



COLLECTIVE INVESTMENT SCHEMES (QUALIFYING FUND) REGULATIONS 2010

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Statutory Document No. 2010/0163



Collective Investment Schemes Act 2008

COLLECTIVE INVESTMENT SCHEMES (QUALIFYING FUND) REGULATIONS 2010¹

Approved by Tynwald: 20 April 2010
Coming into Operation: 1 May 2010

The Financial Supervision Commission makes the following Regulations under section 24(13) of the Collective Investment Schemes Act 2008¹, makes these Regulations under section 24(1) of and Schedule 2 paragraph 4 to that Act.

1 Title

These Regulations are the Collective Investment Schemes (Qualifying Fund) Regulations 2010.

2 Commencement

These Regulations come into operation on 1 May 2010.

3 Interpretation

(1) In these Regulations —

“**the Act**” is the Collective Investment Schemes Act 2008;

“**acceptable financial adviser**” means a person (wherever located) who advises investors on the suitability of investing in the fund and who has terms of business under regulation 15 with a regulated promoter appointed under regulation 14;

“**acceptable jurisdiction**” means a jurisdiction accepted by the Authority as applying appropriate standards of regulation to regulated promoters of qualifying funds;²

“**annual financial statements**” are financial statements prepared in accordance with regulation 18;

“**appropriate auditor**” is a person that is qualified for appointment as auditor of a company under sections 14 to 14H of the Companies Act 1982², and —

¹ 2008 c.7

² 1982 c.2

- (a) has a permanent place of business on the Island;
- (b) is covered by Professional Indemnity insurance of at least £20 million;
- (c) is independent of the scheme, having regard to auditing standards and the code of ethics of the body of accountants of which he is a member;

“**authorised person**” has the meaning given in the Act;

“**the Authority**” means the Isle of Man Financial Services Authority;³

“**the Commission**” [Revoked]⁴

“**functionary**” includes the governing body, a member of the governing body and a person appointed under a contract to provide services to the fund, including (without limitation) a manager, administrator, custodian, asset manager, investment adviser, promoter or sponsor;

“**generally accepted accounting principles or practice**” has the same meaning as in section 3A of the Companies Act 1982;

“**launch date**” is the date of publication of the fund’s initial offering document and, unless the contrary is proved, will be the date of that offering document

“**qualifying investor**” has the meaning given in Schedule 1;

“**qualifying fund**” means a collective investment scheme constituted in accordance with these regulations and “fund” will be construed accordingly;

“**regulated financial adviser**” means a person who advises investors or potential investors on the suitability of investing in the fund and who meets the requirements of regulation 13;

“**regulated promoter**” means a promoter appointed under regulation 14; and

“**sponsor**” means the person or persons responsible for arranging the establishment of the fund.

- (2) A reference to “US\$” is to United States Dollars and its equivalent in any other currency and a figure expressed in United States Dollars includes its equivalent value in that currency.

4 Duties of the governing body

- (1) The governing body of a fund is responsible for ensuring that —
 - (a) These Regulations are complied with;
 - (b) the fund’s offering document and relevant constitutional documents comply with the Act and these Regulations;

- (c) the fund is and continues to be managed and operated in accordance with the fund's constitutional documents and offering document;
 - (d) the fund's offering document accurately sets out all material information which, at the date of the offering document is known by the governing body (or which any member of the governing body would have obtained by making reasonable enquiries at that time) and which is relevant to an investor or potential investor making an informed judgement about whether to invest in the fund;
 - (e) no offering document is issued to investors or potential investors unless, at the date it is issued to such persons, it is up to date in accordance with sub-paragraph (d);
 - (f) the manager of the fund is notified of all material changes to the fund and provided with a copy of all amended offering and constitutional documents without delay;
 - (g) investors in the fund are informed in a timely manner of material changes to the fund and the anticipated impact of such changes;
 - (h) within 6 months of the first anniversary of the launch of the fund, within 6 months of the fund's financial year-end thereafter and immediately prior to the scheme ceasing to be a scheme, an annual compliance declaration in the format and containing the information specified by the Authority is signed by the governing body and submitted to the Authority; and⁵
 - (i) the responsibilities imposed upon the manager under regulation 8 are discharged; and
 - (j) a minimum subscription amount appropriate to the fund is determined jointly with the manager.
- (2) The governing body must sign a statement of responsibility in the format and containing the information specified by the Authority in relation to the initial, and any amended, offering documents. The governing body must submit the statement of responsibility to the Authority within 10 working days of the fund's launch date (in relation to the initial offering document) or of the issue of an amended offering document.⁶

