and Principles” is used to refer to the Objectives and Principles of Securities Regulation issued by IOSCO. These represent the core internationally agreed standards for the regulation of the securities industry, including public issuers, mutual funds and market intermediaries.*

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### **Application of the Code**

4. (1) Subject to subsection (2), this Code applies to—

- (a) a public fund; and
- (b) such other persons as the Code may, in respect of any particular provisions, expressly provide.

- (2) This Code does not apply to a public fund—

- (a) to the extent that the Code expressly provides otherwise;
- (b) in respect of any provisions where, from the context, it is clearly intended that the provisions are not intended to apply to the public fund concerned or are intended to apply to public funds of a different category or type than that of the public fund concerned; or
- (c) to the extent specified in any notice issued by the Commission with respect to the public fund under section 40C of the FSC Act.

- (3) In the case of a public fund that is a unit trust, any requirement or obligation imposed on the fund shall, where the context permits, be construed as a requirement or obligation imposed on the trustee.

(4) If the application of the Code to a public fund or any other person results in a conflict with a provision in the Act or the Regulations, that provision of the Act or Regulations prevails.

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**EXPLANATORY NOTES****Direction to Disapply the Code**

- (i) *The Commission may, on the application of, or with the consent of, a public fund direct that specified provisions in the Code do not apply to the fund or that specific provisions apply to the fund subject to specified modifications [s. 63(5) of SIBA].*
- (ii) *The Commission is unlikely to direct that the Code should be disapplied or modified with respect to a public fund unless the fund can demonstrate that a strict application of the Code would produce an anomalous result.*

## PART I

## PRINCIPLES FOR BUSINESS

**High level principles**

5. A public fund shall at all times carry on business in accordance with the following four principles—

## 1. Integrity

A public fund shall conduct its business with integrity.

## 2. Management and Control

A public fund shall take reasonable care to organise and control its affairs effectively taking into account the nature, scale, complexity and diversity of its business and the risks that it faces.

## 3. Investors' Interests

A public fund shall have due regard for the interests of its investors and treat them fairly; in addition, a public fund shall make appropriate arrangements to protect the fund property and take all reasonable steps to identify and manage conflicts of interest.

## 4. Relationship with Commission

A public fund shall deal with the Commission in an open and cooperative manner.

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**EXPLANATORY NOTES****Introduction**

- (i) *The objective of this Part is to establish a set of high level Principles for the conduct by public funds of their businesses.*
- (ii) *The Commission understands that public funds are essentially vehicles that are managed, administered and operated by independent functionaries. However, a public fund that is a company is a separate legal entity that is registered by the Commission under SIBA in its own right. A public fund is treated as a licensee for the purposes of the FSC Act.*



- (iii) *Although the functionaries may act on behalf of a public fund, they are appointed by the fund which must ensure that the functionaries appointed are able to operate the fund satisfactorily and that conflicts of interest are properly handled. While a public fund will not usually have employees or senior management, a public fund that is a BVI business company must have a board of directors that has duties and responsibilities that are separate from the fund's functionaries. Ultimately, the board of a public fund has responsibility for the operation of the fund.*
- (iv) *A public fund that is a unit trust is not a legal entity. In the case of a unit trust, section 4(3) of the Code therefore provides that any requirement or obligation imposed on the fund shall, where the context permits, be construed as a requirement or obligation imposed on the trustee. These Principles apply to the trustee, not in relation to the trustee's own business, but in relation to the obligations imposed upon the fund.*
- (v) *In the circumstances, the Commission considers that a public fund should be subject to certain high level principles of business. These are adapted from the high level principles that apply to licensees under the Regulatory Code. Obviously, these must be interpreted sensibly, taking full account of the fact that the fund is operated by functionaries.*

#### **Responsibility of public fund with Respect to Principles**

- (vi) *The Code is designed to give practical effect to the Principles. However, it is not possible for the Code to be exhaustive. In areas where the Code is not specific or where it does not cover a particular situation, public funds should apply the Principles appropriately. Furthermore, it remains the responsibility of a public fund to ensure that it carries on its business in accordance with the Principles. Depending upon the nature, scale, complexity and diversity of a public fund's business, it may be necessary for public funds to adopt higher standards than provided for in the Code in order to ensure compliance with the Principles. In such a case, a public fund that is in compliance with all the detailed requirements of the Code may nevertheless be in breach of the Principles and therefore liable to enforcement action.*
- (vii) *There are no specific provisions in the Code relating to Principle 1 (Integrity). The Commission considers this Principle to be fundamental to all activities of a public fund and any failure to comply with the Principle would be regarded by the Commission as an extremely serious breach of the Code.*
- (viii) *Principle 2 (Management and Control) requires a public fund to take reasonable care to organise and control its affairs effectively. It should be appreciated that the inclusion of a reasonableness test is not intended to import a lower standard. However, it is intended to ensure that where, for example, a public fund fails to prevent an unforeseen risk, it will not be in breach of the Principle. The Code imposes certain specific corporate governance and other obligations on a public fund. These are intended to amplify Principle 2.*
- (ix) *Principle 3 relates to the protection of investors' interests. Its provisions include a requirement that a public fund shall have due regard for the interests of its investors and treat them fairly. The Commission understands that investors accept that an investment in a public fund carries some risk. Depending upon the objectives of the fund, the risk may be high or low. Furthermore, the Code contains a number of requirements concerning disclosure of risk, particularly in the fund's prospectus. The requirement to "have due regard for the interests of investors"*

*should be interpreted taking full account of the objectives of the fund and the provisions of its prospectus and constituting documents. For example, the Commission does not consider that this provision requires public funds to avoid properly disclosed risks. Indeed, to do so may not be in the best interests of investors.*

*This Principle is not, therefore, intended to impose requirements that would interfere with the investment strategy of a public fund, where that strategy is in accordance with the disclosed objectives of the fund. The Principle is, however, intended to impose an obligation to have proper regard for investors' interests, given those investment objectives.*

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## PART II

### OPERATION OF PUBLIC FUNDS

#### *Prospectus*

#### **Prospectus**

6. (1) A prospectus issued by a public fund shall—

(a) not contain any matter that—

(i) is unfairly prejudicial to investors generally or to any class of investors;

(ii) conflicts with the Act, the Regulations or this Code; and

(b) contain the information and matters specified in Schedule 1.

(2) A public fund shall supply a copy of the most recent prospectus to any investor who requests it.

