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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 Act, 2019 (Part 1)



EXTRAORDINARY
OFFICIAL GAZETTE
THE BAHAMAS
PUBLISHED BY AUTHORITY

NASSAU

30th April, 2019

INVESTMENT FUNDS ACT, 2019

Arrangement of Sections

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No. 2 of 2019

INVESTMENT FUNDS ACT, 2019

AN ACT TO UPDATE THE LAW RELATING TO THE REGULATION OF INVESTMENT FUNDS BUSINESS; TO BRING THE LAW INTO HARMONY WITH INTERNATIONAL STANDARDS AND BEST PRACTICES; TO EXPAND THE SCOPE OF THE POWERS OF THE SECURITIES COMMISSION OF THE BAHAMAS IN RELATION TO REGULATED PERSONS AND PARTIES RELATED TO INVESTMENT FUNDS; TO PROTECT INVESTORS, THE PUBLIC AND THE REPUTATION OF THE BAHAMAS; TO REPEAL AND REPLACE THE INVESTMENT FUNDS ACT, CHAPTER 369A AND FOR CONNECTED MATTERS

[Date of Assent -30th April, 2019]

Enacted by the Parliament of The Bahamas

PART I – PRELIMINARY

1. Short title and commencement.

- (1) This Act may be cited as the Investment Funds Act, 2019.
- (2) This Act shall come into operation on such day as the Minister by notice published in the *Gazette*, may appoint and the Minister may cause different provisions of this Act to come into operation on different days by notice or notices published in the *Gazette*.

2. Purposes of Act.

The purpose of this Act is to —

- (a) modernize the regulatory framework for investment funds in The Bahamas to achieve international standards and best practices of the investment funds industry;

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- (b) enhance the provisions of the Securities Industry Act, 2011 (*No. 10 of 2011*) to maintain the status of The Bahamas as a reputable international financial centre.

3. Interpretation.

In this Act –

“**accredited investor**” has the same meaning as in the Securities Industry Regulations, 2012 (*S.I. No. 1 of 2012*);

“**administrator**” or “**governing administrator**” in relation to an investment fund that is an investment condominium, has the same meaning as in section 2 of the Investment Condominium Act, 2014 (*No. 38 of 2014*);

“**AIFM**” means a company incorporated under the Companies Act (*Ch. 308*) or the International Business Companies Act (*Ch. 309*) who –

- (a) markets an investment fund or an EU AIF in the EU; or
- (b) manages an EU AIF whether or not it is marketed in the EU, and is licenced under section 29;

“**AIFMD**” means Directive 2011/61/EU of the European Parliament and of the Council of the 8th June, 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No. 1060/2009 and (EU) No. 1095/2010;

“**AIFMD custodian**” means a person appointed under section 91;

“**alternative investment fund**” has the same meaning assigned to an AIF under article 41(a) of AIFMD;

“**auditor**” means a person who is –

- (a) a professionally qualified accountant; or
- (b) an accountant licensed to practice as such under The Bahamas Institute of Chartered Accounts Act, 2015 (*No. 13 of 2015*); and
- (c) approved by the Commission to act on behalf of a regulated person;

“**carry on business in or from The Bahamas**”, and its derivatives, means –

- (a) to incorporate, register or establish an investment fund in The Bahamas;
- (b) to establish a unit trust where the governing law is the Commonwealth of The Bahamas;
- (c) to operate as a fund licensed under this Act;

- (d) to make an invitation to a person in The Bahamas who is not an accredited investor to subscribe for equity interests in an investment fund, regardless of where the investment fund is incorporated, registered or established; or
- (e) to engage in investment funds business in The Bahamas as an investment fund manager, investment fund administrator, investment fund advisor or AIFM;

“Chief Executive Officer” means a person appointed under section 38;

“clearing facility” has the same meaning as in section 4 of the Securities Industry Act, 2011 (*No. 10 of 2011*);

“Commission” means the Securities Commission of The Bahamas established under the Securities Industry Act, 2011 (*No. 10 of 2011*);

“company” means a body corporate incorporated or registered under the laws of The Bahamas or of any other jurisdiction;

“competent authority” means the regulatory authority that is empowered by the laws of a foreign jurisdiction to supervise AIFMs, EU AIFMs, investment funds, EU AIFs and AIFMD custodians in that jurisdiction;

“Compliance Officer” means a person appointed under section 39;

“connected person” means —

- (a) any individual or company beneficially owning, directly or indirectly, ten per cent or more of the ordinary share capital of an investment fund or able to exercise, directly or indirectly, ten per cent or more of the total votes in that fund;
- (b) any individual or company controlled by an individual or company referred to in paragraph (a);
- (c) any member of a group where the fund or a person referred to in (a) or (b) forms a part;
- (d) any director or officer of the fund or any director or officer of a company referred to in paragraphs (a), (b) or (c); or
- (e) any person being a promoter, broker, underwriter, banker, investment banker or professional advisor who has a special relationship with any person described in paragraph (a), (b) or (c);

“constitutive documents” means the principal documents governing the formation of the investment fund, and includes the trust deed in the case of a unit trust, the memorandum and articles of association in the case of a company, the governing regulations in the case of an investment condominium, the partnership agreement or articles of

partnership in the case of a partnership and all other material agreements;