5 Composition of the governing body

- (1) With the exception of funds constituted as unit trusts, a fund's governing body must include —
 - (a) at least one natural person who holds that office in a non-executive capacity and is independent of the —
 - (i) the scheme's promoter; and

- (ii) any body corporate that is a subsidiary of the scheme's promoter; or
 - (iii) a subsidiary of any holding company of the scheme's promoter; and
- (b) at least one natural person who is resident on the Isle of Man.
- (2) The same individual can act under paragraphs (1)(a) and (b).
- (3) The governing body of a fund constituted as a unit trust must be a different person from the manager and be —
- (a) an authorised person;
 - (b) licensed to act as trustee of this type of scheme in an acceptable jurisdiction;
 - (c) a corporate trustee acting with an Isle of Man resident individual co-trustee; or
 - (d) a corporate trustee whose board includes a non executive who is an Isle of Man resident individual.

6 Ceasing to be a member of the governing body

- (1) Where a member of the governing body is removed, resigns or is not reappointed at the end of their term of office, that member must notify the Authority without delay, stating the reasons for the change in the governing body's membership.⁷
- (2) The notice in paragraph (1) can initially be made by any reasonable means however verbal notification must be followed up by letter or email within 5 working days.

7 The manager

The fund must have a manager who is an authorised person.

8 Responsibilities of a manager

- (1) The manager must notify the Authority —
- (a) without delay —
 - (i) if it determines that the fund has not been managed and operated in accordance with the provisions of the fund's constitutional and offering documents;
 - (ii) when it becomes aware that any of the requirements in regulations 9 to 17 have not been complied with;
 - (iii) when it becomes aware that a member of the governing body has been removed, resigned or not reappointed at the end of their term of office; and

- (iv) when it becomes aware that the fund's auditor has been removed, resigned or not been reappointed at the end of its term of office, of that fact;
 - (b) as soon as reasonably practicable after receiving an audit report that —
 - (i) has been qualified by the auditor; or
 - (ii) contains an emphasis of matter.
- Notifications in accordance with sub-paragraphs (i) and (ii) must be accompanied by a copy of the audit report, together with details of any remedial action that the governing body, manager or any other Parry intends to take;
- (c) within 10 working days, where the fund's audited annual financial statements have not been distributed in accordance with regulation 20 of that fact, and every three months thereafter until they have been issued and distributed. Each notification must —
 - (i) give details of the issues giving rise to the delay;
 - (ii) contain a revised timetable for distribution of the audited annual financial statements;
 - (iii) be signed by, or on behalf of the manager; and
 - (iv) be accompanied by a copy of any shareholder communication on the delay, and if no shareholder communication has been issued, the reasons why a communication has not been issued.⁸
- (2) The manager must —
- (a) satisfy itself that the fund's investors have certified they are qualifying investors and, in the case of investors qualifying under Schedule 1 paragraph (h) that:
 - (i) the qualifying investor's status has been certified by a regulated or acceptable financial adviser, as appropriate; and
 - (ii) in relation to applications received in relation to regulated financial adviser distribution satisfy itself that the person who has signed the declaration in Part 3 of Schedule 6 is a regulated financial adviser;
 - (b) jointly with the governing body, determine the minimum subscription amount appropriate to the fund;
 - (c) within 10 working days of —
 - (i) the fund's launch date; or
 - (ii) becoming aware of a material alteration to the fund's constitutional or offering documents that would render any

- of the information in the last notification inaccurate, incomplete or misleading,
- certify and submit a qualifying fund notification and alteration form in the format and containing the information specified by the Authority to the Authority.⁹
- (d) complete and sign the relevant part of the qualifying fund annual compliance declaration in the format and containing the information specified by the Authority. The full compliance declaration must be submitted to the Authority by the manager and governing body within 6 months of the first anniversary of the launch of the scheme, within 6 months of the scheme's financial year-end thereafter and immediately prior to the scheme ceasing to be a scheme;¹⁰
 - (e) supply the statistical information in the format and containing the information specified by the Authority to the Authority within 15 working days of each calendar quarter end; and¹¹
 - (f) where a regulated promoter has not been appointed, oversee the promotion and marketing of the fund by reviewing promotional and marketing materials and advertisements.