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#### **EXPLANATORY NOTES**

(i) *Section 6(1)(a)(i) provides that the prospectus should not contain any matter that is unfairly prejudicial to investors generally or to any class of investors.*

(ii) *The Commission understands that in many cases there are valid reasons for different classes of investors to be treated differently. Where this is fully disclosed, the Commission does not consider that, on its own, this constitutes unfair prejudice. However if, for example, the prospectus permits the rights of investors to be materially changed without their consent, the Commission considers that this may be unfairly prejudicial to investors. In construing this provision it may be necessary to consider the type of investor involved. For example, the unfair prejudice threshold may be lower for a small investor with limited experience than for a large experienced investor.*

*Corporate Governance*

**Corporate governance**

7. (1) A public fund shall—

- (a) take reasonable care to maintain a clear and appropriate apportionment of significant responsibilities between its governing body and functionaries so that—
  - (i) it is clear who has which of those responsibilities; and
  - (ii) the business and affairs of the fund can be adequately monitored and controlled by the governing body; and
- (b) establish and maintain such procedures as are appropriate for the nature, size, complexity, structure and diversity of the fund and the fund property.

(2) A public fund shall ensure that its procedures are regularly reviewed and updated as required.

**Directors of public fund**

8. A public fund that is a BVI business company shall have an adequate number of directors who—

- (a) are capable of exercising independent judgment;
- (b) have sufficient knowledge, skills, experience and understanding of the fund's business to ensure that the governing body is able to fulfil its responsibilities; and
- (c) have sufficient time and commitment to undertake their duties diligently.

**Responsibilities of governing body**

9. (1) The governing body of a public fund has ultimate responsibility for the business and affairs of the fund and for ensuring its effective organisation.

(2) Without limiting subsection (1), the governing body of a public fund has the following responsibilities—

- (a) ensuring that the policies and procedures required by this Code are established and maintained by the fund;
- (b) approving and periodically reviewing the significant policies of the fund;
- (c) ensuring that—
  - (i) appropriate and effective procedures are established, maintained and implemented for giving effect to the policies of the fund, which shall include internal controls and procedures with respect to risk management; and
  - (ii) the public fund complies with its obligations under the Act, the Regulations and this Code;
- (d) monitoring the financial condition of the fund; and

- (e) such other responsibilities as are specified in this Code.

### *Policies and Procedures*

#### **Establishment of policies and procedures**

**10.** (1) A public fund shall—

- (a) establish such policies and procedures, including internal controls, as are appropriate given the nature, size, complexity, structure and diversity of its business and the fund property; and
- (b) ensure that the policies and procedures are fully and clearly documented and communicated, as appropriate, to functionaries and other persons who need to implement them.

(2) Without limiting subsection (1), the policies and procedures of a public fund shall specify the duties and responsibilities of the governing body, including such responsibilities and duties as are imposed on the governing body by this Code.

#### **Conflicts of interest**

**11.** The policies and procedures of a public fund shall include—

- (a) the identification of conflicts of interest, whether arising between the fund and its affiliates, between the fund and its functionaries or their affiliates, the governing body and the fund or the governing body, fund, functionaries or their affiliates and investors, or otherwise; and
- (b) the management of any conflicts of interest identified.

### *Segregation and Safekeeping of Fund Property*

#### **Custodial arrangements**

**12.** (1) Unless a public fund has been exempted by the Commission from the requirement to appoint a custodian under Regulation 16(2) of the Regulations, the fund shall ensure that at all times it has a custodial agreement with its custodian which includes provisions for—

- (a) the appropriate segregation of the fund property; and
- (b) the taking of adequate measures by the custodian to ensure the safekeeping of the fund property.

(2) A public fund referred to in subsection (1) shall ensure that all fund property is transferred into the custody, or taken under the control, of its custodian as soon as reasonably practicable after it is acquired.

(3) A public fund that has been exempted by the Commission from the requirement to appoint a custodian under Regulation 16(2) of the Regulations shall put in place, and ensure that at all times it maintains, adequate arrangements for—

- (a) the segregation of the fund property from the property of other functionaries of the fund; and

- (b) the safekeeping of the fund property.

### **Procedures**

13. (1) A public fund shall—

- (a) establish, maintain and implement procedures, appropriate for the nature, size, complexity, structure and diversity of the fund and the fund property, to ensure compliance with section 12; and
- (b) ensure that the procedures are fully and clearly documented.

(2) The procedures established under subsection (1) shall be approved and reviewed by the governing body on at least an annual basis and the governing body shall make a record of how it has complied with this subsection.

(3) The governing body shall oversee the implementation of the procedures.

### **Issue and redemption of fund interests**

14. (1) A public fund shall—

- (a) establish and maintain—
  - (i) a policy for the issue and redemption of fund interests;
  - (ii) procedures that are sufficient to ensure that the policy is effectively implemented; and
- (b) ensure that the issue and redemption policy is fully and clearly documented.

(2) The issue and redemption policy and procedures shall be—

- (a) appropriate for the nature, size, complexity, structure and diversity of the fund and the fund property;
- (b) consistent with the provisions concerning valuation in the constituting documents and the prospectus; and
- (c) approved and reviewed by the governing body on at least an annual basis.

(3) Without limiting subsection (1), the issue and redemption policy shall make provision for the following matters—

- (a) the dealing days and times in the dealing day on which the fund will be available to receive requests for the issue and redemption of fund interests;
- (b) the procedures for effecting the issue and redemption of fund interests and the settlement of transactions;
- (c) the steps required to be taken by an investor redeeming fund interests before he or she can receive the proceeds of redemption;
- (d) the amounts of the following minima (if relevant) for each class of fund interest in the fund—
  - (i) the minimum number of fund interests which any one person may hold;

- (ii) the minimum value of fund interests which any one person may hold;
- (iii) the minimum number or value of fund interests which may be the subject of any one transaction of purchase; and
- (iv) the minimum number of fund interests which may be the subject of any one act of redemption;
- (e) the circumstances in which the redemption of fund interests may be suspended;
- (f) where and when the most recent issue and redemption prices will be published; and
- (g) the investment exchanges, if any, on which fund interests are listed or dealt.

### *Valuation and Pricing*

#### **Establishment of valuation policy and procedures**

15. (1) A public fund shall—
- (a) establish and maintain—
    - (i) a clear and comprehensive policy, or policies, for the valuation of the fund property; and
    - (ii) procedures that are sufficient to ensure that the valuation policy is effectively implemented; and
  - (b) ensure that the valuation policy and procedures are fully and clearly documented.
- (2) The valuation policy and procedures shall—
- (a) be appropriate for the nature, size, complexity, structure and diversity of the fund and the fund property;
  - (b) comply with the requirements of this Part, and in particular section 19; and
  - (c) be consistent with the provisions concerning valuation in the constitutional documents and the prospectus.
- (3) The valuation policy shall be approved and reviewed by the governing body, following consultation with such persons as the governing body considers appropriate—
- (a) at any time when the fund's investment strategy changes or its activities involve a new type of fund property;
  - (b) whenever anything occurs that may affect its validity, relevance or appropriateness; and
  - (c) in any case, on at least an annual basis.
- (4) A public fund shall ensure that its fund property is consistently valued in accordance with the valuation policy.

