

**SECURITIES AND INVESTMENT BUSINESS
(INCUBATOR AND APPROVED FUNDS) REGULATIONS**

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**SECURITIES AND INVESTMENT BUSINESS
(INCUBATOR AND APPROVED FUNDS) REGULATIONS –
SECTIONS 40C(1) AND 62A
(S.I.s 35/2015 and 83/2019)**

Commencement

[1 June 2015]

Citation

1. These Regulations may be cited as the Securities and Investment Business (Incubator and Approved Funds) Regulations.

Interpretation

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

“Act” means the Securities and Investment Business Act;

“applicant” means a person who has applied to the Commission to be approved as an incubator fund or approved fund;

“approved fund” means a fund that is deemed as such under regulation 5(1)(b) and satisfies the requirements of regulation 11(1) and (2);

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

“fund property”, in relation to an incubator fund or approved fund, means the assets of the fund; *(Inserted by S.I. 83/2019)*

“incubator fund” means a fund that is deemed as such under regulation 5(1)(a) and satisfies the requirements of regulation 10(1) and (2);

“offering document” means a document that contains an invitation or offer to investors or potential investors to purchase or subscribe for fund interests in an incubator fund or approved fund, and includes an amended offering document and a term sheet as may be prescribed;

“prescribed” means prescribed by the Commission;

“private fund” has the meaning assigned under section 40(1) of the Act;

“professional fund” has the meaning assigned under section 40(1) of the Act; and

“sophisticated private investor” means a person who is invited to invest in an incubator fund and the amount of his or her initial investment is not less than \$20,000.

(2) Nothing contained in these Regulations shall be construed as preventing a mutual fund from applying to be recognised as a private fund or professional fund under the Act, but a mutual fund shall not be recognised as a private fund or professional fund while it is approved as an incubator fund or approved fund under these Regulations.

Application as an incubator fund or approved fund

3. (1) A person who wishes to be considered for approval as an incubator fund or approved fund may submit an application to the Commission in the prescribed form.

- (2) For purposes of subregulation (1), an applicant shall, in submitting an application, provide the following information—
- (a) the constitutional documents specifying whether the applicant intends to be an incubator fund or approved fund;
 - (b) a written description of the investment strategy of the proposed incubator fund or approved fund;
 - (c) a written warning which the incubator fund or approved fund will issue to investors or potential investors as provided in regulation 4; and
 - (d) such other information as may be required in the prescribed form.
- (3) For the purposes of this regulation, an application is not complete if—
- (a) it does not satisfy all the requirements of this regulation; and
 - (b) the application is not accompanied by the fee required pursuant to regulation 7.

Investment warning

4. (1) No offer or invitation shall be made to an investor or potential investor to purchase or subscribe for fund interests in an incubator fund or approved fund, unless the investor or potential investor is provided with a written warning in accordance with this regulation.

- (2) Where an incubator fund or approved fund—
- (a) issues an offering document, the written warning shall be included in a prominent place in the offering document; or
 - (b) does not issue an offering document, the written warning shall be provided to each investor or potential investor as a separate document.
- (3) The written warning required to be provided to an investor or potential investor shall clearly indicate that the incubator fund or approved fund, as the case may be, has been established as such and that—
- (a) in the case of an incubator fund—
 - (i) the fund is suitable for sophisticated private investors only;
 - (ii) the total number of investors in the fund is limited to a maximum of 20; and
 - (iii) the fund can only have investments not exceeding \$20,000,000 in net assets or its equivalence in any other currency;
 - (b) in the case of an approved fund—
 - (i) the total number of investors in the fund is limited to a maximum of 20; and
 - (ii) the fund can only have investments not exceeding \$100,000,000 in net assets or its equivalence in any other currency;

- (c) the incubator fund or approved fund, as the case may be, is not subject to supervision by the Commission and that requirements considered necessary for the protection of investors that apply to public funds do not apply to an incubator fund or approved fund;
- (d) an investor in an incubator fund or approved 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 an incubator fund or approved fund may present a greater risk to an investor than investment in a public fund; and
- (f) in the case of an incubator fund, the fund is limited to an approved period of 2 years only (with a possible extension for an additional 12 months upon application to the Commission pursuant to regulation 13 (3)) and may thereafter, unless it decides to terminate its business as such fund, apply to the Commission to be recognised as a private fund or professional fund or to be approved as an approved fund.

