



Regulation of Investment Funds in The Bahamas

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The Investment Funds Act, 2003 (the “IFA”) and its accompanying regulations, the Investment Funds Regulations, 2003 (the “IFR”) govern the licensing and regulation of investment funds in The Bahamas.

Pursuant to the IFA, the Securities Commission of The Bahamas (the “Commission”) has a duty to maintain a general review of the operations of investment funds and parties related to investment funds in The Bahamas; further the Commission has the authority to regulate the investment funds industry and the operations and duties of investment funds and parties related to an investment fund.

DEFINITION OF INVESTMENT FUND

The IFA defines investment fund as a unit trust, a company or a partnership which is incorporated or registered pursuant to the laws of The Bahamas or, in the case of a unit trust, the trust instrument is governed by the laws of The Bahamas or, in the case of a partnership, the partnership articles are governed by the laws of The Bahamas; or whose administrator, investment manager, investment advisor, general partner or trustee, as applicable is a company incorporated or registered pursuant to the laws of The Bahamas or which administrator, investment manager, investment advisor, general partner or trustee has a place of business or uses an address in The Bahamas; and which unit trust, company or partnership, issues or has equity interests the purpose or effect of which is the pooling of investor funds with the aim of spreading investment risks and achieving profits and gains arising from the acquisition, holding, management or disposal of investments.

The IFA defines, equity interest as, a share, a trust unit or a partnership interest that carries an entitlement to participate in the profits or gains of the issuer thereof and that is redeemable or re-purchasable at the option of the investor.

In the IFA, a reference to an investment fund means a Bahamas-based fund.

Under the IFA, a party related to an investment fund is an administrator, operator, promoter, custodian, investment manager or investment advisor.

EXCLUSIONS

The following are not included within the definition of an investment fund under the IFA:

- a person enrolled under the Friendly Societies Act; or
- funds where the investors therein do not have the option to redeem their interest or to require the fund

to repurchase their interest (known as closed-end funds).

TYPES OF INVESTMENT FUNDS

There are four classes of investment funds under the IFA:

- professional funds;
- SMART funds (which stands for “Specific Mandate Alternative Regulatory Test” funds);
- standard funds; and
- recognized foreign funds.

Professional funds

This category of investment fund is appropriate for funds that are offered to professional (sophisticated/ accredited) investors only. Such persons include, (i) a bank or trust company licensed by the Central Bank of The Bahamas or licensed in a prescribed jurisdiction, (ii) any registered broker-dealer or firm registered as a securities investment advisor by the Commission (which maintains a minimum of \$120,000 of regulatory capital) or registered in a prescribed jurisdiction, (iii) any insurance company licensed under the laws of The Bahamas or licensed in a prescribed jurisdiction, (iv) any investment fund licensed or registered under the IFA or regulated in a prescribed jurisdiction, (v) any natural person whose individual net worth or joint net worth with the person’s spouse exceeds one million dollars, (vi) any natural person who had an individual income in excess of two hundred thousand dollars in each of the two most recent years or joint income with that persons spouse in excess of three hundred thousand dollars in each of those years and has a reasonable expectation of reaching the same income level in the current year, (vii) any trust with total assets in excess of five million dollars or (viii) any entity in which all of the equity owners satisfies one of the requirements in (i) – (vii) herein.

Professional funds must hold an investment fund license, which can be granted by the Commission or the fund’s administrator if such administrator holds an unrestricted investment fund administrator’s license.

SMART funds

This is a category of investment fund that provides for an element of flexibility as it enables the Commission to prescribe the regulatory and reporting requirements for such funds. Six SMART fund templates have been approved by the Commission; with five templates currently in use. Other structures may also be considered.

