

Financial Services (Collective Investment Schemes)

2005-48

**FINANCIAL SERVICES (EXPERIENCED INVESTOR FUNDS)
REGULATIONS, 2005**

**Subsidiary
2005/116**

Regulations made under s.52 of the Financial Services (Collective Investment Schemes) Ordinance, 2005.

**FINANCIAL SERVICES (EXPERIENCED INVESTOR
FUNDS) REGULATIONS, 2005**

(LN. 2005/116)

5.8.2005

Amending enactments

Relevant current
provisions

Commencement
date

None

ARRANGEMENT OF REGULATIONS.

Regulation

**PART I
PRELIMINARY**

1. Title.
2. Interpretation.
3. Meaning of “experienced investor”.

**PART II
PROVISIONS APPLICABLE TO ALL EXPERIENCED INVESTOR
FUNDS**

4. Establishment of experienced investor fund.
5. Acceptance of participants.
6. General provisions with respect to experienced investor funds.
7. Management and control of an experienced investor fund.
8. Custodial arrangements for experienced investor funds.
9. Audit requirements.
10. Name of experienced investor fund.
11. Changes in information provided to Authority.
12. Returns to the Authority.

**PART III
OFFER DOCUMENT**

13. Offer document.
14. Information to be included in offer document.
15. Investment Warning.
16. Offences.

PART I
PRELIMINARY

Title.

1. These Regulations may be cited as the Financial Services (Experienced Investor Funds) Regulations, 2005.

Interpretation.

2.(1) In these Regulations—

“collective investment scheme” shall be construed in accordance with the provisions of the Financial Services (Collective Investment Schemes) Ordinance, 2005;

“controller”, with respect to an experienced investor fund, means the person or persons responsible for the management and control of the fund under regulation (7);

“E” or “Euro” means the lawful currency for the time being of the European Union and any figure expressed in Euros shall be taken as including its equivalent in any other currency;

“Minister” means the minister with responsibility for financial services;

“protected cell company” shall be construed in accordance with the provisions of the Protected Cell Companies Ordinance 2001.

Meaning of “experienced investor”.

3.(1) An experienced investor is a person or body who, at the time of the investment falls into one of the following categories —

- (a) a person or partnership whose ordinary business or professional activity includes, or it is reasonable to expect that it includes, acquiring, underwriting, managing, holding or disposing of investments, whether as principal or agent, or the giving of advice concerning investments;
- (b) a body corporate which has net assets in excess of Euro1,000,000 or which is part of a group which has net assets in excess of Euro1,000,000;

REGULATIONS, 2005

- (c) an unincorporated association which has net assets in excess of Euro1,000,000;
- (d) the trustee of a trust where the aggregate value of the cash and investments which form part of the trust's assets is in excess of Euro1,000,000;
- (e) an individual whose net worth, or joint net worth with that person's spouse, is greater than Euro1,000,000, excluding that person's principal place of residence; or
- (f) a participant who invests a minimum of Euro100,000 in the fund.

(2) The Authority may, with the prior approval of the Minister, in respect of a particular fund to which these Regulations apply, approve other categories or descriptions of experienced investor where it considers that it is reasonable to expect that persons within that category or description at the time of the investment are sufficiently experienced to understand the risks associated with an investment in that fund.

PART II**PROVISIONS APPLICABLE TO ALL EXPERIENCED INVESTOR FUNDS****Establishment of experienced investor fund.**

4.(1) An experienced investor fund is a fund—

- (a) that is a collective investment scheme;
- (b) that is established—
 - (i) as a company formed or redomiciled under the Companies Ordinance; or
 - (ii) as a unit trust established under and governed by Gibraltar law and subject to the jurisdiction of the Supreme Court of Gibraltar; or
 - (iii) as a Gibraltar protected cell company;
 - (iv) in any other form recognised under the law of Gibraltar that may be approved by the Authority, either generally or with respect to a particular fund;

- (c) that complies with the requirements for experienced investor funds specified in these Regulations; and
- (d) that is established in accordance with the procedures prescribed in these Regulations.