Valuation of fund property

4A. (1) An incubator fund and approved 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) An approved fund and incubator fund shall ensure that fund property is valued in accordance with the valuation policy.

(3) The valuation policy and procedures of an incubator fund and approved 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 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), an incubator fund and approved fund shall ensure that the persons controlling the fund's investment function, are independent from the persons controlling the fund's the valuation process.

(5) Where an incubator fund or approved fund determines that the person responsible for the fund's investment function must have an involvement in the valuation of fund property, the incubator fund or approved 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 person responsible for the fund's investment function has an involvement in the valuation of fund property; and
- (ii) details of how any potential conflicts of interest will be managed.

(Inserted by S.I. 83/2019)

Deemed approval of an incubator fund and approved fund

5. (1) Subject to this regulation and regulation 7, an applicant that submits a complete application as required under regulation 3—

- (a) shall, in the case of an application for an incubator fund, be deemed to be an incubator fund;
- (b) shall, in the case of an application for an approved fund, be deemed to be an approved fund; and
- (c) may, subject to compliance with any advice given by the Commission under subregulation (2), commence business after a period of 2 business days from the date of receipt of the application by the Commission.

(2) Where the Commission receives an application under regulation 3 which it considers not to be complete, it shall, within a period of 2 business days after the receipt of the application, advise the applicant of that fact and outline the requirements that need to be satisfied to make the application complete.

(3) Subject to regulation 6, where the Commission does not receive a complete application within 7 days or, if an extension has been granted pursuant to regulation 6, within the period of extension, after advising the applicant under subregulation (2), the application shall be considered abandoned and no further action may be taken in respect thereof.

(4) For the purpose of subregulation (1)(c), an application is received by the Commission if it is properly addressed to the Commission and if—

- (a) sent by post, it is received in the ordinary course of post;
- (b) delivered directly to the Commission, when it is physically received by an officer of the Commission, whether or not receipt of the application has been signed or stamped; and
- (c) sent by electronic means, when the application is shown to have been sent electronically to the correct address.

(5) Where a fund is deemed to be an incubator fund or approved fund under subregulation (1), the Commission shall issue a certificate evidencing the status of the fund upon payment of the fee prescribed in accordance with section 62 of the Financial Services Commission Act, 2001.

(6) For the purposes of subregulations (1)(c) and (2), “business days” means any day other than a Saturday, Sunday or public holiday in the Virgin Islands.

Power to extend period of completion of application

6. The Commission may, on the written request of an applicant, extend the period specified in regulation 5(3) for an additional period not exceeding 7 days.

Fees

7. (1) Every application for the approval of an incubator fund or approved fund shall be accompanied by such fees as may be prescribed in accordance with section 62 of the Financial Services Commission Act.

(2) The continued approval of an incubator fund or approved fund may, subject to compliance with regulations 8 to 11 and 13, be renewed upon payment of the fee prescribed in accordance with section 62 of the Financial Services Commission Act.

(3) Where an incubator fund or approved fund fails to pay its renewal fee referred to in subregulation (2) after the renewal has become due and payable, the incubator fund or approved fund, as the case may be, shall be liable to the penalty of \$50 for each day that the renewal fee remains unpaid, up to maximum of \$2,000. (*Amended by S.I. 83/2019, with effect from 1 April, 2020*)

Obligation to report change of information or circumstance

8. (1) Where, in relation to an incubator fund or approved fund, any information provided under regulation 3 changes, the fund shall, within 14 days of the change occurring, notify the Commission in writing of that fact.

(2) A notification under subregulation (1) shall provide details of the change and shall be accompanied by a written declaration in the prescribed form as to whether or not the change complies with the requirements of these Regulations.

(3) In addition to notifying the Commission of any change under subregulation (1), an incubator fund or approved fund, as the case may be, shall notify the Commission of any matter in relation to the affairs (including the conduct of business) of the incubator fund or approved fund which has or is likely to have a material impact with respect to the incubator fund or approved fund.