### **Independence of, and within, valuation process**

16. (1) The governing body of a public fund shall ensure that—

- (a) the persons controlling the fund's manager, or such other persons having responsibility for the investment function, are independent from the persons controlling the fund's administrator, or such other person having responsibility for the valuation process;
- (b) where appropriate, there is segregation of responsibilities between those parties concerned with the process of valuing the fund property and calculating the fund's NAV, with the objective of ensuring that there is adequate independence in the application of the valuation policy; and
- (c) the parties concerned in the valuation process have the appropriate level of experience and competence to properly fulfil their roles.

(2) Subject to subsection (4), a public fund shall ensure that the valuation and NAV functions are undertaken by the fund administrator or by a third-party valuation service provider, independent of the governing body and the fund's other functionaries, appointed for the purpose.

(3) For the purposes of subsections (1) and (2), a public fund may consider an affiliate of the manager to be independent of the manager, if it is satisfied that the group structure ensures functional independence.

(4) Where it considers that the circumstances so require, the governing body may approve the involvement of the manager in the valuation process provided that the manager's involvement is fully disclosed in the prospectus, together with an explanation for the manager's involvement.

(5) The governing body shall—

- (a) determine whether, given the nature, size, complexity, structure and diversity of the fund and the fund property, it is appropriate for the fund to have a valuation committee; and
- (b) if it so determines, appoint a valuation committee.

(6) The valuation committee of a public fund, if appointed, shall have the following responsibilities—

- (a) overseeing the application of the valuation policy;
- (b) reviewing the valuation policy;
- (c) such other responsibilities as are given to it by the governing body; and
- (d) reporting regularly to the governing body on the exercise of its functions.

### **Pricing and price overrides**

17. (1) Subject to subsection (3), the assets of a fund shall be valued using market prices.

(2) Wherever practicable, the valuation of an asset shall be checked against a primary and secondary source and the valuation policy shall specify the hierarchy of sources to be used for each asset and the tolerance levels for variances between the sources.

(3) Hard-to-value assets may be valued using pricing models to determine a fair value, provided that the use of the pricing model has been approved by the governing body.

(4) Where a pricing model is used—

- (a) its use shall be justified by appropriate testing; and
- (b) it must be capable of practical implementation by the parties concerned in the valuation process.

(5) Where the valuation policy permits price overrides, it shall require an independent review of the price override to be conducted as soon as reasonably practicable and provide for the appropriate reporting of the results of the review.

### **NAV reports**

**18.** (1) A public fund shall ensure that it prepares reports of its NAV in accordance with the valuation policy.

(2) A NAV report shall be—

- (a) addressed directly to investors of the fund; and
- (b) published in such a way that the investors have ready access to it.

### **Disclosure to investors**

**19.** (1) If the manager has a material role in the valuation of the fund property or the calculation of the NAV, the fund shall make adequate disclosure of the manager's involvement to the investors.

(2) Subsection (1) applies, even if the administrator or a third-party valuation service provider is appointed.

(3) The procedures of a public fund shall include arrangements for the provision of information concerning the valuation process to investors on request.

(4) The procedures specified in subsection (3) shall include—

- (a) the valuation information that will be made available to investors, without the need for a request;
- (b) the valuation information that may be requested by investors; and
- (c) how valuation information will be disseminated to investors, which may include by placement on a website, electronically or otherwise.

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## **EXPLANATORY NOTES**

### **Introduction**

- (i) *The requirements in the Code relating to valuation and pricing are designed to implement the requirements of Principle 20 of the IOSCO Objectives and Principles, as amplified by the Methodology. Principle 20 provides that the regulatory framework should ensure that there is a proper and disclosed basis for asset valuation and the pricing and the redemption of units in a public fund. The Commission has also drawn on, the following documents in drafting the Code and the Explanatory Notes:*



- (a) *Principles for the Valuation of Hedge Fund Portfolios*, published by IOSCO in November 2007; and
  - (b) *AIMA's Guide to Sound Practices for Hedge Fund Valuation*, published by the Alternative Investment Management Association ("AIMA") in March 2007.
- (ii) *The governing bodies and functionaries of public funds are strongly recommended to review both these documents and take them into account in developing and implementing appropriate valuation and pricing policies as they provide more detail than can be included in the Explanatory Notes.*
- (iii) *It should be noted that both documents are intended to apply specifically to hedge funds. Although the Commission considers that the same principles should apply to public funds, the valuation and pricing requirements in this Code should be regarded as minimum requirements. Section 15(2) of the Code provides that the valuation policy and procedures must be appropriate to the circumstances of the fund.*

*The governing body of a public fund should consider the requirements of the Code to be no more than a base line. The governing body of every public fund should consider whether, given the circumstances of the fund, the requirements in the Code should be exceeded.*

#### ***Establishment of Valuation Policy***

- (iv) *The Code requires the prospectus to include certain information concerning the valuation of the fund property. Although the Commission expects the prospectus to include a reasonably comprehensive overview, it does not expect it to contain the level of detail that will be contained in the valuation policy. This would not be reasonable as it is likely that the detailed valuation policies and procedures will evolve over time, which would necessitate changes to the prospectus. Schedule 1, therefore requires the prospectus to indicate the existence of a valuation policy and provide details of how a copy may be obtained.*
- (v) *Section 15(3) of the Code provides that the valuation policy should be approved by the governing body after consultation with such persons as the governing body considers appropriate. The Commission considers that the investment manager should usually be consulted. Consideration should also be given to consulting with the auditor, particularly if the fund property includes hard-to-value assets.*

#### ***Implementation of valuation policy***

- (vi) *Section 15(4) requires that fund property is consistently valued in accordance with the valuation policy. This requires that the valuation policy and methodologies should generally be—*
  - (a) *applied to all assets comprised in the fund property that share similar economic characteristics;*
  - (b) *applied across all funds that have the same Manager, taking time zone and trading strategies into account; and*
  - (c) *applied over time unless circumstances arise that suggest that the valuation policy requires updating.*

*It is particularly important that valuation sources and rules should, as far as possible, remain consistent over time.*

**Review of Valuation Policy**

- (vii) *It is important that the valuation policy is subject to regular review to ensure that it continues to be appropriate, given the fund's investment strategies. The Code therefore requires the governing body to review the valuation policy when the fund's investment strategy changes or its activities involve a new type of fund property.*
- (viii) *The objective of the review should be to determine whether the existing policies and procedures sufficiently address the new types of strategies or investments.*
- (ix) *Regardless of events or changes, the Code requires that the valuation policy is subject to regular review by the governing body, on at least an annual basis. This is a minimum requirement. The Commission expects that, if the circumstances of a fund require, the valuation policy will be reviewed more frequently.*