Summaries of the requirements and characteristics for the approved templates which are currently in use are as follows:

- SMART Fund Template 001 - The promoter (that is the person inside or outside The Bahamas who is directly or indirectly responsible for the formation of the fund but does not include a professional advisor or underwriter acting for and on behalf of such a person) must be a financial institution, as defined in the IFR, each investor must be a customer of the promoter and a party to a discretionary management agreement and the assets of the investors can only be subject to fees either at the fund level or the management level but not both.
- SMART Fund Template 002 – There can be no more than 10 investors who hold equity interests in the fund and each investor is required to be a person who qualifies to invest in a professional fund (see above under Professional fund). The majority of investors must have the power to appoint and remove the operators of the investment fund, which for the purpose of the IFA, are the directors of a company, the trustee of a unit trust and the general partner of a partnership.
- SMART Fund Template 004 - There can be no more than 5 investors with equity interests in the fund and the fund must operate as a private investment company. A SMART Fund 004 is not required to appoint an administrator but can instead be administered by its operators.
- SMART Fund Template 005 - There can be no more than 5 investors with equity interests. The investors must be those to whom a professional fund can be offered, the fund must operate as a private investment vehicle and the fund's administrator can be a financial institution as defined in the IFR and not require a license from the Commission as an investment fund administrator.
- SMART Fund Template 006 – Provides for the creation of a side pocket fund where illiquid assets from an existing identified investment fund can be transferred into a new SMART fund, provided however that no more than 30% of the gross assets of the existing identified investment fund are invested in the SMART fund. The investors must be those who can invest in a professional fund. At least 75% of the shareholders of the existing identified investment fund must approve the establishment of the SMART fund. A SMART fund 006 is not

required to appoint as its administrator one which is licensed as such under the IFA, and instead, the operators of the fund can administer the fund.

All SMART funds are required to be licensed as an investment fund under the IFA and such funds can be licensed either by the Commission or an unrestricted investment fund administrator, provided that such entity is the administrator of the fund and provides the principal office of the fund.

In the case of SMART funds 001, 004 and 005, such funds are not required to have an offering memorandum/ offering document and in the case of SMART fund 002 and 006, a term sheet (a short form offering memorandum/offering document) is needed, which is required to contain therein certain prescribed requirements. If however a SMART fund 001, 004, or 005 chooses or elects to have a term sheet, the term sheet is required to include certain requirements as prescribed by the legislation.

The constitutive documents of all SMART funds must contain the requirements prescribed by Schedule 2 of the IFR. Further for a SMART fund 006, the constitutive documents shall provide that only shareholders of the existing identified investment fund may become shareholders of the SMART fund and that no new shareholders are permitted into the SMART fund.

Standard funds

This category of investment fund is appropriate for funds which do not satisfy the requirements of any of the other categories of investment fund under the IFA and is the most strictly regulated category of investment fund. Standard funds must hold an investment fund license which licence can only be granted by the Commission.

Recognized foreign funds

Recognized foreign funds do not require a license under the IFA but must be registered with the Commission. A fund can be registered as a recognized foreign fund if its equity interests are listed on a prescribed securities exchange or it is licensed or registered in a prescribed jurisdiction and not suspended from operation. Such exchanges include, amongst others: the Australian Stock Exchange, the Bermuda Stock Exchange, the Cayman Islands Stock Exchange, the Montreal and Toronto Stock Exchanges, the Paris Stock Exchange, the Hong Kong Exchanges and Clearing Limited, the Dublin Stock Exchange, the Deutsche Terminboerse, the Osaka Securities Exchange Co. Ltd., the Tokyo Stock Exchange

Inc., the Nagoya Stock Exchange, the Taiwan Stock Exchange, the London International Financial, the Futures and Options Exchange, The London Stock Exchange, the American Stock Exchange, the NASDAQ Stock Exchange and the New York Stock Exchange. Such jurisdictions include, amongst others, Australia, Bermuda, Brazil, British Virgin Islands, Canada, Cayman Islands, France, Germany, Guernsey, Hong Kong, Japan, Jersey, Luxembourg, Switzerland, Taiwan, the United Kingdom and the United States of America.

A recognized foreign fund is not a licensed investment fund under the IFA.

CONTINUING OBLIGATIONS OF LICENSED FUNDS

Current Offering Memorandum

All licensed investment funds (unless specifically exempted) are required at all times to have filed with the Commission a current offering document.

Annual audit and financial statements

Professional funds are required to be audited annually and file a copy of its audited financial statements with its licensor (the Commission or its investment fund administrator) within four months of its financial year end. Standard funds are required to be audited annually and file a copy of its audited financial statements with its licensor (the Commission) within four months of its financial year end.