(2) Where an experienced investor fund is established as such, the administrator of the fund shall, within 14 days of the establishment of the fund, file with the Authority—

- (a) written notification of the establishment of the fund in the approved form accompanied by the prescribed fee;
- (b) a copy of the offering documents;
- (c) an opinion of a lawyer of at least 5 years professional standing and who is also a Barrister or Solicitor of the Supreme Court of Gibraltar, that the fund complies with the relevant provisions of the principal Ordinance and these Regulations; and
- (d) such other documents as the Authority may require.

(3) Where sub-regulation (2) has been complied with, the fund shall be deemed to be authorised by the Authority to commence its investment activities.

Acceptance of participants.

5.(1) No person shall be accepted as a participant of an experienced investor fund unless he has provided—

- (a) written confirmation that he is an experienced investor within the meaning specified in these Regulations; and
- (b) a written acknowledgement that he has received and accepted the investment warning required by these Regulations to be contained in the offer document.

(2) Subject to sub-regulation (3), the controller, administrator or trustee of an experienced investor fund is not required to verify the factual accuracy of a confirmation provided by a participant or potential participant under sub-regulation (1)(a).

(3) A controller, administrator or trustee of an experienced investor fund commits an offence if he permits a person to become, or acquiesces in a person becoming, a participant in an experienced investor fund—

- (a) where he knows that the person is not an experienced investor within the meaning specified in these Regulations; or
- (b) where the person has not provided both the written confirmation specified in sub-regulation (1)(a) and the written acknowledgement specified in sub-regulation (1)(b).

General provisions with respect to experienced investor funds.

6.(1) For the purposes of sub-regulation (2) and (3) a person is an authorised administrator if he is authorised by the Authority to act as the administrator of an experienced investor fund.

(2) Subject to sub-regulation (3) an experienced investor fund shall have—

- (a) an authorised administrator; and
- (b) a depository, who must be a different person from, and independent of, the authorised administrator.

(3) The Authority shall not authorise a person to act as the administrator of an experienced investor fund unless that person—

- (a) has at least two Gibraltar resident directors; and
- (b) has a physical presence and staff in Gibraltar.

Management and control of an experienced investor fund.

7.(1) If an experienced investor fund is established as a company formed or redomiciled under the Companies Ordinance or as a protected cell company, it shall have at least two Gibraltar resident directors authorised by the Authority to act as the director of an experienced investor fund.

(2) If an experienced investor fund is established as a unit trust –

- (a) with only one trustee, the trustee shall be a person resident in Gibraltar and authorised by the Authority to act as the trustee of an experienced investor fund;
- (b) with more than one trustee, at least one trustee shall be a person resident in Gibraltar and authorised by the Authority to act as the trustee of an experienced investor fund;

- (c) with a corporate trustee, at least 2 directors of which shall be persons resident in Gibraltar.

(3) If an experienced investor fund takes a form other than that specified in sub-regulations (1) or (2) above, the person having ultimate responsibility for the management and control of the fund shall be authorised for the purpose by the Authority and shall be a Gibraltar resident.

(4) The management and control of a fund shall not be carried out by or on behalf of an authorised administrator without the prior permission of the Authority. Notwithstanding the foregoing, nothing in this regulation shall prevent an authorised administrator from delegating functions to a third party investment manager, advisor or custodian authorised by law to act as such.

Custodial arrangements for experienced investor funds.

8.(1) An experienced investor fund is not required to have a depositary where —

- (a) the fund is a closed fund;
- (b) the fund is a hedge fund and a prime broker with a minimum credit rating of A1/P1 is appointed; or
- (c) the Authority makes a determination to that effect.

(2) Where an experienced investor fund has a depositary, whether or not pursuant to a requirement under the Ordinance, the depositary shall be such person as the Authority may, from time to time, authorise to act as depositary.

