



## **Guidance Note - Companies incorporated under the Companies Act 2006 (“2006 Company”) and their use as Collective Investment Schemes**

**January 2017**

### **1. Introduction**

This Guidance Note provides the governing body of collective investment schemes with an understanding of the Isle of Man Financial Services Authority’s (“the Authority’s”) expectations in respect of the use of 2006 Companies for all types of Isle of Man collective investment schemes.

2006 Companies are not required to abide by 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 are attractive to companies wishing to set up as collective investment schemes (“fund companies”). In particular, 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.

The Authority has considered the suitability of using a 2006 Company as a fund company; and, sought to ensure that there is no material reduction in either investor protection or the transparency of the information available to the public or the Authority.

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 Authority has identified measures to mitigate these risks.

The Authority considers that the 2006 Company is suitable for use as a fund company, other than an Authorised Scheme, subject to the guidance that follows.

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

#### **2.1 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 Authority 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.

## **2.2 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.

Such a change would be a material event which should be notified to the Authority and shareholders, and should result in a change to the offering document. Notification to the Authority should be made in line with the requirements of the Collective Investment Schemes Act 2008 (“CIS Act 2008”) and relevant subordinate legislation.

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.

## **2.3 Share capital**

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

Notification to the Authority should be made in line with the requirements of the Collective Investment Schemes Act 2008 (“CIS Act 2008”) and relevant subordinate legislation. 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 Re-registration of a 1931 Company**

If a 1931 Company that is also a fund company wishes to re-register as a 2006 Company, it should be aware that this would be a material event which should be notified to the Authority, and should result in a change to the offering document.

For Full International Schemes/Regulated Funds prior notice must be given to the Authority in line with the requirements of the CIS Act 2008. For all other International Schemes, notification to the Authority 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.

## **2.5 Board of Directors**

2006 Companies may be constituted with only one director who may be a corporate director. This is not suitable for the corporate governance and accountability required of fund companies. The Authority expects a fund company to have two directors, as a minimum, one of whom should be a natural person.

## **2.6 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 Authority 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.

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 Authority should be immediately notified of this fact and the steps that the governing body is taking to remedy the issue.

## **2.7 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 Authority accepts that this practice should prevail.

The Authority 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.

## **2.8 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 directors of fund companies are of interest to the public and more specifically, to shareholders. Consequently, in the public interest the Authority expects that a fund company will make an election to file the register of directors and updates at Companies Registry.

## **2.9 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 retention of the above minutes away from the Isle of Man is not suitable for the corporate governance and accountability the Authority requires of its fund companies. The

minute books should be kept on the Isle of Man, either at the offices of the Manager / Administrator (if they are on the Island) or the Registered Agent.

### **2.10 Annual General Meeting (“AGM”)**

There is no requirement for a 2006 Company to hold an AGM. In the interests of investor protection, the Authority considers that shareholders should be given the opportunity to attend a meeting and be provided, inter alia, with the opportunity to challenge adverse fund performance, even if only a few investors take up this opportunity. It is therefore expected that a fund company will hold an AGM each year and this fact is disclosed within the offering document.

### **2.11 Audited Accounts**

The 2006 Act does not require a company to prepare accounts or to have them audited. However, fund companies must prepare accounts and have them audited under the requirements contained within the Collective Investment Scheme legislation. These requirements will prevail above the requirements of the 2006 Act.

### **2.12 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 Authority 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 Authority 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 Authority 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.

*Status of Guidance: The Financial Services Authority issues guidance for various purposes, including to illustrate best practice, to assist licenceholders to comply with legislation and to provide examples or illustrations. Guidance is, by its nature, not law, however it is persuasive. Where a person follows guidance this would tend to indicate compliance with the legislative provisions, and vice versa.*