BERMUDA

INVESTMENT BUSINESS (CLIENT MONEY) REGULATIONS 2004

BR 73 / 2004

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In exercise of the powers conferred upon the Minister by section 40 of the Investment Business Act 2003, the following regulations are hereby made:—

PART 1

INTRODUCTION

Citation and commencement

1 These Regulations may be cited as the Investment Business (Client Money) Regulations 2004 and shall come into operation on 1st March 2005.

Interpretation

2 In these Regulations—

"Act" means the Investment Business Act 2003;

"approved bank", in relation to a client bank account, means—

(a) where the account is opened in Bermuda, an institution licensed under the Banks and Deposit Companies Act 1999;

(b) where the account is opened elsewhere—

(i) a bank within the same group as an institution in paragraph (a), licensed to conduct banking business in that country or territory; or

(ii) a bank licensed to conduct banking business in that country or territory which, in the opinion of the Authority, is subject to supervision equivalent to the supervision of banks licensed in Bermuda;

"approved investor" means an individual who is both a "sophisticated private investor", and either a "high net worth private investor" or a "high income private investor";

"business day"*[Revoked by BR 85 / 2022 reg. 2]*

"client bank account" means an account at an approved bank which—

(a) is a current or deposit account;

(b) is in the name of an investment provider; and

(c) includes the words 'client' or an appropriate description to distinguish the account as an account containing client money, from an account containing money belonging to the investment provider;

"client money" has the meaning given in regulation 5;

"collective investment schemes"*[Revoked by BR 85 / 2022 reg. 2]*

"default" means the commencement of liquidation or any insolvency proceedings in any jurisdiction;

"high income private investor" has the meaning given in section 9(3) of the Investment Funds Act 2006;

"high net worth private investor" has the meaning given in section 9(3) of the Investment Funds Act 2006;

"intermediary" means a person—

(a) to whom any client money held by the investment provider has been passed; or

(b) from whom any money is owed to the investment provider which, once received by him, will be client money;

in respect of the carrying out of transactions on behalf of clients of the investment provider;

"investment agreement" means any agreement the making or performing of which by either party constitutes an investment activity;

"investment fund" has the meaning given in section 3 of the Investment Funds Act 2006;

"investment provider" has the meaning given in section 40(4) of the Act;

"investment services"*[Revoked by BR 85 / 2022 reg. 2]*

"market intermediary" means a person who engages or holds himself out as engaging in the business of dealing in investments as principal or agent on an investment exchange;

"money" includes cheques and other payable orders in any currency;

"pooling event" has the meaning given in regulation 13;

"sophisticated private investor" has the meaning given in section 9(3) of the Investment Funds Act 2006.

[Regulation 2 definitions "business day", "collective investment schemes" and "investment services" revoked, "high income private investor", "high net worth private investor" and "sohisticated private investor" amended, and ""approved investor", "investment fund" and "investment provider" inserted by BR 85 / 2022 reg. 2 effective 27 July 2022]

Application

3 These Regulations apply to all investment providers, other than an investment provider which is also an institution licensed under the Banks and Deposit Companies Act 1999, insofar as it holds money on behalf of its clients in an account with itself.

General overview

4 (1) These Regulations apply to money held by an investment provider—

(a) which is client money; and

(b) until the fiduciary duty imposed by these Regulations on the investment provider is discharged.

(2) Where these Regulations apply, an investment provider—

(a) must keep client money separate from its own money in accordance with regulation 7(2); and

(b) must hold client money as a fiduciary for the client in accordance with the purpose trust established by Part III; and

(c) must account for the money properly in accordance with regulations 17 and 18;

(d) must implement client money controls, based on the nature, scale and complexity of its business.

(3) A review of client money controls, implemented by an investment provider pursuant to paragraph (2)(d), shall be conducted annually by a qualified person who shall prepare a report on his findings.

(4) A copy of a report prepared by a qualified person pursuant to paragraph (3), shall be maintained by an investment provider at its registered office, or its principal place of business, or at the office of its senior representative, for not less than five years and shall be made available to the Authority upon request.

