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OUTCOME OF PROCEEDINGS

From: General Secretariat of the Council
To: Code of Conduct Group (Business Taxation)
Subject: The EU list of non-cooperative jurisdictions for tax purposes
– Bahamas: final legislation and assessment under criterion 2.2
= Bahamas: final legislation on collective investment funds and
assessment under criterion 2.2
= Investment Funds (Amendment) Act, 2019



EXTRAORDINARY
OFFICIAL GAZETTE
THE BAHAMAS
PUBLISHED BY AUTHORITY

NASSAU

11th February, 2020



No. 2 of 2020

INVESTMENT FUNDS (AMENDMENT) ACT, 2020

AN ACT TO AMEND THE INVESTMENT FUNDS ACT, 2019

[Date of Assent - 11th February, 2020]

Enacted by the Parliament of The Bahamas

1. Short title.

This Act, which amends the Investment Funds Act, 2019 (*No. 2 of 2019*), may be cited as the Investment Funds (Amendment) Act, 2020.

2. Amendment of section 3 of the principal Act.

Section 3 of the principal Act is amended —

- (a) by the deletion of the definition “fit and proper”;
- (b) in the definition of “investment fund administrator”, by the insertion immediately after the number “36”, and immediately before the words “who provides” of the words “or someone licensed in a prescribed jurisdiction”;
- (c) in the definition of “investment fund manager”, by the deletion of the words “licensed or registered under section 26” immediately after the word “person”, and the substitution thereof of the words “— (a) registered under the Securities Industry Act 2011 (*No. 10 of 2011*); or (b) licensed in a prescribed jurisdiction and registered under section 26 of this Act;”;
- (d) in the definition of “professional fund” —
 - (i) by the deletion of paragraphs (d) and (i);
 - (ii) by the deletion in paragraph (e) of the word “professional” immediately before the word “investment” and the substitution thereof with the word “registered”;

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INVESTMENT FUNDS (AMENDMENT) ACT, 2020

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- (iii) by the deletion in paragraph (e) of the word “fund” immediately after the word “investment”;
- (iv) by the deletion in paragraph (f) of all words and the substitution thereof with the following —
“any professional investor;”
- (v) by the insertion in paragraph (h) of the words “where a licensed trustee or investment manager is responsible for investment decisions” immediately after the word “dollars”;
- (vi) by the insertion in paragraph (j) of the words “which has appointed a licensed investment manager to make investment decisions in its behalf” immediately after the word “dollars”;
- (vii) by the re-lettering of paragraphs (e) to (j) as paragraphs (d) to (h);
- (e) by the insertion in the appropriate alphabetical order of the following new definition —
“professional investor” includes —
 - (a) an institutional investor or a financial institution; or
 - (b) a natural person with a net worth of two hundred thousand dollars or more who can evidence that they have the expertise, experience and knowledge with respect to making their own investment decisions;”.

3. Amendment of section 5 of the principal Act.

Section 5 of the principal Act is amended in subsection (1) —

- (a) in paragraph (b), by the insertion immediately after the semicolon, of the word “or”;
- (b) in paragraph (c), by the deletion of the words “; or” and the substitution of a full stop; and
- (c) by the deletion of paragraph (d).

4. Amendment of section 8 of the principal Act.

Section 8 of the principal Act is amended by the deletion of subsection (3) and the substitution of the following —

- “(3) An operator of a self-administered fund shall make arrangements for a principal office to be appointed in The Bahamas.”.

5. Amendment of section 11 of the principal Act.

Section 11 of the principal Act is amended by the deletion of subsection (2).

6. Amendment of section 21 of the principal Act.

Section 21 of the principal Act is amended —

- (a) by the deletion of subsection (1) and the substitution of the following —
 - “(1) An investment fund may voluntarily surrender its licence with the prior approval of the Commission.”;
- (b) by the insertion immediately after subsection (1), of the following new subsection (2) —
 - “(2) Notwithstanding subsection (1), an investment fund that has not commenced its operations within six months of licensing shall surrender its licence to the Commission.”;
- (c) in subsection (3), by the deletion of paragraph (c) and the substitution of the following —
 - “(c) without providing an opportunity to be heard, order a Court supervised winding-up of the investment fund.”.

7. Insertion of new section 21A into the principal Act.

The principal Act is amended by the insertion immediately after section 21, of the following new section —

“21A. Appointment of official receiver.

The Commission may appoint an official receiver to oversee the liquidation of an investment fund, which voluntarily surrenders its licence.”.