Audit requirements.

9.(1) An experienced investor fund shall have an annual audit of its financial statements performed by an auditor registered under the Gibraltar Audit Registration Board. The audit shall be conducted in accordance with internationally recognised audit and accounting standards.

(2) The financial statement period shall not be longer than 12 months unless it is the first financial statement or a change to the period is necessary in which case the period shall be not be longer than 18 months.

(3) The audited financial statements shall be deposited at the Fund Administrator's Gibraltar office within 6 months of the financial statement period end. These shall be made available to the Authority at the same time.

Name of experienced investor fund.

10.(1) The name of an experienced investor fund shall not –

- (a) be misleading or otherwise objectionable whether as to the objectives of the fund or otherwise,
- (b) use the word “Gibraltar” or any word the use of which is restricted under section 17 of the Companies Ordinance.

(2) Where the Authority considers, on reasonable grounds, that the name of an experienced investor fund is contrary to sub-regulation (1), it may by written notice direct the fund to change its name on or before a date specified in the notice, which shall be not less than 21 days after the date of the notice.

(3) If the name of an experienced investor fund to which notice has been given is not changed on or before the date specified in the notice, the Authority may take such enforcement action under the Ordinance against the fund as the Authority may deem appropriate.

Changes in information provided to Authority.

11. All material changes to information provided to the Authority in connection with an experienced investor fund shall be notified to the Authority within 28 days of the change taking place.

Returns to the Authority.

12. The administrator of a fund shall, with respect to each experienced investor fund for which he so acts, file with the Authority an annual return in the form, and containing such information, as may be specified by the Authority.

**PART III
OFFER DOCUMENT****Offer document.**

13.(1) Every experienced investor fund shall issue an offer document that complies with the provisions of these Regulations prior to the promotion of the fund.

(2) Any person who promotes an experienced investor fund prior to the issue of an offer document, commits an offence and shall be liable on summary conviction to a fine at level 5 on the standard scale.

(3) For the purposes of sub-regulation (2), a person promotes an experienced investor fund if he communicates, or causes to be communicated, an invitation or inducement to any other person, or advises or procures any other person, to participate in, or to offer to participate in, an experienced investor fund.

Information to be included in offer document.

14.(1) The offer document of an experienced investor fund shall—

- (a) contain such information as would reasonably be required and expected by participants, and potential participants, and their professional advisers for the purposes of making an informed judgment about the merits of participating in the experienced investor fund and the extent of the risks of participating in the fund; and
- (b) shall be approved by the controller and by the administrator or trustee on the advice of legal counsel.

(2) Without limiting sub-regulation (1)(a), the offer document of an experienced investor fund shall contain the following information—

- (a) an explanation of the structure of the fund, including brief particulars of the constituting documents of the fund and details of how to obtain complete copies of the constituting documents;
- (b) the full name and address of—
 - (i) the persons who control and manage the fund (including their relationship to the fund),
 - (ii) the administrator or trustee of the fund,
 - (iii) the depositary of the fund,
 - (iv) the investment manager of the fund, if any, and
 - (v) any other person or persons performing any function in relation to the fund;
- (c) in the case of a fund established as a company, details of its registered office, the place and date of its incorporation and details of its share capital;

