



BERMUDA

INVESTMENT FUNDS AMENDMENT ACT 2010

2010 : 61

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WHEREAS it is expedient to make new provisions for increased regulation of investment funds, fund administrators and related matters;

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:

Citation

1 This Act may be cited as the Investment Funds Amendment Act 2010.

Amends section 2

2 Section 2(1) of the Investment Funds Act 2006 (in this Act referred to as "the principal Act") is amended—

(a) by inserting the following definitions in their proper alphabetical positions—

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“parent undertaking” has the meaning given in section 5 of the Investment Business Act 2003;

“shareholder controller” has the meaning given in section 2A(4);

(b) in the definition of “controller”, by deleting the words “section 7(3) of the Investment Business Act 2003 as it applies to companies” and substituting “section 2A”;

(c) by deleting the definition of “officer” and substituting the following—

“officer” in relation to an undertaking, includes a director, secretary or senior executive of the undertaking by whatever name called;” and

(d) in the definition of “service provider”, by inserting “auditor,” before “custodian,”.

Inserts section 2A

3 The principal Act is amended by inserting the following section next after section  
2—

“Meaning of “controller” and “associate”

2A (1) In this Act, “controller” shall be construed in accordance with this section.

(2) “Controller” in relation to an undertaking, means—

(a) in the case of an undertaking which is a company, a managing director of the company, or of its parent undertaking;

(b) in the case of an undertaking which is a firm—

(i) if a partnership, the managing partner;

(ii) if an unincorporated association, a member of the firm;

(c) in the case of an undertaking which is neither a company nor a firm, a sole proprietor;

(d) a chief executive of the undertaking or of its parent undertaking;

(e) a person who satisfies the requirements of this paragraph; and

(f) a person in accordance with whose directions or instructions the directors of the undertaking or of its parent undertaking or persons who are controllers of the undertaking by virtue of paragraph (e) (or any of them) are accustomed to act.

(3) A person satisfies the requirements of subsection (2)(e) in relation to an undertaking if, either alone or with any associate or associates—

(a) he holds 10% or more of the shares in the undertaking which is a company or its parent undertaking;

- (b) he is entitled to exercise or control the exercise of 10% or more of the voting power in the undertaking or in the parent undertaking; or
- (c) he is able to exercise a significant influence over the management of the undertaking or the parent undertaking by virtue of the voting power in the undertaking or the parent undertaking.

(4) A person who is a controller of an undertaking by virtue of subsection (2)(e) is in this Act referred to as a "shareholder controller" of the undertaking; and in this Act—

- (a) "ten per cent shareholder controller" means a shareholder controller in whose case the percentage referred to in the relevant paragraph is not less than ten; and
- (b) "majority shareholder controller" means a shareholder controller in whose case the percentage referred to in the relevant paragraph is fifty or more.

(5) In subsection (4), "the relevant paragraph" in relation to a shareholder controller means whichever one of paragraphs (a) and (b) of subsection (4) gives the greater percentage in his case.

(6) In this Act "associate" in relation to a person entitled to exercise or control the exercise of voting power in relation to, or holding shares in, an undertaking, means—

- (a) if that person is an individual —
  - (i) the spouse, child, step-child or parent of that person;
  - (ii) the trustees of any settlement under which that person has a life interest in possession;
  - (iii) an undertaking of which that person is a director;
  - (iv) a person who is an employee or partner of that person;
- (b) if that person is an undertaking which is a company or a firm—
  - (i) a director of that undertaking;
  - (ii) a subsidiary undertaking;
  - (iii) a director of a subsidiary of that undertaking;
- (c) if that person has with any other person an agreement or arrangement with respect to the acquisition, holding or disposal of shares or other interests in that undertaking or under which they undertake to act together in exercising their voting power in relation to it, that other person.

(7) For the purpose of subsection (6), "settlement" includes any disposition or arrangement under which property is held in trust."