8. Amendment of section 22 of the principal Act.

Section 22 of the principal Act is amended by the deletion of subsection (1) and the substitution of the following —

- “(1) An investment fund that ceases trading and liquidates and distributes its assets without formally liquidating its structure, within one year of licensing, shall inform the Commission of the voluntary suspension of its activities.”.

9. Amendment of section 24 of the principal Act.

Section 24 of the principal Act is amended in subsection (3), by the deletion of the words “licensed or”.

10. Repeal of section 25 of the principal Act.

Section 25 of the principal Act is repealed.

11. Amendment of section 26 of the principal Act.

Section 26 of the principal Act is amended —

- (a) by the deletion of the head note and the substitution of the following —

“26. Requirements for the registration of an investment fund manager.”;

- (b) by the deletion of subsection (1) and the substitution of the following —

“(1) A person shall not act as an investment fund manager for —

- (a) a standard fund or any other fund in any other jurisdiction whose equity interests are not limited to being offered to accredited investors only unless —

(i) registered under the Securities Industry Act, 2011 (*No. 10 of 2011*); or

(ii) licensed or registered in a prescribed jurisdiction; and

(iii) registered under this Act;

- (b) a professional, Smart or any other fund in any other jurisdiction, other than the EU, whose equity interests are limited to being offered to accredited investors only unless registered under this Act.”;

(c) by the deletion of subsections (2), (3) and (4);

(d) by the insertion of a new subsection (2) as follows —

“(2) Subject to subsection (1), a person acting as an investment fund manager shall apply to the Commission to be registered under this Act.”.

12. Amendment of section 35 of the principal Act.

Section 35 of the principal Act is amended —

- (a) in subsection (2)(b), by the insertion immediately after the words “Act;” of the word “or”; and

(b) by the deletion of subsection (c) and substitution of the following —

“(c) licensed or registered and operating as an investment fund administrator in accordance with the laws of a prescribed jurisdiction.”.

13. Amendment of section 36 of the principal Act.

Section 36 of the principal Act is amended in subsection (1) —

- (a) in paragraph (f), by the insertion immediately after the word “Bahamas” of the words “or has made arrangements for a principal office in The Bahamas”; and
- (b) in the chapeau of paragraph (g), by the deletion of the words “residing in The Bahamas”.

14. Amendment of section 59 of the principal Act.

Section 59 of the principal Act is amended in paragraph (b), by the deletion of the word “six” and the substitution of the word “four”.

15. Amendment of section 62 of the principal Act.

Section 62 of the principal Act is amended by the deletion of subsection (2).

16. Repeal of section 63 of the principal Act.

Section 63 of the principal Act is repealed.

17. Amendment of section 68 of the principal Act.

Section 68 of the principal Act is amended in subsection (1), by the insertion immediately after the words “investment fund” of the words “unless the operators of the fund certify in writing, that the structure of the investment fund or the nature of the assets of the investment fund, are such that they do not require that a custodian be appointed to hold the assets of the investment fund.”.

18. Amendment of section 70 of the principal Act.

Section 70 of the principal Act is amended by the deletion of paragraphs (a), (b) and (e).

19. Amendment of section 109 of the principal Act.

Section 109 of the principal Act is amended by the deletion of subsection (1) and the substitution of the following—

- “(1) A regulated person shall not appoint an auditor without the prior approval of the Commission.”.

20. Amendment of section 131 of the principal Act.

Section 131 of the principal Act is amended—

- (a) by the deletion of the words “to take any action as it considers necessary.” and the substitution of a hyphen;
- (b) by the insertion, immediately the hyphen, of the following new paragraphs (a), (b), and (c)—

- “(a) to enforce a directive or order made by the Commission under securities laws;
- (b) for a market participant to be wound up, dissolved, liquidated, or otherwise terminated, as appropriate; or
- (c) to take any other action as the Commission considers necessary.”.

21. Repeal and replacement of section 138 of the principal Act.

Section 138 of the principal Act is repealed and replaced by the following —

“138. Confidentiality.