(5) For the purposes of this regulation, a "qualified person" means—

(a) an investment provider's internal auditor;

(b) an investment provider's approved auditor; or

(c) such person approved by the Authority in writing to perform the functions of a qualified person under paragraph (3).

[Regulation 4 paragraphs (1) and (2) amended, and paragraphs (3), (4) and (5) inserted by BR 85 / 2022 reg. 3 effective 27 July 2022]

PART II

GENERAL

Meaning of "client money"

5 (1) Subject to this regulation, client money is money in any currency which, in the course of carrying on investment business, an investment provider receives or holds (whether in Bermuda or elsewhere) in respect of an investment agreement entered into, or to be entered into with or for a client.

(2) Money is not client money if—

(a) it is immediately due and payable to the investment provider for its own account—

(i) in respect of fees and commissions in a manner which satisfies paragraph (3); or

(ii) otherwise, though not, in such a case, if the obligation of the investment provider in respect of which the money is so payable to the investment provider has not yet been performed; and

(b) it is not held in (or it is properly withdrawn from) a client bank account.

(3) Money is not regarded for the purposes of paragraph (2) as due and payable in respect of fees and commissions claimed to be payable to the investment provider unless—

(a) the fees or commissions have been accurately calculated and are in accordance with a formula or on a basis agreed to in writing by the client;

(b) 14 days have elapsed since a statement showing the amount of those fees or commissions has been delivered to the client, and the client has not questioned the sum specified; or

(c) the amount of the fees or commission has been agreed in writing with the client, or has been finally determined by a court or arbitration.

(4) Money is not client money if the investment provider holds it on behalf of a client and the investment provider and the client have agreed that the money (or money of that type) is to be held by the investment provider for the intrinsic value of the metal which constitutes the money.

[Regulation 5 amended by BR 85 / 2022 reg. 4 effective 27 July 2022]

Money of sophisticated persons

6 (1) Subject to this regulation, money is not client money if—

(a) an investment provider holds it on behalf of or receives it from a sophisticated person; and

(b) the investment provider has given a clear warning to a sophisticated person that—

(i) his money will not be subject to the protections conferred by these Regulations;

(ii) as a consequence his money will not be segregated from the money of the investment provider, and may be used by the investment provider in the course of its business; and

(iii) the sophisticated person has given his written consent to the treatment of his money by the investment provider outside the Regulations; and

(iv) the Authority has consented to the money being so treated.

(2) The Authority shall give its consent if, and shall withhold its consent unless, it is satisfied that the investment provider has such systems and controls in place as would ensure that monies held or received on behalf of sophisticated persons by the investment provider are identifiable at all times.

(3) Where a sophisticated person whose money has been treated under paragraph (1) as money which is not client money instructs the investment provider to treat that money and any money which it may hold for him, as client money, the investment provider must, within 10 days of receipt of that person's instruction—

(a) treat all money held for that person as client money in accordance with these Regulations, and confirm to him that his money is being held as client money; or

(b) return the money which it holds for that person to him and ensure that no further investment business is carried on with or for that person which may give rise to the investment provider holding client money on his behalf.

(4) "sophisticated person" means a person falling within any of the following classes of persons—

(a) *[Revoked by BR 85 / 2022 reg. 5]*

(b) *[Revoked by BR 85 / 2022 reg. 5]*

(c) *[Revoked by BR 85 / 2022 reg. 5]*

(d) *[Revoked by BR 85 / 2022 s. 5]*

(da) an approved investor;

(db) an investment fund;

(e) bodies corporate, each of which has total assets of not less than five million dollars, where such assets are held solely by the body corporate or held partly by the body corporate and partly by one or more members of a group of which it is a member;

(f) unincorporated associations, partnerships or trusts, each of which has total assets of not less than five million dollars, where such assets are held solely by such association, partnership or trust or held partly by it and partly by one or more members of a group of which it is a member;

(g) bodies corporate, all of whose shareholders fall within one or more of the subparagraphs of this paragraph, except subparagraph (db);

(h) partnerships, all of whose members fall within one or more of the subparagraphs of this paragraph, except subparagraph (db);

(i) trusts, all of whose beneficiaries fall within one or more of the subparagraphs of this paragraph, except subparagraph (db);

(j) limited liability companies, all of whose members fall within one or more of the subparagraphs of this paragraph, except subparagraph (db).

