



31st July 2013

NOTICE

Investment Funds Amendment Act 2013

On 10th July 2013, the Bermuda Monetary Authority (the “Authority” or “BMA”) posted amendments to the Investment Funds Act 2006 (the “Act”) for comment. The objective of the proposed changes was to introduce a second exemption regime from the requirements under the Act.

The minimum qualifications for this new regime were that:

- a. the fund had to have a licensed investment manager and was restricted to qualified investors;
- b. there was no application process for the exemption only a notification.

This regime would be in addition to the existing regime set out under section 7 of the Act which involves an application to the Authority.

PROPOSED EXEMPTION REGIME - UPDATED

Based on feedback received and upon further discussions with various stakeholders the Authority has further developed this proposal, as follows:

1. New Exemption Classes

The exemption process under the Act should be redrafted to introduce two distinct classes of exemptions: Class A and Class B.

- a. Class A exemption fund - will be available to large institutional funds with managers who manage \$100 million dollars or more of assets. It is expected that most of these managers will be registered with a regulator similar to the Authority.
- b. Class B exemption fund - will replace the existing exemption regime set out under sections 7-9 of the Act but will have similar features. The main difference between the present exemption and the new Class B will be:
 - i. the minimum level of investment by the investors of \$100,000;
 - ii. removal of the requirement that the fund administrator must be recognised
 - iii. requirement to file changes to service providers

All the other requirements will continue, including the requirement that the Authority must be satisfied that the service providers are fit and proper.

2. Revised Applications Process

The two classes will be distinctly different as regards the manner in which the exemption applications are made:

- a. Class A - there will simply be a notification by the fund that it meets the qualifications, thereby streamlining the applications process for funds in this class.
- b. Class B - the Authority will review the application and must be satisfied that the related service providers are fit and proper.

As is presently the case, both classes of funds will be required to file annually a certification that the fund continues to meet the statutory requirements for the exemption. The funds must also file an audited financial statement and any material changes to their prospectus.

3. General Regime Enhancements

In addition to revamping the exemption regime and introducing the two distinct classes, the Authority has proposed additional requirements and BMA powers:

a. Power to modify Requirements

For Class B exemption applications, the Authority will have the express power to consider any representations from the fund that it does not strictly meet the minimum requirements, but has made alternative arrangements for the Authority to consider as being appropriate.

b. Duty to report an exemption disqualification

An exempted fund will have an obligation to report to the Authority any event which is defined as an “exemption disqualification”, i.e. meaning that it does not meet any of the qualifications for the exemption. There is a penalty for not reporting such a disqualification.

The Authority will consider the details of the disqualification in such reports and may direct that the fund reclassify or must be authorised under the Act, or otherwise discontinue its business.

The Authority will also have the power to decide whether the nature of the disqualification may not be substantial, and the fund would therefore not be required to take any actions. For example, because of market fluctuations the investment manager may not at some point have \$100 million assets under management; the Authority may take this point into consideration.

4. Further Details - Classification Features

In summary, the features of two classes are as follows:

a. Class A Exemption

To qualify for this exemption the fund must meet specific criteria as follows:

- i. The fund may only market to qualified investors
- ii. The minimum investment must be \$100,000 or more
- iii. The fund must have an investment manager who is regulated by the Authority or a recognised regulator, or manages assets of 100 million dollars or more
- iv. The fund must appoint various service providers including a fund administrator; auditor; custodian or Prime broker; and
- v. The Fund must appoint a local representative in Bermuda being an officer, trustee or resident representative who will have access to the books.

Application details - A fund notifies the Authority that it meets these requirements in such form as the Authority may direct. A copy of the fund's prospectus is to be filed with the notification. The exemption takes effect when the notification is delivered to the Authority. Annually the fund files a certification that it continues to meet the statutory requirements for the Class A Exemption, along with its audited financial statement and material change to its prospectus. The form of the certification may include filing information related to the fund and any changes.

b. Class B Exemption

To qualify for this exemption, the fund must meet the specific criteria as follows:

- i. The fund may only market to qualified investors
- ii. The minimum investment must be \$100,000 or more
- iii. The fund must have an investment manager
- iv. The fund must appoint various service providers including a fund administrator; auditor; custodian or Primer broker, and
- v. The Fund must appoint a local representative in Bermuda being an officer, trustee or resident representative who will have access to the books of the Fund.

Application details - A fund may apply for a Class B exemption by submitting an application to the Authority in such form as the Authority may direct. A copy of the fund's prospectus is to be filed with the application. The Authority must be satisfied that the fund meets the qualifications and that the service providers are fit and proper. Once the Authority has reviewed the application the Authority must inform the fund of its decision. However, to streamline the process, if the fund has not received an objection from the Authority in 10 days, the application will be deemed as approved.

