

# GUIDANCE NOTE

## Companies incorporated under the Companies Act 2006 (“2006 Company”) and their use as International Collective Investment Schemes

### I Introduction

*This Guidance Note is intended to provide operators of international collective investment schemes (including Specialist Funds (“SF”), Qualifying Funds (“QF”) Experienced Investor Funds (“EIF”) and Professional Investor Funds (“PIF”)) with an understanding of the Commission’s expectations in respect of the use of Companies incorporated under the Companies Act 2006 (“2006 Companies”) as collective investment schemes (“Fund Companies”).*

The Companies Act 2006 (“the 2006 Act”) updated and modernised Isle of Man company law, by introducing a new, simplified corporate vehicle. The 2006 Act does not require a number of traditional company law formalities, including the concept of authorised share capital, the requirement to hold an Annual General Meeting, the requirement to maintain capital, the requirement to have a company secretary and some compulsory registry filings.

A number of features of the 2006 Company (particularly the ability to issue shares without a par value, which will enable the company to issue and redeem shares as required, at net asset value) are felt to be attractive to companies wishing to set up as Fund Companies.

The Commission has considered the suitability of using 2006 Companies as Fund Companies, in so doing its benchmark was to ensure that there is no material reduction in either investor protection (for shareholders) or the transparency of the information available to either the public or the Commission.

For 2006 Companies, where the relaxation from obligations that are imposed on companies incorporated under the Companies Act 1931 (“1931 Companies”) could potentially reduce investor protection standards, corporate governance or corporate transparency, the Commission has identified measures to mitigate these risks.

## **2 Use of 2006 Companies as collective investment schemes**

### **2.1 Scope**

The Commission considers that the 2006 Company is suitable for use as a Fund Company established as a full International Schemes, Specialist Fund (“SF”), Qualifying Fund (“QF”), Experienced Investor Fund (“EIF”) or Professional Investor Fund (“PIF”), subject to the Guidance that follows.

With regard to Exempt Schemes, these are not subject to regulation. Thus, whilst a 2006 Company can be established as an Exempt Scheme, it falls outside the scope of this Guidance.

A 2006 Company is may not be used as a Fund Company for Authorised Schemes because the Authorised Collective Investment Scheme Regulations prohibit this.

### **2.2 Clarity of public status**

1931 Companies that are public companies declare their public status by means of the suffix applicable to their company name – public limited company / plc. There is no similar requirement on 2006 Companies where securities are offered to the public.

The Commission is of the opinion that investor protection requires any public status of a Fund Company to be made clear, and that the appropriate method for achieving this clarity is to declare the public status in the constitutional documentation. Therefore a 2006 Company that offers its securities to the public should clearly and prominently declare this fact within its offering document.

### **2.3 Change of corporate structure**

A 2006 Company has the ability to change its corporate structure to either:

- A company limited by shares; or
- A company limited by shares and by guarantee; or
- A protected cell company; or
- An unlimited company with shares.

The Commission considers such a change to be a material event which should be notified to the Commission and shareholders, and should result in a change to the offering document.

For full international schemes notification to the Commission should be made at least 14 days in advance of the change, and for SF, QF, EIF or PIF such notification can be made within 14 days following the change.

Subject to any requirement in the scheme's constitutional documents, notification to shareholders may be made together with the next shareholder communication, and not as a separate communication exercise.

#### ***2.4 Share capital***

A 2006 Company can issue shares at par value, and resolve to increase or reduce this capital, and the Commission considers such a resolution to be a material event which should be notified to the Commission and shareholders, and should result in a change to the offering document.

For full international schemes notification to the Commission should be made at least 14 days in advance of the change, and for SF, QF, EIF or PIF such notification can be made within 14 days following the change.

Subject to any requirement in the scheme's constitutional documents, notification to shareholders may be made together with the next shareholder communication, and not as a separate communication exercise.

#### ***2.5 Re-registration of a 1931 Company***

It is possible to re-register a 1931 Company as a 2006 Company.

If a 1931 Company that is also a Fund Company wishes to re-register as a 2006 Company the Commission considers such a change to be a material event which should be notified to the Commission, and should result in a change to the offering document.

For all international schemes notification to the Commission should be made at the time of making the application to the Registrar of Companies.

Subject to any requirement in the scheme's constitutional documents, notification to shareholders may be made together with the next shareholder communication, and not as a separate communication exercise.