[Regulation 6 amended by BR 85 / 2022 reg. 5 effective 27 July 2022]

Segregation of client money

7 (1) An investment provider shall pay all client money which it holds or receives into a client bank account.

(2) Client money and money belonging to the investment provider must be kept separate from one another.

Client bank accounts

8 (1) Where an investment provider holds client money on behalf of a client, it must ensure that the money is held in a client bank account with an approved bank and that the title of the account sufficiently distinguishes the account from any account containing money that belongs to the investment provider.

(2) Where an investment provider opens a client bank account, the investment provider must give or have given notice to the approved bank requiring the bank to acknowledge to it in writing—

(a) that all money standing to the credit of the account is held by the investment provider as trustee;

(b) the bank is not entitled to combine the account with any other account or to exercise any right of set-off or counterclaim against money in that account in respect of any sum owed to it on any other account of the investment provider.

Payments into client bank accounts

9 (1) Where an investment provider holds client money it must either—

(a) pay it as soon as possible (and in any event, not later than the next day after so beginning) into a client bank account; or

(b) pay it out or pay it over in a manner which secures under regulation 10 that it is no longer client money (for example by endorsing a cheque).

(2) Where client money is received by the investment provider in the form of an automated transfer, the investment provider must ensure that—

(a) where possible, the money is transferred into a client bank account; and

(b) in the event that the money is transferred into the investment provider's own account, the money is paid into a client bank account no later than the next day after the transfer.

(3) Where an investment provider receives a 'mixed remittance' (that is an aggregate sum of money which is in part client money and in part other money) it must pay the full sum into the relevant client bank account, but must then ensure that, except to the

extent that it represents fees and commissions due to the investment provider, the other money is paid out of the account within one day of the day on which the investment provider would normally expect the remittance to be cleared.

[Regulation 9 amended by BR 85 / 2022 reg. 6 effective 27 July 2022]

Discharge of fiduciary duty

10 Money ceases to be client money if it is paid—

(a) to the client;

(b) to a third party on the instruction of the client;

(c) into a bank account in the name of the client (not being an account which is also in the name of the investment provider); or

(d) to the investment provider itself, where it may properly be so paid under these Regulations.

PART III

DEFAULT OBLIGATIONS

Purpose of this Part

11 (1) This Part applies to all client money held by an investment provider so as to create—

(a) a fiduciary relationship between the investment provider and the client, under which the client money is in the legal ownership of the investment provider but in the beneficial ownership of the client; and

(b) a system of pooling of the beneficial interests of different clients once there has been a "pooling event".

(2) Regulation 12 applies whether or not there has been a "pooling event" , and regulations 13 and 14 apply after there has been such a pooling event.

Client purpose trust

12 (1) Whenever the circumstances are that client money is held by an investment provider in the course of investment business carried on in Bermuda, the client money is held in accordance with these Regulations by the investment provider on trust—

(a) upon the terms and for the purposes set out in these Regulations;

(b) subject to subparagraph (a), for the respective clients for whom that client money is held, according to their respective shares in it; and

(c) after all valid claims under subparagraph (b) have been met, for the investment provider itself.

(2) The duties of an investment provider holding client money under these Regulations pursuant to paragraph (1) shall take the place of the corresponding duties which would be owed by it as a trustee under the general law.

Pooling events

13 (1) The power of an investment provider, in accordance with Part II, to pay money into and out of the accounts in which client money is held is interrupted by the occurrence of a pooling event specified in paragraph (2).

(2) The pooling events are—

(a) the default of the investment provider;

(b) the default of an intermediary;

(c) the coming into force of a direction by the Authority in respect of all client money held by the investment provider; or

(d) the default of any approved bank with which any client money held by the investment provider is deposited, in which case regulation 15 applies,

(3) Notwithstanding paragraph (2), a pooling event will not occur, and regulation 15 will not apply, if, on the default of an approved bank or intermediary, the investment provider repays to its clients or pays into a client bank account an amount equal to the amount of client money held on their behalf with that bank or passed to that intermediary.