Annually the fund must file a certification that it continues to meet the statutory requirements for the Class B Exemption along with a copy of its audited financial statements and any changes to its prospectus. The form of the certification may include information related to the fund. It must also submit changes to its service providers which the Authority will review for fitness and propriety.

There is a new requirement for the fund to notify the Authority of changes to its service providers. The Authority will review the providers to ensure they are fit and proper.

5. Transition

Funds that are presently exempted will be grandfathered and must continue to meet the requirements which are presently imposed on the funds.

The Authority invites comments on the updated proposal to redraft the exemption regime under the Act. Comments may be submitted to the Bermuda Monetary Authority at Policy@bma.bm by 30th August 2013.

Draft: 31 July 2013

A BILL

INVESTMENT FUNDS AMENDMENT ACT 2013

ARRANGEMENT OF SECTIONS

- 1 Short title
- 2 Interpretation
- 3 Section 5 amended
- 4 Section 6A added
- 5 Section 6B added
- 6 Section 7 repealed and replaced
- 7 Section 8 repealed and replaced
- 8 Section 8A added
- 9 Section 9 amended
- 10 Section 9A added
- 11 Section 17 amended
- 12 Consequential amendments
- 13 Transitional and saving

WHEREAS it is expedient to make new provision for exempting funds from authorisation and for connected 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:

Short title

1. This Act may be cited as the Investment Funds Amendment Act 2013.

Interpretation

2. In this Act, 'principal Act' means the Investment Funds Act 2006.

Section 5 amended

3. Section 5(2) of the principal Act is amended by deleting 'section 7' where it occurs and substituting in each case 'sections 6A and 8A'.

Section 6A added

4. The principal Act is amended by adding the following section after section 6-

"Class A Exempt funds: qualification

6A. (1) A fund that satisfies the provisions of this section ('Class A Exempt Fund') is exempt from the requirement of authorisation where the fund is only open to qualified participants who invest a minimum amount of \$100,000 in the fund and satisfies the requirements of subsection (2).

(2) The requirements of this subsection are –

(a) that the operator of the fund has appointed as an investment manager for the fund a person who –

(i) has assets under his management of an amount that is not less than one hundred million dollars; or

(ii) is licensed under the Investment Business Act 2003; or

- (iii) is authorised or otherwise licensed by a foreign regulator recognised by the Authority; and
- (b) the operator of the fund has appointed for the fund an officer, trustee or representative resident in Bermuda who has authority to access the books and records of the fund; and
- (c) the operator of the fund has appointed the following persons ('service providers') to provide services to the fund –
 - (i) a fund administrator;
 - (ii) an attorney;
 - (iii) an auditor; and
 - (iv) a custodian bank or prime broker.

(3) In this section "qualified participants" has the meaning given in sections 9(2) and 9(3)."

Section 6B added

5. The principal Act is amended by adding the following section after section 6A –

"Class A Exempt Fund: procedure for exemption

6B. (1) The operator of a Class A Exempt Fund must on or before the date of commencement of the fund's business certify to the Authority that the requirements for exemption specified in sections 6A(1) and (2) are satisfied.

(2) The operator must also certify to the Authority annually on or before 31st March that the fund satisfies the requirements for exemption specified in sections 6A(1) and (2) and will continue to satisfy them.

(3) Such certificate must be filed with the Authority by the due date and must be in the form as the Authority directs.

- (4) The operator of a Class A Exempt Fund must –
 - (a) at the time of filing the certificate required by subsection (1) also file with the Authority a copy of the fund prospectus;
 - (b) at the time of filing the annual certificate required by subsection (2) also file with the Authority –
 - (i) a copy of the fund’s audited financial statements for the preceding year; and
 - (ii) a statement of any material changes to the fund’s prospectus.”.

Section 7 repealed and replaced

6. Section 7 of the principal Act is repealed and the following substituted –

“Class B Exempt Funds: qualification

7. (1) The Authority may exempt from the requirements of authorisation a fund (‘Class B Exempt Fund’) that is only open to qualified participants who invest a minimum amount that is not less than \$100,000 in the fund and satisfies the requirements of subsection (2).

- (2) The requirements of this subsection are that –
 - (a) the operator of the fund -
 - (i) has appointed for the fund an officer, trustee or representative resident in Bermuda who has authority to access the books and records of the fund;
 - (ii) has appointed the following persons (‘service providers’) to provide services to the fund -
 - (aa) an investment manager;
 - (bb) a fund administrator;
 - (cc) an attorney;
 - (dd) an auditor; and
 - (ee) a custodian bank or prime broker,

being persons, who in the Authority's view are fit and proper to perform the respective functions of their office.