- (1) The Commission or any Member, officer, employee, agent or adviser of the Commission who discloses any information relating to —
 - (a) the affairs of the Commission;
 - (b) any application made to the Commission;
 - (c) the affairs of a regulated person; or
 - (d) a request for assistance from a domestic regulatory authority or an overseas regulatory authority, the affairs of a client of a regulated person, that the person has acquired in the course of that person’s duties or in the exercise of the Commission’s functions under this or any other law, is guilty of an offence and shall be liable on summary conviction to a fine not exceeding \$50,000.00 or to imprisonment for a term not exceeding three years.
- (2) Subsection (1) shall not apply to a disclosure —
 - (a) lawfully required or permitted by any court of competent jurisdiction within The Bahamas;
 - (b) for the purpose of assisting the Commission to exercise any function conferred on it by this Act;
 - (c) in respect of the affairs of a regulated person or of a client of a regulated person, with the consent of the regulated person or client, as the case may be, which consent has been voluntarily given;
 - (d) where the information disclosed is or has been available to the public from any other source;
 - (e) where the information disclosed is in a manner that does not enable the identity of any regulated person or of any client of a regulated person to which the information relates to be ascertained;

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- (f) to a person with a view to the institution of, or for the purpose of —
 - (i) criminal proceedings;
 - (ii) disciplinary proceedings, whether within or outside The Bahamas, relating to the exercise by a counsel and attorney, auditor, accountant, valuer or actuary of the person's professional duties;
 - (iii) disciplinary proceedings relating to the discharge by a public officer, or a Member or employee of the Commission, of that person's duties; or
- (g) in any legal proceedings in connection with —
 - (i) the winding-up or dissolution of a regulated person; or
 - (ii) the appointment or duties of a receiver of a regulated person.”.

22. Insertion of new sections 138A to 138D into the principal Act.

The principal Act is amended by the insertion, immediately after section 138 of the following new sections 138A to 138D —

- 138A. Exercise of powers on behalf of domestic regulatory authorities.**
- (1) At the request of a domestic regulatory authority, the Commission may, where it considers appropriate, exercise its powers under securities laws for the purposes of assisting the performance by the domestic regulatory authority of its regulatory functions.
 - (2) Notwithstanding subsection 138(1), the Commission may provide information that it has acquired in the course of its duties or in the exercise of its functions under securities laws to any other domestic regulatory authority where the commission considers such information may be relevant to the functions of such other domestic regulatory authority or as a necessary part of a framework for consolidated supervision, oversight or regulation of the financial services sector.
- 138B. Assistance to Foreign Regulatory Authorities.**
- (1) The Commission may provide the assistance referred to in section 138C to an overseas regulatory authority

if the Commission is satisfied that all of the following conditions are fulfilled —

- (a) the assistance is intended to enable the overseas regulatory authority, or any designated third party, to carry out the supervision, investigation or enforcement to which the request relates;
 - (b) the overseas regulatory authority has given a written undertaking that any material obtained pursuant to its request shall not be used for any purpose other than a purpose that is specified at the time of the request or thereafter and is approved by the Commission;
 - (c) the overseas regulatory authority has given a written undertaking not to disclose to a third party, other than a designated third party of the foreign jurisdiction in accordance with paragraph (d), any material received pursuant to the request;
 - (d) the overseas regulatory authority has given a written undertaking to obtain the prior consent of the Commission before disclosing to a designated third party any material received pursuant to the request, and to make such disclosure only in accordance with such conditions as may be imposed by the Commission;
 - (e) the material requested is of sufficient importance to the carrying out of the supervision, investigation or enforcement to which the request relates and cannot reasonably be obtained by any other means;
 - (f) the matter to which the request relates is of sufficient gravity; and
 - (g) the rendering of assistance will not be contrary to the public interest of The Bahamas or the interest of the investing public.
- (2) In deciding whether to grant a request for assistance referred to in section 138C from an overseas regulatory authority, the Commission may also have regard to the following —
- (a) whether the act or omission that is alleged to constitute the contravention of the law or regulatory requirement to which the request relates would, if it had occurred in

The Bahamas, have constituted a breach of securities laws;

- (b) whether the overseas regulatory authority has given or is willing to give an undertaking to the Commission to comply with a future request by the Commission to the overseas regulatory authority for similar assistance;
 - (c) whether the overseas regulatory authority has given or is willing to give an undertaking to the Commission to contribute towards the costs of providing the assistance that the overseas regulatory authority has requested.
- (3) where an overseas regulatory authority fails to comply with a requirement of the Commission under subsection (1) or (2), the Commission may refuse to provide the assistance sought.

138C. Assistance that may be rendered.