(4) An investment provider shall inform the Authority and all affected clients of any pooling event, as soon as practicable after its occurrence.

Pooling

14 (1) Save as described in this regulation, where a pooling event occurs, money held in all the investment provider's client bank accounts is pooled, and must be made available to meet the claims of clients in respect of whom client money is or should be held in those accounts on a pari passu basis.

(2) Where, at the time when a pooling event occurs, client money from a client bank account is in the hands of an intermediary, it shall, on its return to the client bank account, be pooled in accordance with paragraph (1).

(3) Where client money referred to in paragraph (2) cannot be returned within one month after the pooling event, the investment provider may make distributions from the account in advance of that date if he makes provision for the possibility of such money not being returned.

(4) If any surplus remains in the pool created by the operation of paragraph (1) after all the valid claims of clients to money in that pool have been met, that surplus shall be distributed to the investment provider.

(5) Where an investment provider receives money from a client after a pooling event which, but for that event, would fall to be paid into a client bank account, that money—

(a) shall be placed in a new client bank account duly opened after the pooling event; and

(b) shall not be pooled with the money held in the investment provider's client bank accounts at the time of the pooling event.

Pooling on default of approved bank or intermediary

15 (1) Where client money is held by an approved bank or an intermediary which defaults or which, following a pooling event by an investment provider, fails to recognize that the money is client money held in accordance with these Regulations—

(a) the money shall—

(i) be pooled separately;

(ii) be made available to satisfy the separate claims of the separate clients pari passu; and

(iii) after the claims described in subparagraph (a)(ii) have been satisfied, be paid into the pool created under Regulation 14 (1); and

(b) the pool created under that Regulation shall be applied—

(i) to meet any claims of separate clients that are not separate claims and the claims of other clients (all ranking equally); and

(ii) after the claims described in subparagraph (b)(i) have been satisfied, to meet any unsatisfied separate claims of separate clients.

(2) In this Regulation—

"separate claim" means the claim of a separate client to the value of the money that was or should have been held with the approved bank or intermediary; and

"separate client" means a client whose money was, or should have been, held with the approved bank or intermediary.

PART IV

INTEREST AND RECORD KEEPING

Interest on client money

16 An investment provider must clarify in writing with a client whether or not interest is payable to the client in respect of client money, and if so, on what terms.

Accounting for and use of client money

17 (1) An investment provider must account properly and promptly for client money and, in particular, must ensure that—

(a) save as permitted by these Regulations, client money and other money do not become mixed;

(b) individual transactions can be accurately identified and traced;

(c) the credit standing to the account of each client is calculated each day; and

(d) money belonging to one client is not used for another client.

(2) Wherever the daily calculation referred to in paragraph (1)(c) reveals an overdraft or that one client's money has been used for another—

(a) the investment provider must pay in a sum of money equivalent to the deficit; and

(b) money paid in by the investment provider under sub-paragraph (a) shall be treated as client money and must not be withdrawn by the investment provider until the client responsible for the deficit has paid in a sum of money equivalent to the deficit.

[Regulation 17 paragraph (1)(c) amended by BR 85 / 2022 reg. 7 effective 27 July 2022]

Reconciliation of accounts

18 (1) An investment provider shall, not less frequently than once a month—

(a) reconcile the balance on each client bank account, as recorded by the investment provider, with the balance on that account as set out in the statement issued by the approved bank covering the period in respect of which the reconciliation is made; and

(b) reconcile the total of the balances on each client account with the total of the corresponding balances in respect of each of its clients, (both totals as recorded by the investment provider).

(2) The reconciliation referred to in paragraph (1) must be performed within 10 days of the date to which the reconciliation relates, and any differences must be corrected forthwith unless they arise as a result of differences in timing between the accounting and settlement systems of the investment provider and the approved bank.

[Regulation 18 paragraph (2) amended by BR 85 / 2022 reg. 8 effective 27 July 2022]

Record keeping

19 An investment provider must retain accounting records in relation to each client bank account for at least 5 years from the date of the transaction to which it relates.

Made this 25th day of November, 2004

Minister of Finance

[Amended by:

BR 85 / 2022]