(3) In this section "qualified participants" has the meaning given in sections 9(2) and 9(3). "

Section 8 repealed and replaced

7. The principal Act is amended by repealing section 8 and substituting the following –

"Class B Exempt Fund: procedure for exemption

8. (1) The operator of a fund that qualifies for exemption as a Class B Exempt Fund may apply to the Authority for exemption.

(2) Such application must be in such form as the Authority may direct and be accompanied with a copy of its prospectus. "

Section 8A added

8. The principal Act is amended by adding the following section after 8-

"Class B Exempt Funds: approvals

8A (1) The Authority may grant an application for exemption made under section 8 if it is satisfied that the fund meets the requirements for exemption specified in sections 7(1) and (2).

(2) The Authority must notify the applicant in writing of its decision within 10 days from date of the application.

(3) In considering an application for exemption, the Authority may serve notice on the applicant requiring him to provide it with such information and documents as it requires for the purpose.

(4) Where the Authority has requested information or documents pursuant to 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 (2).

(5) If the Authority fails to notify the applicant of its decision within the time specified in subsection (2), as enlarged by subsection (4) where notice has been served under subsection (3), the Authority shall be considered to have approved the application for exemption.

(6) The operator of a Class B Exempt Fund must certify to the Authority annually on or before 31st March that the fund satisfies the requirements for exemption under sections 7(1) and (2) and will continue to satisfy them.

(7) Such certificate must be filed with the Authority by the due date and must be in such form as the Authority directs.

(8) The operator of a Class B Exempt Fund must at the time of filing the certificate required by subsection (6) also file with the Authority –

- (a) a statement of any material changes to the fund's prospectus;
- (b) a copy of its audited financial statements for the preceding year; and
- (c) a schedule of any changes made to its service providers.

(9) The operator of a Class B Exempt Fund shall not appoint a person to act as a service provider of the fund, unless it applies to the Authority in writing seeking the Authority's approval to the proposed appointment.

(10) The Authority must within 14 days of receipt of an application under subsection (9) notify the applicant in writing of its decision.

(11) Where the Authority is satisfied that a service provider of a Class B Exempt Fund is not, in the Authority's view, a fit and proper person to perform the functions of his office, the Authority must within 14 days of receipt of the application for approval inform the applicant in writing of its objection to the appointment; otherwise the Authority must inform the applicant of its approval.

(12) Where the Authority fails to give the notice required by subsection (11) within the prescribed time, the Authority shall be treated as having no objection to the application for appointment of the service provider.

(13) The Authority may, on the application of the operator of a Class B Exempt Fund, waive any requirement of sections 7(1) or (2), if it is satisfied that appropriate arrangements are in place to safeguard the interests of investors in the fund. "

Section 9 amended

9. Section 9 of the principal Act is amended by –

- (a) by deleting the section heading and substituting the following-
"Meaning of "qualified participants";
- (b) by repealing subsections (1), (1A) and (1B); and
- (c) in subsections (2) and (3), by deleting "In this section" where they appear and substituting in each case "In sections 6A(1) and 7(1)"."

Section 9A added

10. The principal Act is amended by adding the following section after section 6B -

"Exempt funds: notice of disqualifying event

9A (1) The operator of an exempt fund of any class must give notice to the Authority of the occurrence of any of the following events ('a disqualifying event')

- (a) permitting a person who is not a qualified participant to invest in the fund;
- (b) accepting investments from qualified participants in amounts below the minimum amount of \$100,000;
or
- (c) being in default of any of the requirements of section 6A(2) or 7(2) .

(2) The operator of an exempt fund of any class must notify the Authority by notice in writing of a disqualifying event within 14 days of its occurrence.

(3) The Authority may on receipt of such notice give such directions to the operator of the fund as it considers appropriate to safeguard the interests of investors in the fund, and may direct that the fund ceases to qualify as an exempt fund of the class for which it had been exempt or of any class.

(4) An operator who fails to notify the Authority as required by subsection (2) is liable to a default fine of \$5000 and a further fine of \$500 for every day that the fund is in default.

(5) An operator who fails to comply with a direction given by the Authority under subsection (3) is liable to a civil penalty of an amount not exceeding \$100,000.

(6) The Authority may recover as a civil debt any unpaid fine imposed under subsection (4) or (5) in a court of competent jurisdiction."

Section 17 amended

11. Section 17(1) of the principal Act is amended by deleting "and" at the end of paragraph (b) and adding the following paragraphs after paragraph (b) –

- "(ba) in relation to a Class A Exempt Fund, on the initial filing of the certificate of exemption in accordance with section 6B;
- (bb) in relation to a Class B Exempt Fund, on the making of an application for exemption under section 8; and".