9 The custodian

- (1) The fund must appoint at least one custodian.
- (2) A custodian must be a different person from the manager who must be an authorised person or be licensed to provide custody services to this type of fund type in a jurisdiction outside the Island.
- (3) Before making an appointment, and on an ongoing basis, the governing body must ensure that each appointed custodian is appropriately experienced in providing services to the class of assets for which it will provide such services.
- (4) When assessing a custodian under paragraph (3), the governing body must —
 - (a) consider the suitability of the domicile and the regulatory framework for the provision of custody services in the jurisdiction in which the custodian is regulated; and
 - (b) obtain the manager's approval to the appointment.
- (5) The manager must notify the governing body without delay if it becomes aware of anything which it reasonably believes is relevant to assessing a custodian's ongoing suitability under paragraph (3).

10 Asset management

- (1) The fund must ensure that it receives relevant advisory or discretionary management services, whether directly or indirectly, in relation to the investment and re-investment of its assets.
- (2) Before making an appointment and on an ongoing basis, the governing body must ensure that any proposed or appointed asset manager or investment adviser is suitable to act in that capacity'
- (3) In making the assessment in paragraph (2), the governing body must —
 - (a) take account of the regulatory status of the asset manager or investment adviser and of any person providing investment services to the asset manager or investment adviser;
 - (b) consider any guidance issued by the Authority; and¹²
 - (c) obtain the manager's approval to the appointment'
- (4) The manager must notify the governing body without delay if it becomes aware of anything which it believes is relevant to an assessment of ongoing suitability under paragraph (2).

11 Investor certifications

The fund must only accept investments from investors who have certified their status in the form set out in Schedule 6

12 Distribution of a fund. to investors who require a financial adviser to certify that they are qualifying investors

- (1) A fund cannot accept an application to invest from a person who certifies that they are a qualifying investor under paragraph 1(h) of Schedule L unless that investor has been advised about the suitability of the investment by a financial adviser and that financial adviser has signed the declaration in Part 3 of Schedule 6.
- (2) In relation to investors who qualify under paragraph 1(h) —
 - (a) where the fund only permits regulated financial advisers to advise such investors about the fund regulation 13 shall apply. This distribution method is known as regulated financial adviser distribution; and
 - (b) in all other cases regulations 14 to 15 shall apply. This distribution method. is known as regulated promoter distribution.

13 Regulated financial adviser distribution

A fund must not treat a financial adviser as a regulated financial adviser unless —

- (a) they are regulated as a financial adviser; and

- (b) the scope of their regulatory permission is sufficiently broad to include advising on or selling this type of fund to this type of investor in the jurisdiction in which the advice is given; and
- (c) the regulatory regime under which they are regulated –
 - (i) includes a requirement they must be competent in relation to any product upon which they provide advice; and
 - (ii) requires them to provide advice to an investor or potential investor about the suitability of an investment based on that investor's requirements and attitude to risk.

14 Regulated promoter distribution - the promoter

- (1) A fund which allows regulated promoter distribution must appoint a regulated promoter who is an authorised person or who is regulated as a promoter in an acceptable jurisdiction.
- (2) Where a regulated promoter is appointed under paragraph (1), that promoter is responsible for overseeing the promotion and marketing of the fund by reviewing promotional and marketing materials and advertisements and considering whether they give a fair portrayal of the scheme and the risks attendant to it.