#### ***2.6 Board of Directors***

2006 Companies may be constituted with only one director who may be a corporate director.

The Commission is of the opinion that this is not suitable for the corporate governance and accountability it requires of Fund Companies. Therefore it expects the minimum number of directors for a Fund Company to be two, one of whom should be a natural person.

## ***2.7 Company Secretary***

A 2006 Company is not required to have a Company Secretary but must instead have a Registered Agent at all times.

For clarity, the Commission views the Registered Agent as a key functionary, but not an officer of the company, and the Registered Agent does not therefore have a fiduciary duty to the company.

## ***2.8 Resignation of the Registered Agent***

The Registered Agent of a 2006 Company may resign giving 8 weeks notice and if a replacement Registered Agent is not appointed within this period the company can be struck off the register.

If the Registered Agent of a Fund Company resigns, the Manager / Administrator of the Fund Company and the Commission should be immediately notified of this fact.

## ***2.9 Register of Members***

The Register of Members of a 2006 Company or a copy of it, is required to be held by the Registered Agent.

Practically, the Register of Members for a Fund Company is normally maintained by its Manager / Administrator and the Commission accepts that this practice should prevail.

The Commission therefore expects that, because the Directors are responsible for the management of the company, they should pass a resolution that the Manager / Administrator is to hold the original register and the Registered Agent is to hold a duplicate register. The Manager / Administrator must ensure that the Registered Agent is kept updated with any changes made to the original register.

## ***2.10 Register of Directors***

For a 2006 Company the Register of Directors or a copy thereof is required to be held by the Registered Agent, but the filing of the Register of Directors and updates at Companies Registry is optional under the 2006 Act.

The Commission considers that the directors of Fund Companies are of interest to the public and more specifically, to shareholders. Consequently, in the public interest the Commission expects that a Fund Company will make an election to file the Register of Directors and updates at Companies Registry.

### **2.11 Board Minutes**

The 2006 Act permits directors / members meetings to be held away from the Isle of Man and the minutes of such meetings also to be held away from the Island by a party other than the Registered Agent.

The Commission is of the opinion that the retention of the above minutes away from the Isle of Man is not suitable for the corporate governance and accountability it requires of Fund Companies. Therefore it expects that the minute books are kept on the Isle of Man, either at the offices of the Manager / Administrator (if they are on the Island) or the Registered Agent.

### **2.12 Annual General Meeting ("AGM")**

There is no requirement for a 2006 Company to hold an AGM.

The Commission considers that the opportunity for shareholders to attend a meeting and be provided inter alia with the opportunity to challenge adverse fund performance is desirable in the interest of their protection, even if only a few investors take up this opportunity. It is therefore expected that a Fund Company holds an AGM each year and this fact is disclosed within the offering document.

### **2.13 Audited Accounts**

The 2006 Act does not require a company to prepare accounts or to have them audited.

However, the accounts for Fund Companies must be audited, under the requirements contained within the Orders relating to International Schemes and those for SF, QF, EIF and PIF. These requirements prevail above the requirements of the 2006 Act.

For clarity it is therefore confirmed that the accounts of Fund Companies must be audited and made available to investors within a prescribed time period. The auditor must be qualified as required in the relevant Orders, or where these are silent on this matter they should hold the same qualifications as defined in section 14 of the 1982 Companies Act.

### **2.14 Mergers or consolidations**

Under the 2006 Act mergers may only be approved by shareholders representing at least 75% of the voting rights. However, a 2006 Company can confer no, special, limited or conditional voting rights.

It is common for fund companies to limit shareholders voting rights and generally, voting rights are permitted solely in terms of changes in class rights.

The Variation in Class Rights under the 2006 Act also limits approval to shareholders representing at least 75% of voting rights.

The Commission is of the view that a merger or consolidation is a material change and that shareholders should be given the opportunity to approve the same by a 75% majority if a penalty would apply to any redemption resulting from the change. In this case the Commission expects a clause to be included within the Articles of the Fund Company requiring that a scheme of merger or consolidation is approved by at least 75% of members.

However, the Commission accepts that if a reasonable notice period is given during which shareholders may redeem their holdings with no penalty then there is no need for the above approval.

*Disclaimer*

*The Commission has issued this guidance for general guidance purposes only. It should not be relied on in respect to points of law. Reference for that purpose should be made to the appropriate statutory provisions.*

*25<sup>th</sup> October 2007*