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Amends section 9

4 Section 9 of the principal Act is amended—

(a) in subsection (1), by repealing paragraph (c) and substituting the following paragraph—

“(c) the fund has appointed—

- (i) an investment manager;
- (ii) a registrar;
- (iii) a custodian or prime broker; and
- (iv) an auditor; and”;

(b) by inserting the following subsections next after subsection (1)—

“(1A) The Authority may, on the application of a fund, direct that the criterion specified in subsection (1)(c)(iii) need not be satisfied in respect of that fund.

“(1B) The Authority may not give a direction unless it is satisfied that appropriate arrangements are in place to safeguard the fund’s property.”.

Amends section 14

5 Section 14 of the principal Act is amended by repealing subsection (1) and substituting the following subsection—

“(1) The requirements referred to in section 13(1) are as follows —

- (a) the fund shall prepare annual financial statements which will be audited;
- (b) the fund has appointed, or will on authorisation appoint, an investment manager, an auditor and a fund administrator;
- (c) the fund property has been or will on authorisation be entrusted to a custodian;
- (d) the person appointed as custodian of the fund must—
  - (i) if incorporated in Bermuda, be licensed under the Banks and Deposit Companies Act 1999, the Trusts (Regulation of Trust Business) Act 2001 or the Investment Business Act 2003;
  - (ii) if incorporated elsewhere, be subject to regulatory supervision equivalent to that imposed by or under the Acts referred to in subparagraph (i); and
  - (iii) be independent of the operator and—

- (A) in the case of a mutual fund company, of the persons appointed as directors of the company;
- (B) in the case of a partnership fund, of the partners;
- (e) the operator of the fund, its officers and its proposed service providers are fit and proper persons to act as such;
- (f) in relation to the operator and service providers, the combination of their experience and expertise is such as is appropriate for the purposes of the fund; and
- (g) the fund complies, or will on authorisation, comply with the requirements of fund rules and fund prospectus rules.”.

Inserts sections 45A, 45B, 45C, 45D and 45E

6 The principal Act is amended by inserting the following sections next after section 45—

*Objection to Shareholder Controllers*

“Notification of new or increased control

45A (1) No person shall become a shareholder controller of a fund administrator unless—

- (a) he has served on the Authority a written notice stating that he intends to become such a shareholder controller of the fund administrator; and
  - (b) either the Authority has, before the end of the period of forty-five days beginning with the date of service of that notice, notified him in writing that there is no objection to his becoming such a controller of the fund administrator, or that period has elapsed without the Authority having served him under section 45B with a written notice of objection to his becoming such a controller of the fund administrator.
- (2) Subsection (1) applies also in relation to a person becoming a member of a fund administrator which is a partnership.
- (3) A notice under subsection (1)(a) shall contain such information as the Authority may direct and the Authority may after receiving such a notice from any person, by notice in writing, require him to provide such additional information or documents as the Authority may reasonably require for deciding whether to serve notice of objection.
- (4) Where additional information or documents are required from any person by a notice under subsection (3), the time between the giving of the notice and the receipt of the information or documents shall be added to the period mentioned in subsection (1)(b).

Objection to new or increased control

45B (1) The Authority may serve a notice of objection under this section on a person who has given notice under section 45A, unless it is satisfied that—

- (a) the person concerned is a fit and proper person to become a shareholder controller of the description in question, of the fund administrator;
- (b) the interests of clients or potential clients of the fund administrator would not be in any other manner threatened by that person becoming a shareholder controller of that description of the fund administrator; and
- (c) without prejudice to paragraphs (a) and (b), that, having regard to that person's likely influence on the fund administrator as a shareholder controller of the description in question the minimum criteria would continue to be fulfilled in the case of the fund administrator or, if any of those criteria is not fulfilled, that person is likely to undertake adequate remedial action.