**Matters that Commission expects to be included in the Valuation Policy**

- (x) *The Code does not specify in detail the matters that must be included in the valuation policy. The Commission considers that this should be determined by the governing body of the fund. However, the Commission would normally expect to see the following matters included in the valuation policy—*
  - (a) *the obligations and responsibilities of each person concerned with the valuation of the fund property, clearly apportioning the responsibilities between the governing body, relevant functionaries and other persons in order to ensure compliance with section 16(1)(b) (segregation of responsibilities and independence);*
  - (b) *oversight of the valuation policy, including the persons responsible for oversight and the frequency of oversight;*
  - (c) *the methodologies that will be used for valuing each type of asset comprised in the fund property, which shall include—*
    - (i) *criteria for the selection of inputs and pricing and market data sources;*
    - (ii) *details of any pricing models that are to be used; and*
    - (iii) *the process for the approval of pricing models;*
  - (d) *the appropriate time for closing the books for valuation purposes;*
  - (e) *for each type of hard-to-value asset, a methodology or procedure for arriving at a consistent valuation to be included in the NAV;*
  - (f) *the valuation adjustments (if any) related to the size and liquidity of positions, as appropriate;*
  - (g) *the process for handling and documenting price overrides;*
  - (h) *a requirement that, whenever possible and appropriate, prices should be obtained from independent sources;*
  - (i) *a validation procedure which governs how a single source or non-independent source may be justified;*
  - (j) *the calculation of NAV;*
  - (k) *the frequency with which assets will be valued and NAV calculated;*

- (l) *how valuations and NAV calculations will be used and when and how they will be published;*
- (m) *an appropriate level of independent review of each valuation;*
- (n) *escalation procedures for the management of exceptions;*
- (o) *the process for formulating policies when the fund invests, or trades, in a new type of asset not covered by the valuation policy;*
- (p) *how the valuation of assets will be undertaken in case an instrument falls outside the scope of the existing valuation policies and procedures;*
- (q) *the accounting standards that will be followed; and*
- (r) *the processes for amending the valuation policy.*

*Where the governing body determines that the valuation policy will not include one or more of the matters specified in this paragraph, the governing body should ensure that the decision is recorded in writing, together with the reasons for the decision.*

- (xi) *The valuation policy should provide for an appropriate level of independent review of each valuation. It is for the governing body to determine what level of review is appropriate. In order to determine this, the governing body will need to consider the risks of inappropriate pricing and valuation. There are certain situations in which the risk is greater. For example—*
  - (a) *prices are only available from a single counterparty or broker source;*
  - (b) *prices supplied by the counterparty who originated an instrument, and in particular where the originator is also financing the Manager's position in the same instrument;*
  - (c) *illiquidity of instruments (e.g., small cap stocks or OTC derivatives or structured products);*
  - (d) *valuations influenced by the Manager;*
  - (e) *valuations influenced by parties related to the Manager; and*
  - (f) *valuations influenced by other entities that may have a financial interest in the fund's performance.*

*Where any of the above risks are present, the governing body should factor this into the review procedure for individual valuations.*

- (xii) *The Commission recognises that in the case of hard-to-value assets, it may be more difficult to obtain an independent review.*
- (xiii) *The valuation policy should include controls that enable checks to be carried out in relation to values obtained from external sources. These checks should seek to determine the reasonableness of the values and the review of material exceptions.\**
- (xiv) *Explanatory Note (x)(n) indicates that the valuation policy should include escalation procedures for the management of exceptions. It is a pre-requisite that the valuation policy sets accepted tolerance levels for differences between price sources, at a position and portfolio level. The escalation procedures should*

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\* For examples of possible checks, see the IOSCO Report on Principles for the Valuation of Hedge Fund Portfolios referred to above.

*provide for breaches of those tolerance levels, together with situations where the degree of subjectivity in pricing is such that the governing body should periodically undertake reviews.*

### ***Segregation of Responsibilities, Independence and Competence***

- (xv) *Independence of those concerned with the valuation function is extremely important, as is independence in the valuation process, and also within any party concerned with the valuation process. Other than in exceptional cases, the Commission therefore considers that valuations should be carried out by the administrator or a third party valuation service provider.*
- (xvi) *However, the Commission recognises that there may be circumstances which justify the manager undertaking part of, or assisting with, the valuation and NAV functions. The governing body should not approve the involvement of the manager unless—*
  - (a) *it is satisfied that there are exceptional reasons that justify the involvement of the manager in the valuation process;*
  - (b) *there is adequate disclosure of the manager's role in the valuation process in the prospectus, together with an explanation as to why the involvement of the manager is necessary;*
  - (c) *the fund has adequate procedures in place to manage the conflict of interest; and*
  - (d) *the manager has adequate procedures in place to manage the conflict of interest, that include separation between the management and valuation functions and separate reporting lines.*
- (xvii) *If the governing body appoints a valuation committee, it should ensure that the members of the committee have the authority and experience to provide meaningful oversight of the valuation process and that at least some of its members are independent of the manager.*
- (xviii) *The Code also requires the governing body to be satisfied that the parties concerned in the valuation process have the appropriate level of experience and competence to properly fulfil their roles. Therefore the Commission would expect that where a third party is appointed to perform valuation services, whether an administrator, a third party service provider or, in exceptional circumstances, the manager, the governing body would carry out appropriate due diligence before the appointment and on an ongoing basis.*

### ***Pricing Models/Methodologies***

- (xix) *The selection of a methodology to value a particular class of assets directly affects the resulting price. In selecting the methodology to value an asset, account should be taken of the sensitivity of varying methodologies and how specific strategies may determine the relative value of the assets in the portfolio. The selection process for a particular methodology should include an assessment of the different relevant methodologies that are available by appropriately qualified and experienced parties.*
- (xx) *If a model is used to value an asset, the model and the variable inputs should be explained and justified in the valuation policy and procedures. Underlying data, assumptions and limitations of model-based valuations, in addition to the rationale for using them, should be appropriately documented (preferably*

*contemporaneously) to facilitate later review. The valuation policy should specify how the model and its inputs will be checked for appropriateness.*