Consequential amendments

12 The Fourth Schedule to the Bermuda Monetary Authority Act 1969 is amended under the heading "Investment Funds Act 2006" by deleting section 6 onwards and replacing with the following-

"(6) Initial filing fee pursuant to section 17(1)(ba) in relation to a Class A Exempt Fund.....\$1500

(7) Application fee pursuant to section 17(1)((bb) in relation to a Class B Exempt Fund\$700;

(7a) Annual fee pursuant to s 17(1)(c) in relation to a Class A Exempt Fund.....\$1500

(7b) Annual fee pursuant to s 17(1)(c) in relation to a Class B Exempt Fund\$700

(8) Application fee - fund administrator's licence \$8,270

(9) Annual fee - fund administrator \$9,100

(10) Transaction fee: all section 25 changes and notifications and section 6 notifications. - \$250".

Transitional and saving

13. Notwithstanding the repeal of section 7 ('the repealed provisions') by this Act, every fund that on the date of commencement of this section qualified for exemption under the repealed provisions ('the pre-xxx exempt funds) shall continue to be exempt in accordance with the repealed provisions and shall be subject to such repealed provisions which shall continue to apply to them.

Investment Funds Amendment Act 2013

Explanatory Memorandum

The purpose of this Act is to make new provisions for funds that meet certain requirements to be exempt from the requirement of Authorisation and supervision. The Act repeals the existing provisions on exemption, and makes provision for two new classes of exempt funds. The current provisions on exempt funds would be replaced by the new provisions. However, Funds that are currently exempt would be 'grandfathered' by the Act and continue to be exempt under the repealed provisions.

Section 1 provides for the short title.

Section 2 defines 'principal Act'.

Section 3 makes consequential amendments to section 5.

Section 4 makes provision for a new class of exempt funds: Class A Exempt Funds. These funds are only open to qualified investors as defined in sections 9(2) and (3) of the current Act, who invest a minimum of \$100,000 in the fund. In relation to the fund, it must also satisfy the requirements set out in proposed section 6A(2) in relation to the appointment by the operator of a fund of designated service providers, especially the investment manager who must be a licensed and supervised person, whether by the BMA in Bermuda or by a recognised foreign supervisor, or else be a person who has funds of at least \$100 million under management. The operator of the fund is also required to appoint in Bermuda an officer who has access to the Fund's books etc.

Section 5 sets out the procedure for exemption of Class A Exempt Funds. In their case, the operator of the fund must certify to the Authority on or before the commencement of fund business, and annually thereafter that the fund meets the requirements for exemption as a Class A Exempt Fund and will continue to do so.

Section 6 makes provision for the other new class of exempt funds: Class B Exempt Funds. Like the Class A Exempt Funds, this Class is also only open to qualified investors who invest a minimum of \$100,000 in the fund. But proposed section 7(2), that imposes requirements relating to the appointment of designated service providers, does not require the investment manager to have a minimum of \$100 million in funds under its management or to be licensed or otherwise authorised abroad. But it does require the fund to have appointed the same set of service providers as a Class A Exempt Fund including the appointment in Bermuda of an officer who has access to the fund's books etc. all of whom are required to be fit and proper.

Sections 7 and 8 make provision for the procedure for exemption of Class B Exempt Funds. Unlike the self-certification of a Class A Exempt Funds, the exemption in this case must be given by the Authority on the application of the operator of the fund. However, provision is made that requires the Authority to inform the applicant of its decision within 10 days of the application. Failure by the Authority to inform the applicant of its decision within 10 days, would be treated as an approval of the application by the Authority. Provision is also made in section 8A(9) for a Class B Exempt Fund to seek the approval of the Authority before appointing any new service providers. The Authority is empowered to object to proposed appointees if it determines that they are not fit and proper.

The operator is also required to certify to the Authority on an annual basis that the Fund meets the requirements for exemption and will continue to do so

Section 9 makes consequential amendments to section 9 of the principal Act.

Section 10 makes provision for the giving of notice of disqualifying events within 14 days of their occurrence. Where such notice is given, the Authority may issue directions to the operator of the fund as it considers appropriate in the circumstances to protect the interests of investors. A fund that fails to give the required notice is subject to a civil penalty.

Section 11 makes provision for fees.

Section 12 amends the fee schedule in the Bermuda Monetary Authority Act 1969 ('Schedule Four') to provide for new fees.

Section 13 makes transitional provisions to 'grandfather' funds exempted under the repealed provisions. Such funds would continue to be exempt notwithstanding the repealed provisions, which will continue to apply to such pre-repeal funds.