In the case of SMART funds 002, 004 and 005, such funds are not required to be audited annually if all of the holders of equity interest in the fund unanimously waive the requirement for the fund to have an annual audit. If the annual audit requirement is waived, the investment fund is required to file semi-annual performance reports with the Commission.

The SMART fund 001 is not required to produce annual audited financial statements but in lieu of audited financials, such fund is required to produce annual unaudited financial statements and semi-annual performance reports which have to be filed with the Commission. In the case of SMART Fund 006 a performance report or management account is to be filed every six months with the Commission and every shareholder of record.

Annual declaration and annual fees

All investment funds shall on or before 31st January of each year, submit to the Commission a written declaration stating that all information filed with the Commission is current and applicable. At the time of filing of the annual

declaration a fund is required to pay its annual fee to the Commission.

Additionally, for each SMART Fund, the directors are required to certify to the Commission by 31st January in each year that the fund is qualified to operate as that particular SMART Fund.

MINIMUM NUMBER OF DIRECTORS

Investment funds that are structured as companies are required to have a minimum of two directors.

ADMINISTRATOR REQUIREMENT

All investment funds must appoint a licensed investment fund administrator unless the fund is:

- self-administered (which is a fund that is administered by its own operators);
- a recognized foreign fund;
- an investment fund administered by a company that is exempt from obtaining an investment fund administrator's license;
- an investment fund exempted from this requirement by the Commission in writing;
- a SMART Fund 004 (such type of fund is permitted to be administered by its operators);
- a SMART Fund 005 (see further above); and
- a SMART Fund 006 (such type of fund is permitted to be administered by its operators).

CUSTODIAN REQUIREMENT

All investment funds must appoint a custodian, EXCEPT for funds whose investment structure or the nature of the fund's assets are such that they do not require that a custodian be appointed to hold the assets of the investment fund (for example, fund-of-funds or master-fund structures). In such cases, the operators of the fund would have to certify in writing that the fund, due to its investment structure or the nature of its assets, does not require a custodian.

LICENSING OF INVESTMENT FUNDS BY THE COMMISSION

In respect of the licensing of an investment fund by the Commission, an application will have to be submitted to the Commission which will have to include, inter alia, details of the offer, details on the parties related to the investment fund, a copy of the fund's offering memorandum and its constitutive documents along with the prescribed fee.

FEES

Application fee for an investment fund licence (Standard, Professional or SMART fund)	\$750.00
Registration fee for a recognized foreign fund	\$100.00
Initial Filing Fee (funds licensed by an unrestricted investment fund administrator)	\$750.00
Annual investment fund licence fee (Standard, Professional or SMART fund - pro-rated in the first year of licensing)	\$950.00
Annual Investment Fund licence fee (Self-administered Standard, Professional or SMART fund - pro-rated in first year of licensing)	\$1000.00
Annual registration fee for recognized foreign funds (prorated in the first year of registration)	\$100.00
Annual filing fees (funds licensed by an unrestricted investment fund administrator- prorated in the first year of licensing)	\$950.00
Initial principal office fee (prorated in the first year)	\$500.00
Annual principal office fee (not payable in the first year of licensing or filing)	\$500.00

NON-BAHAMAS BASED FUNDS

If a fund does not fall within the definition of an investment fund under the IFA, but has some form of nexus to The Bahamas, including without limitation, being sold in or from The Bahamas or having appointed a custodian in The Bahamas, such fund is a non-Bahamas based fund. In the case of a non-Bahamas based fund which is being sold in or from The Bahamas, it must appoint a representative in The Bahamas who must be approved by the Commission. The representative can be an attorney or firm of attorneys in The Bahamas, an accountant or firm of accounts in The Bahamas, a bank or trust company licensed in The Bahamas, an investment fund administrator licensed in The Bahamas, a broker-dealer or securities investment advisor licensed in The Bahamas or such other person as the Commission may approve.

Details of all contracts between the representative and the fund together with amendments thereto must be supplied to the Commission.