### **Price Overrides**

- (xxi) *Where, for any reason, the value for an asset determined in accordance with the valuation policy is rejected, the valuation policy must require an independent review to be undertaken. The detail of, and reasons for, each override should be documented contemporaneously with the override including any evidence supporting the case for the proposed override. A price override should not normally be used as an input into the calculation of the fund's formal net asset value until the review has taken place. Such a report, prepared regularly, could be one of the mechanisms by which the independent party satisfies itself that a consistent application of the policies and procedures is taking place.*
- (xxii) *Where overrides have occurred, any other assets in the fund that are related to the overridden instrument should be reviewed to assess whether any additional adjustments are also required. The repeated use of overrides for a particular asset should trigger a review of the policies and procedures.*

### **Valuation Committee**

- (xxiii) *Section 16(5) and (6) provide for the appointment of a valuation committee. It should be noted that section 16(5) requires only that the governing body consider whether to appoint a valuation committee, not to actually appoint such a committee.*

### **NAV Reports**

- (xxiv) *Section 18 requires a public fund to prepare NAV reports in accordance with the valuation policy. Whilst some funds may consider it appropriate to provide investors with a detailed NAV report, this is not a requirement of the Code. The Commission is content to leave the precise contents of the NAV report to the fund. However, the Commission would expect the NAV report, at a minimum, to include the NAV of the fund, and each class of fund interests, and the NAV per fund interest at the date specified in the report.*

### **Disclosure to Investors**

- (xxv) *The arrangements for the valuation of the fund property of a public fund must be transparent to investors (section 19). Relevant information that the Commission expects would typically be made available to investors upon request include, but are not necessarily limited to—*
- (a) *a description of the roles, skills and experience of all of the parties that are involved in the valuation process;*
  - (b) *a description of the extent to which valuations have been provided by or influenced by the manager;*
  - (c) *a description of any material conflicts of interest associated with the parties who are valuing the fund's assets; and*
  - (d) *information about the nature and degree of any contracted pricing services.*
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*Dealing and Managing***Dealing and managing by functionaries**

20. A public fund shall take reasonable steps to protect the interests of the fund and in so doing shall have regard to compliance by its functionaries of their obligations with respect to dealing and managing specified in sections 191 to 197 of the Regulatory Code.

*Record keeping***Public fund to maintain records**

21. (1) A public fund shall keep adequate and orderly records which, insofar as not covered by section 59 of the Act, shall include records of its business and operations, including records of all transactions relating to assets that form part of the fund property and all transactions in or relating to fund interests.

(2) The records kept by a public fund shall be sufficient to enable the Commission to monitor its compliance with its obligations under the Act, the Regulations and this Code.

(3) A public fund shall—

- (a) maintain its records so that they can be readily retrieved in the Virgin Islands and, if kept otherwise than in legible form, so that they can be accessed and read at a computer terminal in the Virgin Islands and produced in the Virgin Islands in legible form and in the English language without undue delay; and
- (b) ensure that its records are kept up to date and that a full audit trail is maintained of all changes to its records.

(4) A public fund shall not keep any records that it is required to maintain under the BVI Business Companies Act, the Act or this Code outside the Virgin Islands if access to those records will or is likely to be impeded by confidentiality or data protection restrictions.

**Retention of records**

22. (1) A public fund shall establish a record retention policy which shall include—

- (a) the period of time for which various types of record will be retained, which shall be no less than the minimum period specified in subsection (2);
- (b) how records are to be securely and safely stored; and
- (c) the process by which stored records can be readily accessed when required by the public fund, the Commission, law enforcement agencies or other persons entitled to access them.

(2) Subject to the BVI Business Companies Act, or any other enactment requiring a public fund to retain records for a longer period, a public fund shall retain all records that it is required to maintain under this Code for a period of at least 5 years.

(3) In the case of records relating to transactions with an investor, the 5 year period shall commence on the termination of the public fund's relationship with the investor.

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**EXPLANATORY NOTES**

- (i) *Section 21(3) sets out requirements concerning access to a fund's records in the BVI. The objective of this provision is to ensure that all records of the fund can be made available in the BVI without undue delay to ensure regulatory compliance and, if necessary, by the law enforcement authorities.*
- (ii) *Given that public funds are not required to have an office in the BVI, there is no requirement for funds to keep their records or even copies of their records in the BVI. However, it is essential that they should be accessible in the BVI without undue delay.*
- Where records are maintained in electronic form (which would be the case for most records), this section may be complied with by putting arrangements in place that would enable records either to be accessible from a computer terminal in the BVI or to be transmitted electronically to the BVI on request. This could be via e-mail or some other form of electronic transmission.*
- (iii) *Where records are not held in electronic form, the Commission would expect that scanned copies of the records could be sent to the BVI electronically. Where the records comprise a significant amount of documentation that is not in electronic form, it may be appropriate for the records to be sent by courier.*
- (iv) *The term "without undue delay" should be construed in the context of the records concerned. Where the records are held in electronic form, but not directly accessible from a computer in the BVI, the Commission would expect them to be made available electronically very quickly. Obviously, in the case of paper records being sent by courier, the Commission accepts that this would take longer.*

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*Relationship with, and Reporting to, the Commission*

**Significant regulatory impact disclosure**

23. (1) A public fund shall disclose to the Commission any matter that might reasonably be expected to have a significant regulatory impact.

(2) Without limiting subsection (1), the following shall be regarded as matters that might reasonably be expected to have a significant regulatory impact—

- (a) the suspension of valuation, dealing or redemptions;
- (b) any matter that could impact on the ability of the public fund to continue to carry on business; and
- (c) any incidence of fraud or other criminal activity that is connected with, or may affect, the public fund's business if the fraud or criminal activity is material to the safety, soundness or reputation of the public fund.

(3) In determining whether a disclosure should be made under this section, a public fund shall consider—

- (a) its business and activities that are not subject to supervision by the Commission; and
- (b) the business and activities of its affiliates.

(4) Disclosure under subsection (1) shall be made immediately after the public fund—

- (a) becomes aware of the matter concerned; or
- (b) has reasonable grounds for believing that the matter concerned has occurred or that it may occur in the foreseeable future.

#### **Required standard of disclosure**

24. (1) A public fund shall use its best endeavours to ensure that all information and documents that it provides to the Commission are accurate and complete.

(2) If a public fund becomes aware that any information or documentation that it has provided to the Commission is not accurate or complete, the public fund shall—

- (a) immediately on becoming so aware, notify the Commission that it has provided inaccurate or incomplete information; and
- (b) within 7 days, or such shorter period as the Commission may require, provide the Commission with such information or documentation as is required to ensure that subsection (1) is complied with.

#### **Certain events and changes to be notified to Commission**

25. (1) Without limiting section 23, a public fund shall notify the Commission in writing of any event specified in Schedule 2, within the time limit specified against the event.

(2) Where the time limit specified in Schedule 2 is “immediate”, the public fund shall notify the Commission—

- (a) immediately after there are reasonable grounds for the public fund believing that the event is likely to occur in the foreseeable future; and
- (b) whether or not paragraph (a) applies, immediately after the public fund knows, or has reasonable grounds for believing, that the event has occurred.