Obligations of incubator fund and approved fund

9. (1) An incubator fund and approved fund shall at all times—

- (a) have an authorised representative in the Virgin Islands; (*Amended by S.I. 83/2019*)
- (b) have no less than 2 directors, at least one of whom shall be an individual; and (*Amended by S.I. 83/2019*)
- (c) have arrangements in place for the safekeeping of fund property, which include provisions for the appropriate segregation of fund property. (*Inserted by S.I. 83/2019*)

(2) In addition to the requirements of subregulation (1), an approved fund shall at all times have an administrator.

(3) Where the number of directors of an incubator fund or approved fund falls below 2, the incubator fund or approved fund, as the case may be, shall—

- (a) immediately notify the Commission of that fact in writing; and
- (b) take necessary steps to bring the number of directors to the requirement of subregulation (1)(c) within a period of 21 days from the date when that requirement was not complied with.

(4) Where the authorised representative of an incubator fund or approved fund ceases to represent the incubator fund or approved fund, as the case may be, the incubator fund or approved fund shall immediately notify the Commission in writing of that fact and take necessary steps to replace the authorised representative within a period of 21 days from the date the authorised representative ceased to represent the incubator fund or approved fund.

(5) Where there is a change in the administrator of an approved fund, the approved fund shall immediately notify the Commission in writing of that change.

Restrictions in relation to investments: incubator fund

10. (1) Investment in an incubator fund is restricted to sophisticated private investors only and the fund shall not have investments that exceed \$20,000,000 in net assets or its equivalence in any other currency.

(2) The total number of investors in an incubator fund at any one time shall not exceed 20.

(3) Where the amount of the investments or the total number of investors exceeds the threshold prescribed in subregulation (1) or (2) respectively over a period of two consecutive months, the incubator fund shall, within 7 days of the end of the second month—

- (a) notify the Commission in writing of that fact outlining the reasons therefor; and
- (b) submit an application to the Commission for the conversion and recognition of the fund as—
 - (i) a private fund or professional fund in accordance with the provisions of the Act and the Mutual Funds Regulations; or
 - (ii) an approved fund in accordance with the provisions of these Regulations,unless if, at the time of notification, the incubator fund no longer exceeds the amount of the investments or the total number of investors; or
- (c) commence the process of voluntary liquidation of the fund under the BVI Business Companies Act or take necessary steps to amend its constitutional documents so as to cease to be a mutual fund as defined in section 40(1) of the Act and to remove any reference to it being an incubator fund.

(4) Where an incubator fund amends its constitutional documents under subregulation (3)(c), it shall cease to function as an incubator fund on the date of the filing of the amended constitutional documents or, if there is an effective date in relation to the filing, on the date the filing becomes effective.

Restrictions in relation to investments: approved fund

11. (1) An approved fund shall not have investments that exceed \$100,000,000 in net assets or its equivalence in any other currency.

(2) The total number of investors in an approved fund at any one time shall not exceed 20.

(3) Where the amount of the investments or the total number of investors exceeds what is prescribed in subregulation (1) or (2) respectively over a period of two consecutive months, the approved fund shall, within 7 days of the end of the second month—

- (a) notify the Commission in writing of that fact outlining the reasons therefor; and
- (b) submit an application to the Commission for the conversion and recognition of the fund as a private fund or professional fund in accordance with the provisions of the Act and the Mutual Funds Regulations, unless if, at the time of notification, the approved fund no longer exceeds the amount of the investments or the total number of investors; or
- (c) commence the process of voluntary liquidation of the fund under the BVI Business Companies Act or take necessary steps to amend its constitutional documents so as to cease to be a mutual fund as defined in section 40(1) of the Act and to remove any reference to it being an approved fund.

(4) Where an approved fund amends its constitutional documents under subregulation (3)(c), it shall cease to function as an approved fund on the date of the filing of the amended constitutional documents or, if there is an effective date in relation to the filing, on the date the filing becomes effective.