In the case of a non-Bahamas based fund that has some form of nexus to The Bahamas other than being sold in or from The Bahamas (for example, if its custodian is in The Bahamas) such fund shall notify the Commission in writing of its nexus to The Bahamas within 14 days of the start of such relationship.

REGULATION OF INVESTMENT FUND ADMINISTRATORS

A company shall not carry on or attempt to carry on business as an investment fund administrator unless it is licensed to do so by the Commission or is exempted from having to have an investment fund administrator's licence. An investment fund administrator shall be either a company incorporated under the Companies Act, 1992 or the International Business Companies Act, 2000.

The IFA defines investment fund administration as:

- (a) to administer the operations and administrative affairs of an investment fund;
- (b) to provide the administrative services for an investment fund including the accounting, valuation or reporting services; or
- (c) to provide the principal office of an investment fund; but does not include – the provision of a registered office to an investment fund where the usual corporate, secretarial and related services are provided; in relation to an investment fund, the maintenance of any register of equity interests or the registration and payment of fees; the provision of investment advice or investment management or trading execution services.

There are two types of investment fund administrator's licences, the unrestricted investment fund administrator's licence and the restricted investment fund administrator's licence. An unrestricted investment fund administrator's licence authorises the administrator to administer an unlimited number of investment funds. A restricted investment fund administrator's licence permits the administrator to administer investment funds specified by the Commission from time to time.

Physical Presence

An unrestricted investment fund administrator is required to have a physical presence in The Bahamas and two persons residing in The Bahamas to be its agents.

A restricted investment fund administrator is required to have a registered office in The Bahamas and if it does not have a physical presence in The Bahamas it is required to have a place in The Bahamas where administration records of the investment funds under its administration are available.

UNRESTRICTED INVESTMENT FUND ADMINISTRATORS AS LICENSORS

Additionally, an unrestricted investment fund administrator is able to licence certain types of investment funds, namely professional funds and SMART funds, provided

that it is the administrator of the fund and provides the fund's principal office.

An unrestricted investment fund administrator shall within 30 days of the licensing of a fund submit to the Commission:

- the offering document of the fund along with a written certification from the administrator or an attorney that the offering document is in compliance with the IFA;
- a certified copy of the fund's constitutive documents along with a written certification from the administrator or an attorney that the constitutive documents are in compliance with the IFA;
- documentation establishing the fitness and properness of the promoter, operator, investment advisor or investment manager or both, the custodian and auditor of the investment fund;
- a copy of the licence issued by the administrator; and
- the filing fee of \$750.00

ONGOING REPORTING OBLIGATIONS

Annual fees and annual declaration

A licensed investment fund administrator shall on or before 31st January in each year pay its annual fee and submit to the Commission a written declaration that all information filed with the Commission is current and applicable.

Annual audits

An investment fund administrator shall have its financial statements audited annually by an approved auditor and shall submit its audited financial statements to the Commission within four months of its financial year end or within such extension of that period as the Commission may reasonably allow.

Requirements to report certain matters

If an investment fund administrator knows or has reason to believe that an investment fund for which it provides a principal office or a promoter or operator of an investment fund (a) is or is likely to become unable to meet any of its obligations as they fall due (b) is carrying on business otherwise than in accordance with the IFA or any other applicable legislation or (c) is carrying on business in a manner that is or is likely to be prejudicial to investors or creditors of the investment fund, the investment fund administrator shall immediately give the Commission written notice of its knowledge or belief giving its reason for such knowledge or belief.

Additionally, where an investment fund administrator is the licensor of a fund, and the investment fund has failed to submit its audited financial statements to its administrator within four months of the fund's financial year end, the administrator shall advise the Commission of such failure immediately upon the expiration of such time.

LICENSING OF INVESTMENT FUND ADMINISTRATORS

An application for licensing shall be made to the Commission in the prescribed form and is to be accompanied by such information as the Commission requires to determine the application along with the prescribed fee.

The Commission may grant an investment fund administrator's licence if it is satisfied that the applicant inter alia, has sufficient expertise to administer investment funds, is of sound reputation and has directors, officers and senior management who meet the fit and proper requirements of the Commission.