15 Regulated promoter distribution - acceptable financial advisers

- (1) A financial adviser must not be treated as acceptable until it has –
 - (a) been assessed as being acceptable by a regulated promoter; and
 - (b) entered into written terms of business with that regulated promoter.
- (2) When assessing whether a financial adviser is acceptable under paragraph (1), the regulated promoter must satisfy itself that the financial adviser –
 - (a) holds all necessary regulatory permissions and licences in each jurisdiction in or from which they will advise upon or sell the fund;
 - (b) can demonstrate appropriate competence in relation to advising upon or selling this type of fund. In making this assessment the regulated promoter must consider the financial adviser's relevant qualifications and experience and the content of their standard client terms of business; and
 - (c) can demonstrate the continuing adequacy and appropriateness of its procedures, controls and investor records and how these ensure that the fund will only be distributed to qualifying investors
- (3) Written terms of business referred to in paragraph (1) must require the financial adviser to –
 - (a) undertake customer due diligence on all applicants which they introduce to the fund. This assessment must include consideration

of whether the customer meets the criteria to be a qualifying investor and whether the fund is suitable for the customer;

- (b) maintain records of the assessment in sub paragraph (a) and provide those records to the regulated promoter without delay on request; and
 - (c) only sell the fund to investors that meet the definition of qualifying investor.
- (4) The regulated promoter is responsible for ensuring that a financial adviser with whom it has terms of business continues to be an acceptable financial adviser and must terminate terms of business as soon as it becomes aware that the financial adviser no longer meets the requirements.

16 Offering document

- (1) The fund must have an offering document that –
 - (a) accurately sets out all material information which, at the date of the offering document, is known to the governing body (or which the governing body would have obtained by making reasonable enquiries) and which is relevant to an investor or potential investor for the purpose of making an informed judgement about whether to invest in the fund; and
 - (b) contains the matters set out in Schedule 5.
- (2) A revision of the offering document may take the form of a new offering document or of a supplement to the existing offering document; whichever method is chosen the date on which the revision was made must be prominently displayed the document.

17 Application form

- (1) The fund's application form must contain the certifications set out in Schedule 6.
- (2) Before being accepted as an investor each applicant must complete the Part 1 certification and, if applicable, the relevant Part 2 certification' The Part 3 certification must be completed by a financial adviser where required.

18 Financial statements

- (1) The fund must ensure that financial statements are prepared annually in respect of each accounting period ending on its financial year-end date.
- (2) The fund's annual financial statements must be prepared in accordance with generally accepted accounting principles or practice.

19 Audit of financial statements

- (1) The fund must appoint an appropriate auditor.
- (2) The appropriate auditor must audit the fund's annual financial statements in accordance with internationally accepted auditing standards and practices and issue an audit report in relation to the audit

20 Distribution of financial statements

The fund's audited annual financial statements must be distributed to investors no later than 6 months after the fund's financial year-end or within the timescales set out in the offering document if earlier.

21 Removal of, resignation of or failure to reappoint an auditor

Where the scheme's auditor, is removed, resigns or is not reappointed at the end of its term of office, the auditor must supply a signed statement direct to the Authority –

- (a) stating whether there are any circumstances connected with it ceasing to hold office which should be brought to the Authority's attention; and¹³
- (b) providing full details of those circumstances which it considers should be brought to the Authority's attention.^{14 15}

22 Revocation

The Financial Supervision (Qualifying Fund) (Exemption) Order 2007³ is revoked.

23 Transitional arrangements

- (1) A fund which was a qualifying fund under the Financial Supervision (Qualifying Fund) (Exemption) Order 2007 at the date these Regulations come into effect will be a qualifying fund under these Regulations and an investor who was a qualifying investor under that Order continues to be a qualifying investor under these Regulations.
- (2) A fund which qualifies under paragraph (1) must update its offering and constitutional documents to bring them into full compliance with these Regulations on the next occasion when they are updated.