Forced conversion or liquidation

12. (1) Where an incubator fund or approved fund exceeds the amount of investments or the total number of investors contrary to regulation 10 or 11, the Commission may direct—

- (a) in the case of the incubator fund, that the fund convert into a private fund or professional fund or into an approved fund;
- (b) in the case of the approved fund, that the fund convert into a private fund or professional fund; or
- (c) the incubator fund or approved fund, as the case may be, to—
 - (i) commence the process of voluntary liquidation of the fund in accordance with the provisions of the BVI Business Companies Act; or
 - (ii) take necessary steps to amend its constitutional documents so as to cease to be a mutual fund as defined in section 40(1) of the Act and to remove any reference to it being an incubator fund or approved fund.

(2) Where the Commission considers it to be in the public interest, it may, in relation to an incubator fund or approved fund, issue any of the directions referred to in subregulation (1).

(3) Where an incubator fund or approved fund amends its constitutional documents under subregulation (1)(c), it shall immediately cease to function as an

incubator fund or approved fund, as the case may be, on the date of the filing of the amended constitutional documents or, if there is an effective date in relation to the filing, on the date the filing becomes effective.

Validity period of an incubator fund and approved fund

13. (1) Subject to regulations 7, 10(3)(b) and (c) and 12, the period of validity of an incubator fund is 2 years.

(2) Subject to regulations 7, 11(3)(b) and (c) and 12, the validity period for an approved fund is unlimited.

(3) An incubator fund may, at least 1 month prior to the end of its period of validity, (or such shorter period as the Commission may approve) submit a written application to the Commission requesting an extension for an additional period not exceeding 12 months.

(4) Where the Commission receives an application under subregulation (3), it may grant the request for extension if it is satisfied that—

- (a) the incubator fund's investments or total number of investors do not exceed the specified threshold and the fund has complied with all of its obligations under these Regulations; and
- (b) it is not against the public interest to grant the extension.

Conversion of incubator fund

14. (1) Subject to regulation 15, an incubator fund may at least 2 months before the expiry of its period of validity referred to in regulation 13(1) (or such shorter period as the Commission may approve) submit an application to the Commission to convert into and be recognised as a private fund or professional fund or be approved as an approved fund.

(2) An application under subregulation (1) shall—

- (a) in relation to recognition as a private fund or professional fund, be made in accordance with the provisions of the Act and the Mutual Funds Regulations; and
- (b) in relation to approval as an approved fund, be made in accordance with the provisions of these Regulations.

(3) Where an incubator fund converts to an approved fund, the sophisticated private investors in the incubator fund shall, upon conversion of the fund into an approved fund, be treated like any other investor in the approved fund.

(4) Where an incubator fund intends to cease carrying on business as a mutual fund, it shall give reasonable notice to its investors advising them of its plan to cease carrying on business as a mutual fund and give them an opportunity to redeem their investments.

(5) Subregulation (4) shall not apply in the case of a liquidation of the incubator fund.

Conditions for conversion of an incubator fund

15. (1) Where an incubator fund intends to convert into a private fund or professional fund under these Regulations, it shall, at least 2 months prior to the expiry of its period of validity as referred to in regulation 13(1) (or such shorter period as the Commission may approve), prepare and submit to the Commission an audit of its—

- (a) current financial position; and
- (b) compliance with the requirements of these Regulations.

(2) The audit referred to in subregulation (1) shall be performed by either—

- (a) a person approved by the Commission under the Act or pursuant to section 56 of the Regulatory Code as an auditor; or
- (b) a person who, though not an approved auditor as referred to in paragraph (a), is independent of the incubator fund and whose normal duties include the performance of such an independent audit function.

(3) Where an audit is performed by a person referred to in subregulation (2)(b), the incubator fund shall, in submitting the audit to the Commission, provide a detailed report of the person's academic qualifications and experience outlining how the person's normal duties include the performance of an independent audit function.

(4) Where the Commission, in reviewing the audit of an incubator fund, considers a person referred to in subregulation (2)(b) not to be sufficiently independent of the incubator fund or not to have the necessary qualifications to perform the audit function, it may require the incubator fund to appoint an approved auditor to perform the required audit function.

(5) For the avoidance of doubt, the reference to “audit” in subregulation (1) in relation to an incubator fund's—

- (a) financial position, relates to an independent determination of the status of the fund's finances as at the date the audit is carried out and shall not be construed to require the fund to provide audited financial statements; and
- (b) compliance with the requirements of these Regulations, relates to an independent determination of the level of compliance by the fund of its obligations under these Regulations as at the date of the audit.