(2) Before serving a notice of objection under this section the Authority shall serve the person concerned with a preliminary written notice stating that the Authority is considering service on that person of a notice of objection and that notice—

- (a) shall specify which of the matters mentioned in subsection (1) the Authority is not satisfied about and, subject to subsection (5), the reasons for which it is not satisfied; and
- (b) shall give particulars of the rights conferred by subsection (3).

(3) A person served with a notice under subsection (2) may, within a period of twenty-eight days beginning with the day on which the notice is served, make written representations to the Authority; and where such representations are made, the Authority shall take them into account in deciding whether to serve a notice of objection.

(4) A notice of objection under this section shall—

- (a) specify which of the matters mentioned in subsection (1) the Authority is not satisfied with, and, subject to subsection (5), the reasons why it is not satisfied; and
- (b) give particulars of the rights conferred by section 55.

(5) Subsections (2)(a) and (4)(a) shall not require the Authority to specify any reason which would in its opinion involve the disclosure of confidential information, the disclosure of which would be prejudicial to a third party.

(6) Where a person required to give a notice under section 45A in relation to becoming a shareholder controller of any description becomes a controller of that description without having given the notice, the Authority may serve him with

notice of objection under this section at any time within 45 days after becoming aware of his having done so, and may, for the purpose of deciding whether to serve him with such a notice, require him by notice in writing to provide such information or documents as the Authority may reasonably require.

(7) The period mentioned in section 45A(1)(b) (with any extension under subsection (4) of that section) and the period mentioned in subsection (6) shall not expire, if it would otherwise do so, until fourteen days after the end of the period within which representations can be made under subsection (4).

#### Objection to existing shareholder controller

45C (1) Where it appears to the Authority that a person who is a shareholder controller of a fund administrator is not or is no longer a fit and proper person to be such a controller of the fund administrator, it may serve him with a written notice of objection to his being such a controller of the fund administrator.

(2) Before serving a notice of objection under this section the Authority shall serve the person concerned with a preliminary written notice stating that the Authority is considering serving a notice of objection on that person and that notice shall—

- (a) subject to subsection (5), specify the reasons for which it appears to the Authority that the person in question is not or is no longer a fit and proper person as mentioned in subsection (1); and
- (b) give particulars of the rights conferred by subsection (3).

(3) A person served with a notice under subsection (2) may, within a period of twenty-eight days beginning with the day on which the notice is served, make written representations to the Authority and where such representations are made, the Authority shall take them into account in deciding whether to serve a notice of objection.

(4) A notice of objection under this section shall—

- (a) subject to subsection (5), specify the reasons for which it appears to the Authority that the person in question is not or is no longer a fit and proper person as mentioned in subsection (1); and
- (b) give particulars of the rights conferred by section 55.

(5) Subsections (2)(a) and (4)(a) shall not require the Authority to specify any reason which would in its opinion involve the disclosure of confidential information, the disclosure of which would be prejudicial to a third party.

#### Contraventions by shareholder controller

45D (1) Subject to subsection (2), any person who contravenes section 45A by—

- (a) failing to give the notice required by subsection (1)(a) of that section; or

- (b) becoming a shareholder controller of any description to which that section applies, before the end of the period mentioned in subsection (1)(b) of that section in a case where the Authority has not served him with a preliminary notice under section 45B(2),

shall be guilty of an offence.

(2) A person shall not be guilty of an offence under subsection (1) if he shows that he did not know of the acts or circumstances by virtue of which he became a shareholder controller of the relevant description; but where any person becomes a shareholder controller of any such description without such knowledge and subsequently becomes aware of the fact that he has become such a controller, he shall be guilty of an offence unless he gives the Authority written notice that he has become such a controller, within fourteen days of becoming aware of the fact.

(3) Any person who—

- (a) before the end of the period mentioned in section 45A(1)(b), becomes a shareholder controller of any description to which that subsection applies, after being served with a preliminary notice under section 45B(2);
- (b) contravenes section 45A by becoming a shareholder controller of any description after being served with a notice of objection to his becoming a controller of that description; or
- (c) having become a shareholder controller of any description in contravention of that section (whether before or after being served with such notice of objection) continues to be such a controller after such a notice has been served on him,

shall be guilty of an offence.