MADE 15 MARCH 2010

³ SD 808/07

SCHEDULE 1

Regulation 3(1)

MEANING OF QUALIFYING INVESTOR

A qualifying investor is a person or body who has certified that they are sufficiently experienced to understand the risks associated with an investment in that fund and who, at the time of the initial investment in that fund falls into one of the following categories —

- (a) a person, body corporate, partnership, trust or other unincorporated association whose ordinary business or professional activity includes acquiring, underwriting, managing, holding or disposing of investments, whether as principal or agent or giving advice about investments;
- (b) any director or partner of or consultant to a person referred to in paragraph (a);
- (c) a functionary, or an associate of a functionary, to a qualifying fund;
- (d) an employee, director or shareholder of, or consultant to a person in (c), who is acquiring the investment as part of his remuneration or an incentive arrangement or by way of co-investment;
- (e) a trustee of a family trust settled by or for the benefit of, one or more persons 'referred to in paragraphs (c) or (d);
- (f) a trustee or operator of any employment benefit or executive incentive scheme, or trust established for the benefit of persons referred to in paragraphs (c) or (d), or their dependants;
- (g) a government, local authority, public authority or supra-national body in the Isle of Man or elsewhere; or
- (h) a person whose expertise, experience and knowledge to adequately appraise the investment is certified in accordance with Schedule 6 Part 3.

SCHEDULE 2¹⁶

SCHEDULE 3¹⁷

SCHEDULE 4¹⁸

SCHEDULE 5¹⁹

Regulation 16

Specific matters to be contained in a qualifying fund's offering document —

1. The definition of qualifying investor in a prominent position as set out in Schedule 1.
2. A description of arrangements for —
 - (a) the management of the fund's assets; and
 - (b) custody of the fund's assets including the extent to which any underlying investments, including any assets held within special Purpose vehicles, are not held or controlled by * appointed custodian.
3. Statements that the fund —
 - (a) will only accept initial investment amounts from investors which are not less than a specified minimum, which is an amount jointly determined by the fund's governing body and manager;
 - (b) will only accept applications to invest in the fund or effect a transfer of an interest in the fund from qualifying investors who have signed the certification(s) required by regulation 17; and
 - (c) must issue audited annual financial statements to investors within six months from the end of each financial period of the fund, or within the timescales prescribed in the offering document (if earlier).
4. The following risk warning in a prominent position —

“[This fund] is a qualifying fund which is only suitable for “qualifying investors” as defined in the Collective Investment Schemes (Qualifying Fund) Regulations 2010 (“the Regulations”).

All qualifying funds are required to register with the Isle of Man Financial Services Authority (“the Authority”). Accordingly, the fund must be registered with the Authority in accordance with the Regulations. In granting registration, the Authority has not reviewed this document but has relied upon the statement of compliance provided by the fund's governing body filed in accordance with the Regulations. Details of registration will be available at www.fsc.gov.im.

The fund's manager and its governing body are subject to ongoing filing and reporting obligations in accordance with the Regulations.

Investors are not protected by statutory compensation arrangements and the Authority does not vouch for the financial soundness of the fund or for the accuracy of statements made or opinions expressed about it.

Requirements which may be deemed necessary to protect retail or non-qualifying investors do not apply to qualifying funds. By signing the declaration at [] you confirm you are a “qualifying investor” and accept the reduced requirements, or absence of requirements, accordingly.

You are wholly responsible for ensuring that [this fund] is acceptable to you. Investment in qualifying funds may involve special risks that could lead to a loss of all or a substantial portion of the investment. Unless you fully understand and accept the nature of [this fund] and the potential risks inherent in [this fund] you should not invest in [this fund].”

Where the fund does not expressly prohibit an investor from investing on behalf of another person - “If you are investing on behalf of someone else, the Authority expects you to be satisfied that person is a qualifying investor who understands the risks associated with this type of investment.”

Where the fund does not expressly prohibit a life assurance company from investing assets comprised within its long term business fund in circumstances where the fund has been selected by the policyholder of a particular policy as the basis for determining the benefit of that policy - “If you are a life assurance company investing assets within your long-term business fund, the Authority expects that relevant policyholders have had the opportunity to read the fund’s offering document and as such to have information about risks associated with an investment in this fund.”

SCHEDULE 6

Regulation 17

Certifications to be contained in the qualifying fund's application form

The Part 2 Certification (1) may be omitted where the fund expressly prohibits an investor from investing on behalf of another person'

The Part 2 Certification (2) may be omitted where the fund expressly prohibits a life assurance company from investing assets comprised within its long term business fund in circumstances where the fund has been selected by the policyholder of a particular policy as the basis for determining the benefit of that policy.