(3) A public fund shall not, without giving the Commission reasonable prior written notice, cause or permit a change in—

- (a) its name or any business name under which it carries on regulated business;
- (b) the address of its principal office or place of business, whether in or outside the Virgin Islands;
- (c) the address of its registered office; or
- (d) its authorised representative.

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#### **EXPLANATORY NOTES**

##### **Summary of Requirements**

- (i) *The fourth principle for business requires a public fund to deal with the Commission in an open and cooperative manner. SIBA, the MFR and the Code set out a number of requirements relevant to this principle. These may be classified as follows—*



- (a) *all public funds are required to submit documents and returns to the Commission on a regular basis, as required;*
  - (b) *SIBA, the MFR and the Code specify certain events and changes that trigger a requirement to provide information to the Commission (specific event triggered disclosures); and*
  - (c) *section 23(1) of the Code contains an over-riding requirement to disclose to the Commission any matter that might reasonably be expected to materially affect the Commission's regulation and supervision of the public fund (significant regulatory impact disclosure).*
- (ii) *It follows that compliance with the fourth principle requires a public fund not just to respond to specific requirements in SIBA, the MFR and the Code, but also to be proactive in supplying the Commission with information.*
  - (iii) *Section 24 of the Code provides that a public fund shall use its best endeavours to ensure that all information and documents that it provides to the Commission are accurate and complete. This requirement is in addition to specific offence provisions created by the FSC Act and other regulatory enactments. See, for example, section 53(1) of the FSC Act which provides that a person commits an offence if, with intent to deceive or injure another, or for any purpose of the Act, the person makes any representation or submits any information which he or she knows to be false or does not believe to be true.*

**Significant Regulatory Impact Disclosure**

- (iv) *A disclosure under section 23 is triggered by any matter that might reasonably be expected to have a significant regulatory impact. Underlying this requirement is an expectation that matters will be disclosed if there is a reasonable prospect that—*
  - (a) *a potential outcome will have a significant regulatory impact, if it occurs; and*
  - (b) *the outcome will occur.*

*It is recognised that what might constitute “a significant regulatory impact” is not necessarily capable of exhaustive definition and proper judgment will have to be exercised. Section 23(2) outlines some broad elements of what the Commission would consider as constituting significant regulatory impact and would therefore be required to be disclosed. These elements do not exclude other essential elements or factors that might arise in relation to the public fund's affairs and business which prudence dictates should be disclosed as having significant regulatory impact. Where in any case a public fund is not certain as to whether a particular element or factor might constitute a significant regulatory impact, it should make a disclosure.*

- (v) *However, the Commission expects every public fund to exercise proper judgment and not to disclose matters that are clearly not of a serious nature. A plethora of disclosures of a minor nature would not assist the Commission in exercising its objectives. In determining whether to make a significant regulatory impact disclosure, a public fund should, therefore, consider both the probability of an outcome occurring and the potential severity of the outcome.*
- (vi) *Where a disclosure has been considered, but not made, the Commission will expect a public fund to be able to demonstrate from its written records that all relevant information and matters have been fully considered and that there are reasonable*

*grounds for the decision not to make a disclosure. The reasons for each decision should, therefore, be properly recorded.*

### **Event-triggered Disclosures**

- (vii) *Section 25 and Schedule 2 together set out requirements for the notification of certain specific events and changes to the Commission. These notifications must always be in writing. However, in cases of urgency, notification may be made to the appropriate member of the Commission's regulatory staff by telephone, or even by a director of the public fund in person, provided that this is followed as soon as possible with a written notification.*
- (viii) *In addition, SIBA and the MFR contain specific requirements for notifying events and changes to the Commission, usually in writing.*
- In many cases, failure to comply with a notification requirement in a regulatory enactment is an offence.*
- (ix) *Where a notification requirement under SIBA, the MFR or the Code are substantively the same, the Commission does not expect a public fund to submit two separate notices to it.*
- (x) *Section 25(3)(d) provides that a public fund shall not, without giving the Commission reasonable prior written notice, cause or permit a change in its authorised representative. Section 65(4) of SIBA provides (in relation to a public fund) that where the authorised representative of the fund resigns or his or her appointment is terminated or becomes vacant for any reason, the fund does not commit an offence if it appoints another authorised representative within 21 days of the date of the previous authorised representative ceasing to act.*
- (xi) *A public fund should ensure that, in order to ensure compliance with SIBA and the Code, where an authorised representative ceases to act, it gives reasonable prior notice to the Commission of the appointment of a new authorised representative, before the expiry of the 21 day period specified in SIBA.*

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### *Disclosure to Investors*

#### **Changes to investor rights**

**26.** (1) Where a public fund proposes to make any changes to the rights of investors which the investors are not required to approve, the fund shall give each investor notice of the change.

(2) Wherever practicable, notice under subsection (1) shall be given prior to the change.

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**SCHEDULE 1**

*(Section 6(1))*

**INFORMATION TO BE CONTAINED IN  
PROSPECTUS OF A PUBLIC FUND**

**The Manager**

1. The following particulars shall be stated in respect of the manager—
  - (a) its name;
  - (b) the nature of its corporate form;
  - (c) the country of its incorporation or formation;
  - (d) if it is a part of a group, general details of the group;
  - (e) the address of the manager's principal place of business;
  - (f) the date of its incorporation;
  - (g) if the duration of its corporate status is limited, when that status will or may cease;
  - (h) the main business of the manager and a brief description of the manager's relevant experience; and
  - (i) whether the manager is licensed to carry on fund management business in the Virgin Islands or, if not, whether the manager is authorised to conduct fund management business elsewhere, and if so the country in which it is authorised and the name of the relevant supervisory body.

**The Administrator**

2. The following particulars shall be stated in respect of the administrator—
  - (a) its name;
  - (b) the nature of its corporate form;
  - (c) the country of its incorporation;
  - (d) if it is a part of a group, general details of the group;
  - (e) the address of the administrator's principal place of business;
  - (f) the date of its incorporation;
  - (g) if the duration of its corporate status is limited, when that status will or may cease;
  - (h) the main business of the administrator and a brief description of the administrator's experience; and
  - (i) whether the administrator is licensed to carry on fund administration business in the Virgin Islands or, if not, whether the administrator is authorised to conduct fund administration business elsewhere, and if so the country in which it is authorised and the name of the relevant supervisory body.