(4) A person found guilty of an offence under subsection (1) or (2) is liable on summary conviction to a fine of \$25,000.

(5) A person found guilty of an offence under subsection (3) is liable—

- (a) on summary conviction to a fine of \$25,000 and in respect of an offence under paragraph (c) of that subsection, to a fine of \$500 for each day on which the offence has continued; and
- (b) on conviction on indictment, to a fine of \$50,000 or to imprisonment for two years or to both.

#### Restriction on and sale of shares

45E (1) The powers conferred by this section shall be exercisable where a person—

- (a) has contravened section 45A by becoming a shareholder controller of any description after being served with a notice of objection to his becoming a controller of that description;

- (b) having become a shareholder controller of any description in contravention of that section continues to be one after such a notice has been served on him; or
- (c) continues to be a shareholder controller of any description after being served under section 45C with notice of objection to his being such a controller.

(2) The Authority may by notice in writing served on the person concerned, direct that any specified shares to which this section applies shall, until further notice, be subject to one or more of the following restrictions—

- (a) any transfer of, or agreement to transfer those shares or, in the case of unissued shares, any transfer of, or an agreement to transfer the right to be issued with them, shall be void;
- (b) no voting rights shall be exercisable in respect of the shares;
- (c) no further shares shall be issued in right of them or in pursuance of any offer made to their holder; and
- (d) except in liquidation, no payment shall be made of any sums due from the fund administrator on the shares, whether in respect of capital or otherwise.

(3) The court may, on the application of the Authority, order the sale of any specified shares to which this section applies and, if they are for the time being subject to any restrictions under subsection (2), they shall cease to be subject to those restrictions.

(4) No order shall be made under subsection (3) in a case where the notice of objection was served under section 45B or 45C—

- (a) until the end of the period within which an appeal can be brought against the notice of objection; or
- (b) if such an appeal is brought, until it has been determined or withdrawn.

(5) Where an order has been made under subsection (3) the court may, on the application of the Authority, make such further order relating to the sale or transfer of the shares as it thinks fit.

(6) Where shares are sold in pursuance of an order under this section the proceeds of sale, less the costs of the sale, shall be paid into court for the benefit of the persons beneficially interested in them; and any such person may apply to the court for the whole or part of the proceeds to be paid to him.

(7) This section applies—

- (a) to all the shares in the fund administrator of which the person in question is a shareholder controller of the relevant description which are held by him or any associate of his and were not so held

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immediately before he became such a controller of the fund administrator; and

- (b) where the person in question became a shareholder controller of the relevant description as a result of the acquisition by him or any associate of his, of shares in another company, to all the shares in that company which are held by him or any associate of his, and were not so held before he became such a controller of that fund administrator.

(8) A copy of the notice served on the person concerned under subsection (2), shall be served on the fund administrator or company to whose shares it relates, and if it relates to shares held by an associate of that person, on that associate.

(9) In this section, “associate” has the meaning given in section 2A.”.

Amends section 55

7 Section 55 of the principal Act is amended by inserting the following subsection next after subsection (4)—

“(4A) Any person on whom notice of objection is served under section 45B or 45C may appeal to a tribunal constituted as aforesaid, against the decision of the Authority to serve the notice; but this subsection does not apply to a person in any case in which he has failed to give a notice or become or continued to be a shareholder controller in circumstances in which his doing so, constitutes an offence under section 45D(1), (2) or (3). ”.

Amends Schedule

8 The Schedule to the principal Act (“Minimum criteria for licensing”) is amended by inserting the following paragraph next after paragraph 1—

“Business to be directed by at least two individuals

1A At least two individuals shall effectively direct the business of the fund administrator.”.

[Assent Date: 22 December 2010]

[Operative Date: 22 December 2010]