FEES

Application fee for an unrestricted investment fund administrator	\$5000.00
Application fee for a restricted investment fund administrator	\$2000.00
Application fee for an exemption from the obligation to obtain an investment fund administrator's licence	\$1500.00
Annual fee for an unrestricted investment fund administrator (prorated in the first year)	\$10000.00
Annual fee for restricted investment fund administrator (prorated in the first year)	\$5000.00
Annual fee for exemption from having to obtain an investment fund administrator's licence	\$1500.00

SUPERVISORY AUTHORITY OF THE COMMISSION

The Commission may at any time instruct an investment fund or an investment fund administrator to have its accounts audited (other than the existing statutory requirement for audits to be conducted annually) and to submit its audited financial statements to the Commission within such time as the Commission may specify.

The Commission can also request a party related to an investment fund to give it such information or such explanation in respect of the investment fund as the Commission may reasonably require to enable the Commission to carry out its duties under the IFA.

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The Commission can request an investment fund administrator to give the Commission such information or such explanation in respect of its investment fund administration or its operations as the Commission may reasonably require to enable it to carry out its duties under the IFA.

If requested to do so by the Commission a party related to an investment fund shall give the Commission access to or provide at any reasonable time all records relating to the investment fund. If requested to do so by the Commission, an investment fund administrator shall grant access to or provide the Commission within a reasonable time with (a) the records of the administrator and (b) any records under the control of the administrator, relating to the investment fund administration carried out by the investment fund administrator.

Where an investment fund or investment fund administrator has ceased to carry on its business or if the investment fund or investment fund administrator becomes insolvent or goes into liquidation or is wound up or otherwise dissolved, the Commission may by Order revoke the licence or registration, as applicable.

The Commission also has the authority under the IFA to conduct regulatory hearings to determine whether:

- there has been or there is likely to be a failure to comply with the provisions of the IFA or the IFR;
- an investment fund or investment fund administrator is carrying on its business in a manner detrimental to the public interest;
- an investment fund or investment fund administrator is carrying on or attempting to carry on business or is winding up, dissolving, liquidating or terminating its investment fund or investment fund administration business voluntarily in a manner that is prejudicial to (i) the investors in the investment fund or (ii) any investment fund being administered by an investment fund administrator or (iii) the creditors of the investment fund or (iv) the creditors of the investment fund administrator; or
- an investment fund or investment fund administrator is carrying or attempting to carry on its investment fund or investment fund administration business without complying with any conditions of its investment fund licence or its investment fund administration licence.

As a result of any regulatory hearings, the Commission has the authority to impose, inter alia, the following sanctions or remedies:

- censure;
- fine, not to exceed three hundred thousand dollars;
- restitution;
- suspension of licence or registration;
- revocation of licence or registration; and
- to apply to the Court for an Order to take such other action as it considers necessary to protect the interests of the (i) investors in an investment fund or (ii) any investment fund being administered by an investment fund administrator (iii) the creditors of the investment fund or (iv) the creditors of the investment fund administrator.

REGULATORY AUTHORITY OF THE COMMISSION OVER UNREGULATED INVESTMENT FUNDS AND UNLICENSED INVESTMENT FUND ADMINISTRATORS

Where the Commission has reasonable grounds for believing that a person is carrying on or attempting to carry on business as an investment fund or investment fund administrator in contravention of the IFA, the Commission has the authority to instruct that person to give it such information or explanation as the Commission may reasonably require to enable it to carry out its duties. Additionally, where it appears to the Commission that an investment fund or investment fund administrator is carrying on or attempting to carry on business without being regulated under the IFA, the Commission has the same authority in respect of such entities as it has for regulated investment funds and regulated investment fund administrators as set out above under Supervisory Authority of the Commission.

CONFIDENTIALITY

Any officer, employee, agent or technical advisor of the Commission is prohibited from disclosing any information relating to (a) the affairs of a regulated person (being a licensee, a recognized foreign fund or a person exempted from licensing under the IFA), (b) any application made to the Commission or (c) the affairs of a customer or client of a regulated person except where such disclosure is inter alia, required by law or permitted by any Courts of The Bahamas or for the purpose of assisting the Commission to exercise any of its functions under the IFA.