- (1) Notwithstanding subsection 138(1), the provisions of any prescribed written law or any requirement imposed thereunder, or any rule of law, the Commission may, in relation to a request by an overseas regulatory authority for assistance —
- (a) transmit to the overseas regulatory authority any material in the possession of the Commission that is requested by the authority;
 - (b) order any person to furnish to the Commission any material that is requested by the overseas regulatory authority, that the Commission may then transmit to that authority;
 - (c) order any person to give the Commission assistance in connection with a request made by an overseas regulatory authority; or
 - (d) order any person to make an oral statement to the Commission on any information requested by the overseas regulatory authority, record such statement, and transmit the recorded statement to the authority.
- (2) Without limiting the generality of subsection (1), the material which the Commission may order to be furnished under subsection (1) includes —
- (a) auditing information including, but not limited to, audit working papers, communications, and other information relating to the audit or review of financial statements;

- (b) subscriber records held or maintained by telephone service providers located in The Bahamas that include the identity of subscribers (name and address), payment details and incoming and outgoing communications with date, time, duration and identification of phone numbers from which communications are made or received, and such other details as prescribed; and
 - (c) subscriber records held or maintained by internet service providers or other electronic communication providers located in The Bahamas that include the identity of subscribers (name and address), payment details, length of service, type of service utilized, network addresses, session times, dates and durations, and such other details as prescribed.
- (3) An order under subsection (1)(b), (c) or (d) shall have effect notwithstanding any obligations as to secrecy or other restrictions upon the disclosure of information imposed by any prescribed written law or any requirement imposed thereunder, any rule of law, any contract or any rule of professional conduct.
- (4) A person shall not be required under this section to disclose information or to produce a document which the person would be entitled to refuse to disclose or to produce on the grounds of legal professional privilege in court proceedings.
- (5) For the purposes of this section, any information or other matter comes to a professional legal adviser in privileged circumstances if it is communicated or given to the legal adviser —
- (a) by, or by a representative of, a client of the adviser in connection with the giving by the adviser of legal advice to the client;
 - (b) by, or by a representative of, a person seeking legal advice from the adviser; or
 - (c) by any person —
 - (i) in contemplation of, or in connection with, legal proceedings; and
 - (ii) for the purpose of those proceedings.
- (6) No information or other matter shall be treated as coming to a professional legal adviser in privileged circumstances if it is communicated or given with a view to furthering any criminal purpose.

- (7) Where the person in possession of any document required to be produced under this Part claims a lien on the document —
- (a) the requirement to produce the document shall not be affected by the lien;
 - (b) no fees shall be payable for or in respect of the production; and
 - (c) the production shall be without prejudice to the lien.

138D. Interpretation.

For the purposes of section 138 A to 138C, unless the context otherwise requires —

“designated third party” in relation to a foreign jurisdiction, means —

- (a) any person or body responsible for supervising the overseas regulatory authority in question;
- (b) any authority of the foreign jurisdiction responsible for carrying out the supervision, investigation or enforcement in question; or
- (c) any authority of the foreign jurisdiction, other than the requesting authority, exercising a function that corresponds to a regulatory function of the Commission under this Act;

“enforce” means enforce through criminal, civil or administrative proceedings;

“enforcement” means the taking of any action to enforce a law or regulatory requirement against a specified person, where the law or regulatory requirement relates to the investment funds industry of the foreign jurisdiction of the regulatory authority concerned;

“investigation” means an investigation to determine if a specified person has contravened or is contravening a law or regulatory requirement where the law or regulatory requirement relates to the investment funds industry of the foreign jurisdiction of the regulatory authority concerned;

“material” includes any information or document in any form and, in relation to information recorded otherwise than in legible form, the power to require its production includes the power to require the production of a copy of it in legible and intelligible form;

“Supervision” in relation to an overseas regulatory authority, means the taking of any action for the supervision of investment funds, investment fund administrators or investment fund managers or any other person regulated or supervised by the overseas regulatory authority in relation to investment funds.”.

23. Repeal and replacement of section 158 of the principal Act.

Section 158 of the principal Act is repealed and replaced by the following —

“158. Amendment of Schedule.

The Commission, in consultation with the Minister, may by order published in the *Gazette* amend the Schedule to this Act.”.

24. Amendment of section 160 of the principal Act.

Section 160 of the principal Act is amended —

- (a) by the numbering of the existing paragraph as “subsection “(1)”; and
- (b) by the insertion immediately after subsection (1), of the following new subsection (2) —
“(2) The Commission may by order, vary any rule made under this section.”.

25. Amendment of section 166 of the principal Act.

Section 166 of the principal Act is amended in subsection (3), by the deletion of the word “six” and the substitution of the word “twelve”.