REGULATIONS, 2005

- (d) details of the manner in which each of the persons specified in paragraph (b) may be appointed and replaced;
- (e) the name and address of—
 - (i) the auditor of the fund, and
 - (ii) the legal adviser to the fund;
- (f) any conflicts of interest that may exist in relation to the fund;
- (g) the investment objective and investment management strategies to be employed by the fund, including the fund's approach to borrowing and gearing, and any investment or borrowing restrictions applicable to the fund;
- (h) the manner in which changes likely to have a material effect on investors may be made to the fund;
- (i) the basis upon which dealing in the fund is to take place, if applicable;
- (j) in the case of a closed fund, the basis upon which any subsequent offerings in the fund may be made;
- (k) the basis upon which the value of the fund is to be calculated and, in the case of an open-ended fund, the value of units in the fund is to be determined;
- (l) the manner in which units in the fund are to be created, issued and paid for and, in the case of an open-ended fund, cancelled and redeemed;
- (m) the manner in which meetings of unitholders are to be convened and managed generally and the manner in which voting by unitholders is to be conducted;
- (n) the fees, charges and expenses payable from the property of the fund;
- (o) the address at which the most recent audited annual report and accounts of the fund may be inspected;
- (p) the address, if any, where the register of unitholders can be inspected;

- (q) the manner in which any voting rights in underlying assets held by the fund will be exercised;
 - (r) the arrangements for the safe custody of the assets of the fund, including disclosure, if applicable, of prime broker arrangements;
 - (s) in the case of an umbrella fund or a protected cell company, as the case may be, details of the “ring-fencing” of assets within sub-funds, or, if there is no such arrangement, a statement to the effect that “in the event of the fund being unable to meet liabilities attributable to any particular sub-fund out of the assets attributable to such sub-fund, the excess liabilities may be met out of the assets attributable to the other sub-funds” and an explanation of the manner in which such liabilities may be apportioned; and
 - (t) a statement to the effect that “further information in relation to the regulatory treatment of experienced investor funds in Gibraltar may be obtained from the Gibraltar Financial Services Commissioner”.
- (3) Every offer document shall contain a statement to the following effect—
- “The [directors of the company/trustee] have/has taken all reasonable care to ensure that the facts stated in this document are true and accurate in all material respects, and that there are no other facts the omission of which would make misleading any statement in the document, whether of facts or of opinion. The [directors/ trustee] accept responsibility accordingly.”.
- (4) Nothing in any of the constituting documents of an experienced investor fund may exclude the jurisdiction of the courts of Gibraltar with respect to an action concerning the fund.
- (5) In the event that an offer document is issued in a language other than English—
- (a) a statement should be included in both the original offer document and the translation stating which version will take precedence in the event of a dispute; and
 - (b) a copy of an English language version of the document shall be lodged with the Authority.

Investment Warning.

15. The offer document of every experienced investor fund must contain the following investment warning in a prominent position—

“This [fund] has been established in Gibraltar as an experienced fund. It is suitable only for those who fall within the definition of “experienced investor” contained in the Financial Services (Experienced Investor Funds) Regulations 2005.

Requirements which may be deemed necessary for the protection of retail or non-experienced investors, do not apply to experienced funds. By acknowledging this statement you are expressly agreeing that you fall within the definition of an “experienced investor” and accept the reduced requirements accordingly.

You are wholly responsible for ensuring that all aspects of [this fund] are acceptable to you. Investment in experienced funds may involve special risks that could lead to a loss of all or a substantial portion of such investment. Unless you fully understand and accept the nature of [this fund] and the potential risks inherent in [this fund] you should not invest in [this fund].”.

Offences.

16.(1) The following shall constitute an offence—

- (a) for the person having the management and control of a fund not to inform the Authority immediately upon knowing the fund has ceased comply with the requirements for experienced investor funds within the meaning of regulation 4(1);
- (b) for the person having the management and control of a fund to accept as a participant of an experienced investor fund any person contrary to the provisions of regulation 5;
- (c) for a person to assume the functions of an authorised administrator contrary to the provisions of regulation 6;
- (d) for the person having the management and control of a fund not to inform the Authority immediately upon knowing that any requirement of regulation 7, 9, 10, 11 or 12 or Part 3 is not complied with.

(2) A person found guilty of an offence contrary to sub-regulation (1) shall on summary conviction be liable to a fine at level 5 on the standard scale.

(3) A person found guilty of a second or subsequent offence contrary to sub-regulation (1) shall on summary conviction be liable to a fine at twice level 5 on the standard scale.