Part 1 Certification - This certification is to be completed by all applicants. The investor confirmations (a) to (d) apply to all applicants. The investor confirmation (e) applies to all applicants except those who are signing a Part 2 certification.

"I/we confirm that —

- (a) I am/we are a qualifying investor as defined on page [] of the offering document of [name of fund] dated []; and
- (b) I am/we are sufficiently experienced to understand the features and risks associated with an unauthorised and unapproved fund of this type; and
- (c) I/we have read and fully understood the offering document including in particular the information on the risks associated with the fund (contained on pages [X – X] of the offering document), before deciding to invest in the fund; and
- (d) I/we confirm that, where appropriate, I/we have taken independent advice on the suitability of this investment within my/our overall investment portfolio; and
- (e) I/we personally accept all the risks associated with this investment and particularly that my/our investment in the [name of fund] involves risks that could result in a loss of a significant proportion or all of the sum invested.

[Signed] [Dated]".

Part 2 Certification —

- (1) The following certification is to be completed by any investor who is investing on behalf of another person.

“I/We confirm that I am/we are investing in the qualifying fund on behalf of another person/ other persons and have certification(s) signed by such person/persons to show that each such person is a qualifying investor and understands and accepts the risks associated with this type of investment.

[Signed].....[Dated]”.

- (2) The following certification is to be completed by an investor who is a life assurance company investing assets comprised within its long term business fund where the [XYZ fund] has been selected by the policyholder of a particular policy as the basis for determining the benefit of that policy (as appropriate).

“We confirm that we are investing assets comprised within our long term business fund and —

- (a) we have procedures and controls in place to obtain client declarations from our policyholders which include confirmation from the policy holder to the effect that —
- (i) the policyholder has the opportunity to read the offering documents for funds of this nature, where they wish to do so, and as such has information about and accepts the levels of risks associated with this type of investment and
 - (ii) the policyholder, where necessary, meets the minimum criteria of a class of investor in a fund of this nature;
- (b) we confirm no investment in this type of fund is made without a client declaration being obtained from relevant policyholders.

[Signed].....[Dated]”.

Part 3 Certification - This certification is to be completed by the financial adviser who has advised the investor where that investor qualifies as a qualifying investor only by virtue of Schedule 1 paragraph (h) —

“I confirm that —

- (a) I am the appointed financial adviser for the above named client;
and
- (b) I have discussed the features and risks attendant to an investment in a nonregulated fund of this type with the client; and
- (c) I have discussed the specific risks attendant to an investment in the [name of qualifying fund] as set out in the offering document dated []; and
- (d) the client has confirmed that they understand these risks and wish to proceed with the investment.

I am not aware of any information that would lead me to believe that the client does not understand and accept these risks.

[Signed].....[Dated]

[Business name]

[Regulated status]”

ENDNOTES

Table of Endnote References

¹ The format of this legislation has been changed as provided for under section 75 of, and paragraph 2 of Schedule 1 to, the Legislation Act 2015. The changes have been approved by the Attorney General after consultation with the Clerk of Tynwald as required by section 76 of the Legislation Act 2015.

² Definition of “acceptable jurisdiction” amended by SD2015/0306.

³ Definition of “the Authority” inserted by SD2015/0306.

⁴ Definition of “Financial Supervision Commission” revoked by SD2015/0306.

⁵ Subpara (h) amended by SD2015/0306.

⁶ Para (2) amended by SD2015/0306.

⁷ Para (1) amended by SD2015/0306.

⁸ Para (1) amended by SD2015/0306.

⁹ Subpara (c) amended by SD2015/0306.

¹⁰ Subpara (d) amended by SD2015/0306.

¹¹ Subpara (e) amended by SD2015/0306.

¹² Subpara (b) amended by SD2015/0306.

¹³ Subpara (a) amended by SD2015/0306.

¹⁴ Subpara (b) amended by SD2015/0306.

¹⁵ Reg 21 amended by SD2015/0306.

¹⁶ Sch 2 revoked by SD2015/0306.

¹⁷ Sch 3 revoked by SD2015/0306.

¹⁸ Sch 4 revoked by SD2015/0306.

¹⁹ Sch 5 amended by SD2015/0306.