Exemption where incubator fund converts

16. Where an incubator fund converts into a professional fund under the Act pursuant to regulation 14, the restrictions provided in regulation 5(1) and (2) of the Mutual Funds Regulations shall not apply in respect of a sophisticated private investor whose investment in the incubator fund on the date of conversion is less than the amounts stipulated in regulation 5(1) and (2) of those Regulations.

Requirement re submission of financial statements

17. (1) Subject to subregulation (2), an incubator fund and approved fund are required to prepare and submit financial statements in accordance with the Act and shall, for that purpose, be treated as if each were a relevant licensee under Part IV of the Act.

(2) Sections 71, 75, 76, 77, 78, and 79(2) of the Act are disappplied with respect to an incubator fund and approved fund, and the Regulatory Code and paragraph 2 (1) (e) of Schedule 5 of the Financial Services (Miscellaneous Exemptions) Regulations are modified accordingly.

(3) The reference to “financial statements” in subregulation (1) means a statement of the financial position of the incubator fund or approved fund, as the case may be.

Filing returns

18. (1) An incubator fund shall—

- (a) no later than the 31st day of July and 31st day of January of each year, prepare and submit to the Commission a semi-annual report for the periods ending 30th June and 31st December respectively, detailing—
 - (i) the number of investors in the fund;
 - (ii) the total investments in the fund;
 - (iii) the aggregate subscriptions to the fund;
 - (iv) the aggregate redemptions paid to investors;
 - (v) the net asset value of the fund; and
 - (vi) any significant investor complaint received by the fund and how the complaint was dealt with; and
- (b) no later than the 31st day of January of each year, file with the Commission a return in the prescribed form—
 - (i) stating that it is not in breach of the requirements of these Regulations that entitle it to continue as an incubator fund or approved fund; and
 - (ii) providing such other information as may be required in the prescribed form.

(2) An approved fund shall, no later than the 31st day of January of each year, file a return with the Commission in the prescribed form—

- (a) stating that it is not in breach of the requirements of these Regulations that entitle it to continue as an approved fund;
- (b) outlining any significant investor complaint received by the fund and how the complaint was dealt with;
- (c) providing such other information as may be required in the prescribed form; and
- (d) providing, as at the 31st day of December of the preceding year, details of—
 - (i) the number of investors in the fund;
 - (ii) the total investments in the fund;
 - (iii) the aggregate subscriptions to the fund;

- (iv) the aggregate redemptions paid to investors; and
- (v) the net asset value of the fund.

(3) Where the Commission is required or considers it necessary to comply with any reporting obligation, whether under an enactment or otherwise, it may require an incubator fund or approved fund to provide the Commission with such further information as the Commission may consider fit.

(4) Any information required by the Commission under subregulation (3) shall be in such form and provided within such period as the Commission may determine.

(5) For the purposes of subregulations (1)(a)(vi) and (2)(b), what constitutes a significant investor complaint shall be construed in accordance with section 69B of the Regulatory Code.

Register of incubator funds and approved funds

19. (1) The Commission shall keep and maintain a register of incubator funds and approved funds under these Regulations.

- (2) The register kept and maintained under subregulation (1)—
 - (a) may be in such form and published in such manner and for such period as the Commission considers fit; and
 - (b) shall be open to the public for inspection, and any person may request and obtain an extract from the register.

Transitional provisions

20. The transitional provisions specified in the Schedule shall have effect.
(Inserted by S.I. 83/2019)

SCHEDULE

(Regulation 20)

Interpretation

1. In this Schedule “existing incubator fund or approved fund” means a mutual fund that, immediately prior to the coming into force of these Regulations (“Securities and Investment Business (Incubator and Approved Funds) (Amendment) Regulations, 2019), was an incubator fund or approved fund.

Effective Date

2. Subject to paragraph 3, the provisions of the Mutual Funds (Amendment) Regulations, 2019 shall take effect in relation to an existing incubator fund or approved fund on 1st July 2020.

Penalty Fees

3. The maximum penalty amount prescribed in regulation 4 of these Regulations shall in relation to an existing incubator fund or approved fund, apply with effect from 1st April 2020.

(Inserted by S.I. 83/2019)