**The Custodian**

3. The following particulars shall be stated in respect of the custodian—
- (a) its name;
  - (b) the nature of its corporate form;
  - (c) the country of its incorporation;
  - (d) if it is a part of a group, general details of the group;
  - (e) the address of the custodian's principal place of business;
  - (f) a description of the custodian's principal business activity; and
  - (g) whether it is authorised to carry on business as a custodian in any country and, if so, the name of the country and the name of the relevant supervisory body.

**The Prime Broker**

4. The following particulars shall be stated in respect of any prime broker to be employed by the fund—
- (a) its name;
  - (b) the nature of its corporate form;
  - (c) the country of its incorporation;
  - (d) if it is a part of a group, general details of the group;
  - (e) the address of the prime broker's principal place of business; and
  - (f) whether the prime broker is authorised to carry on business as a prime broker in any country and, if so, the name of the country and the name of the relevant supervisory body.

**The Investment Adviser**

5. If the manager of the fund or the fund employs the services of an investment adviser to manage any of the fund property or to supply investment advice in relation to the fund, the following particulars shall be stated in respect of the investment adviser—
- (a) its name;
  - (b) the nature of its corporate form;
  - (c) the country of its incorporation;
  - (d) if it is a part of a group, general details of the group;
  - (e) the address of the investment adviser's principal place of business;
  - (f) the date of its incorporation;
  - (g) if the duration of its corporate status is limited, when that status will or may cease;
  - (h) the main business of the investment advisor and a brief description of the investment advisor's relevant experience;

- (i) if the investment adviser is licensed to carry on investment advisory business in a country other than the Virgin Islands, that fact and the name of the relevant supervisory body;
- (j) a summary of the agreement between the investment adviser and the manager (other than provisions relating to its remuneration) and, if it has the authority of the manager to make decisions on behalf of the manager, that fact and a description of the matters in relation to which it has authority; and
- (k) if the investment adviser is authorised to deal on behalf of the fund and is an associate of the manager, the relationship by virtue of which it is an associate and the maximum percentage commission payable to it under the agreement or arrangement in paragraph (j) for any transaction done or which could be done on behalf of the fund.

#### **Other Relevant Persons**

6. The name and address of the following shall be stated—

- (a) the fund's registrar;
- (b) the fund's transfer agent;
- (c) the fund's auditor;
- (d) the fund's legal advisors;
- (e) the fund's authorised representative; and
- (f) the fund's promoter.

#### **The Directors**

7. The names and relevant qualifications and experience of the directors of the fund shall be stated.

#### **The Constitution and Objectives of the Fund**

8. The following shall be stated—

- (a) the name of the fund;
- (b) the date on which and the jurisdiction in which the fund was incorporated, formed or registered;
- (c) whether the vehicle is a company, and if so what type of company, or a unit trust;
- (d) if the fund is a segregated portfolio company within the meaning of the BVI Business Company Act, a statement to that effect;
- (e) in the case of a property fund, the maximum extent to which the fund property may be invested in immovables and related assets;
- (f) the circumstances in which the winding-up of the fund can be decided upon, a description of the procedure to be followed in a winding-up and what the rights of investors will be in a winding-up;
- (g) the date of the fund's financial year end; and
- (h) if there are interim accounting periods, what they are.

**The Characteristics of Fund Interests in the Fund**

9. The following shall be stated—

- (a) in relation to each available class of fund interest in the fund, the entitlement of the investor to participate in the fund property and the income of the fund, a statement of the nominal value (if any) of each fund interest and, where there is more than one class of fund interest, the names or designations given to each class and characteristics of each class which distinguishes it from the others;
- (b) the nature of the right represented by the fund interests in the fund; and
- (c) the voting rights attached to the fund interests or to classes of fund interest, if appropriate, and whether persons other than investors can vote at meetings of investors and who those persons are.

**The Characteristics of the Fund**

10. The following shall be stated—

- (a) that the fund is a registered public fund;
- (b) if the fund is a feeder fund, the name of the fund into which the fund is to feed;
- (c) if the fund is a fund of funds, that fact;
- (d) if the fund is an umbrella fund, that fact and details of the individual funds constituting the umbrella fund;
- (e) the date on which the fund was established and, if the duration of the fund is not unlimited, when it will or may terminate;
- (f) particulars of the capital structure of the fund;
- (g) sufficient information to enable an investor to ascertain—
  - (i) the objective of the fund; and
  - (ii) the manager's investment policy for achieving that objective;
- (h) if the manager's investment policy does not envisage remaining fully invested at all times, a statement of the manager's policy in that respect;
- (i) the general nature of the portfolio and any intended specialisation (for example, in an economic sector, geographical area or type of investment or other asset);
- (j) a clear and easily understandable explanation of any risks associated with an investment in the fund of which a reasonably prudent investor would want to be aware, including any particular risk factors inherent in the fund's objectives, portfolio or intended portfolio;
- (k) the risks of default or breach associated with the legal structure of the fund, i.e. as a company or as a unit trust;
- (l) a description of the type of asset which may be included in the fund property and any limitations on the extent to which the fund may invest in such asset;

- (m) where the fund's ability to invest in a particular type of asset or to a particular extent is provided by the instrument constituting the fund, that fact;
- (n) a statement of what borrowing powers are exercisable in relation to the fund;
- (o) in the case of a fund which may invest in other public funds, the extent to which the fund property may be invested in the fund interests of public funds which are managed by the manager or by an associate of the manager;
- (p) a statement of any material conflicts of interest, including conflicts of interest between functionaries and the fund, between the functionaries, between the governing body and the fund and between the functionaries, governing body, fund and investors;
- (q) a statement as to the potential risks associated with any conflicts of interest identified in accordance with paragraph (p); and
- (r) how it is proposed that the conflicts of interest identified will be managed.

### **Valuation of Fund Property and Fund Interests**

11. The following shall be stated—

- (a) the person or persons who are responsible for undertaking valuations of the fund property, preparing NAVs and valuing the fund interests, and where the valuations will be undertaken;
- (b) how frequently (in days), and what time or times of day, the fund property and the fund interests will be valued, and a description of any circumstances in which the fund property and the fund interests may be specially valued;
- (c) the basis on which the fund property will be valued, including the methodology and procedures for undertaking the valuation;
- (d) an indication of the circumstances in which a valuation can be suspended;
- (e) the person or persons who have oversight responsibility for the valuation of the fund property and the preparation of NAVs;
- (f) a description of any material conflicts of interest associated with the parties concerned with the valuation process, including whether the fund manager has any role in the valuation of the fund property;
- (g) that full details of the fund's valuation policies are contained in a written valuation policy, indicating how a copy may be obtained; and
- (h) other information concerning the valuation process that is available to investors on request, and how this may be obtained.

### **Fees**

12. The prospectus shall state—

- (a) if the price at which fund interests may be purchased from the fund may include an initial fee charged by the manager, the maximum amount of that fee, expressed either as a fixed amount in the base currency or as a percentage of the net asset value of those fund interests;

- (b) if the manager may charge an annual fee out of the fund property—
  - (i) the maximum amount of that fee, expressed as an annual percentage of the net asset value of the fund; and
  - (ii) if the fund and the manager have agreed that all or part of that fee is to be treated as a capital charge—
    - (A) that fact; and
    - (B) the actual or maximum amount of the fee which may be so treated;
- (c) if the manager may charge a performance or incentive fee out of the fund property—
  - (i) that fact;
  - (ii) the basis of calculation of that fee; and
  - (iii) when and how that fee is to be charged;
- (d) if the manager may charge a fee by way of deduction from the proceeds of redemption—
  - (i) the amount of that fee or, if it is variable, the rate or method of calculating the fee; and
  - (ii) if the amount or rate or method has been changed, that details of any previous amount or rate or method may be obtained from the manager on request;
- (e) where the fund is a unit trust, if the trustee is to be remunerated out of the fund property, that fact that remuneration will be paid out of the fund property and the basis for the remuneration;
- (f) where the fund is a BVI business company, the remuneration and expenses of the directors; and
- (g) the nature of any other payments which may lawfully be made out of the fund property and how their amounts will be determined, including, inter alia, custodian fees, administration fees, registrar and transfer agency fees and fees payable to any investment advisor.

### **Distribution of Income**

13. State the annual distribution date and, if any, the interim distribution dates.

### **The Issue and Redemption of Fund Interests**

14. State—

- (a) the dealing days and times in the dealing day on which the fund will be available to receive requests for the issue and redemption of fund interests;
- (b) the procedures for effecting the issue and redemption of fund interests and the settlement of transactions;
- (c) the steps required to be taken by an investor redeeming fund interests before he or she can receive the proceeds of redemption;



- (d) the amounts of the following minima (if relevant) for each class of fund interest in the fund—
  - (i) the minimum number of fund interests which any one person may hold;
  - (ii) the minimum value of fund interests which any one person may hold;
  - (iii) the minimum number or value of fund interests which may be the subject of any one transaction of purchase; and
  - (iv) the minimum number of fund interests which may be the subject of any one act of redemption;
- (e) the circumstances in which the redemption of fund interests may be suspended;
- (f) where and when the most recent issue and redemption prices will be published; and
- (g) the investment exchanges, if any, on which fund interests are listed or dealt.

### **General Information**

#### **15. State—**

- (a) the date when the prospectus was issued and the date of each amendment;
- (b) when annual and half-yearly reports will be published and the address at which these will be available;
- (c) the address at which copies of the constituting documents of the fund, any amending instrument and of the most recent annual and half-yearly reports may be inspected and from which copies of them may be obtained;
- (d) the address at which copies of the prospectus and all material contracts may be obtained; and
- (e) that, if a fund publishes a prospectus or any amendment thereto that contains misrepresentation relating to any of the disclosures required under section 48(1)(b) of the Act, a person who purchased any fund interests pursuant to such prospectus or amendment thereto is deemed to have relied upon the misrepresentation and shall have the rights provided in section 52 of the Act, namely, to exercise a right of action for—
  - (i) the rescission of the purchase; or
  - (ii) damages,

jointly and severally against the fund and every member of the board of directors or, in the case of a partnership, unit trust or other similar body, every member of the equivalent governing body who, while aware of the misrepresentation, or would have been aware of the misrepresentation had he or she made reasonable investigation consistent with his or her duties, authorised the signing of or approved the prospectus or amendment thereto and consented to its publication and filing or caused it to be signed or published and filed.

### **Additional Information**

#### **16. State any other material information which—**

- (a) investors and their professional advisers would reasonably require, and reasonably expect to find in the fund prospectus, for the purpose of making an informed judgment about the merits of investing in the fund and the extent of the risks accepted by so investing; and
- (b) is within the knowledge of the fund or which the fund would have obtained by the making of reasonable enquiries.

### **Umbrella Funds**

17. (1) State, in the case of an umbrella fund—
- (a) that in no circumstances will a holder who exchanges rights or fund interests in one part of the fund for rights or fund interests in another part of the fund be given a right by law to withdraw from or cancel the transaction; and
  - (b) what arrangements there are for charges in the case of an exchange of fund interests in one sub-fund for fund interests in another, including the maximum amount of the charge and the minimum number of exchanges that will be permitted free of charge.
- (2) In the application of this Schedule to an umbrella fund, information required shall be stated—
- (a) in relation to each class or sub-fund of the fund where the information for any class or sub-fund of the fund differs from that for any other class or sub-fund; and
  - (b) for the fund as a whole, but only where the information is meaningful in relation to the fund as a whole.

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## **SCHEDULE 2**

### *(Section 25)*

#### **EVENTS AND CHANGES TO BE NOTIFIED TO THE COMMISSION**

<i>Event</i>	<i>Time Limit for Notification</i>
1. Application being made to the Court for the appointment of a liquidator or administrator of the public fund under the Insolvency Act	Immediate
2. A meeting being called to consider the appointment of a liquidator under section 159(2) of the Insolvency Act	Immediate
3. A proposal being made for a creditors' arrangement under the Insolvency Act	Immediate

4.	The making of, or any proposals for the making of, a composition or arrangement with one or more creditors of the public fund other than a creditors' arrangement as referred to in event 3.	Immediate
5.	The striking of the public fund off the register of companies maintained by the Registrar of Corporate Affairs under the BVI Business Companies Act	Immediate
	<b><i>Event</i></b>	<b><i>Time Limit for Notification</i></b>
7.	Anything equivalent to events 1 to 6 occurring in a jurisdiction outside the Virgin Islands	Immediate
8.	The bringing of civil proceedings against the public fund where the size of the claim is significant with respect to the fund property or is likely to affect the public fund's reputation	Immediate
9.	The commencement of an investigation with respect to the business or affairs of the public fund by any overseas regulatory authority	Immediate
10.	The taking of any enforcement action against the public fund by a foreign regulatory authority	Immediate
11.	The prosecution or conviction of the public fund, or any of its directors, in or outside the Virgin Islands for any offence—  (a) relating to financial services; or  (b) involving fraud or dishonesty	Immediate
12.	The public fund becomes aware of any fraud committed against it.	Immediate
13.	Any matter that the public fund considers to be material to the fit and properness of any of its directors or functionaries	Immediate
14.	Any significant failure in the public fund's procedures	Immediate
15.	Any material change to investors' rights	Within a reasonable time period prior to the proposed change

16. Any proposed significant restructuring or reorganisation of the public fund or its regulated business or activities

Within a reasonable time prior to the proposed restructuring or reorganisation taking effect.