“**counsel and attorney**” has the same meaning as in section 2 of the Legal Profession Act (*Ch. 64*);

“**court**” means the Supreme Court of The Bahamas;

“**custodian**” means a person appointed under section 68;

“**Directive 2004/109/EC**” means Directive 2004/109/EC of the European Parliament and of the Council of the 15th December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC;

“**document**” includes, in addition to a document in writing —

- (a) an electronic communication as defined in the Electronic Communications and Transactions Act (*Ch. 337A*);
- (b) any map, plan, graph or drawing;
- (c) any photograph;
- (d) any disc, tape, sound track or other device in which sounds or other data, not being visual images, are embodied so as to be capable, with or without the aid of some other equipment, of being reproduced; and
- (e) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable, with or without the aid of some other equipment, of being reproduced;

“**domestic regulatory authority**” means an authority in The Bahamas that exercises regulatory, supervisory, enforcement or similar functions and includes —

- (a) authorities that regulate or supervise financial institutions;
- (b) securities exchanges;
- (c) self-regulatory organisations;
- (d) law enforcement agencies;
- (e) governmental or regulatory agencies not mentioned in paragraphs (a) to (d); and
- (f) any other Bahamian authority as prescribed;

“**equity interest**” means a share, a trust unit, a participation interest or a partnership interest that carries an entitlement to participate in the profits or gains of the issuer thereof and that, except where the issuer is a closed-ended fund, is redeemable or re-purchasable at the option of the investor;

- “**ESMA**” or “**European Securities and Markets Authority**” means the Authority established by Regulation (EU) No. 1095/2010 of the European Parliament and of the Council of the European Union;
- “**EU**” means the European Union established by the Treaty on European Union signed in Maastricht on 7th February 1992;
- “**EU AIF**” means an alternative investment fund established in a Member State;
- “**EU AIFM**” means a company who is —
- (a) established or has its principal office in a Member State; and
 - (b) authorised by a Member State —
 - (i) to manage one or more investment funds or EU AIFs whether or not the investment funds or the EU AIFs are marketed in the EU; or
 - (ii) to market investment funds in the EU;
- “**EU passport**” means an authorization from a Member State that facilitates —
- (a) the marketing by an EU AIFM of an investment fund that is managed by the EU AIFM to professional investors in the EU;
 - (b) the management by an AIFM of an EU AIF;
 - (c) the marketing by an AIFM of an investment fund or an EU AIF to professional investors in the EU, in accordance with AIFMD;
- “**euros**” mean the basic unit of currency of the member states of the European Union;
- “**Executive Director**” means the person appointed as such under the Securities Industry Act, 2011 (*No. 10 of 2011*);
- “**feeder fund**” means an investment fund that conducts more than fifty-one per cent of its investing in a master fund either directly or through an intermediary entity;
- “**fit and proper**” has the prescribed meaning;
- “**foreign jurisdiction**” means a jurisdiction other than The Bahamas;
- “**former act**” means the Investment Funds Act (*Ch. 369A*);
- “**general partner**” means —
- (a) in respect of an exempted limited partnership constituted under the laws of The Bahamas, a general partner as defined under section 2 the Exempted Limited Partnership Act (*Ch. 312*); or

(b) in respect of a partnership constituted under the laws of a jurisdiction other than The Bahamas, a person equivalent to a general partner under the laws of The Bahamas;

“Hearing Panel” means the hearing panel established under rule 9 of the Securities Industry (Disciplinary Proceedings)(Hearings and Settlements) Rules, 2017 (*S.I. No. 11 of 2017*);

“investment condominium” means an investment condominium established and registered under the Investment Condominium Act, 2014 (*No. 38 of 2014*);

“investment fund” or **“fund”** means a unit trust, company, partnership or investment condominium that issues or has equity interests the purpose or effect of which is the pooling of investor funds with the aim of spreading investment risks and achieving profits or gains arising from the acquisition, holding, management or disposal of investments;

“investment fund administration” means —

(a) to administer the operations and administrative affairs of an investment fund;

(b) to provide the administrative services for an investment fund including the accounting, valuation or reporting services; or

(c) to provide the principal office of an investment fund;

but does not include —

(i) the provision of a registered office to an investment fund where the usual corporate secretarial and related services are provided;

(ii) in relation to an investment fund, the maintenance of any register of equity interests or the registration and payment of fees;

(iii) the provision of investment advice or investment management or trading execution services;

“investment fund administrator” means a person licensed under section 36 who provides investment fund administration in or from The Bahamas;

“investment fund administrator’s licence” means a licence referred to under section 36;

“investment fund advisor” means a person not being an officer or employee of an investment fund who for valuable consideration, provides or is entitled to provide an investment fund with investment advice only, and who does not provide any investment management services to such investment fund;

- “**investment fund licence**” means a licence granted under section 5;
- “**investment fund manager**” means a person licensed or registered under section 26;
- “**investor**” means a person who holds or owns an equity interest issued by an investment fund;
- “**licensee**” means a person to whom a licence is granted under this Act;
- “**licensor**” means the Commission or an investment fund administrator licensed under section 35(1)(a);
- “**marketing**” means a direct or indirect offering or placement of shares, trust units, partnership interests or participation interests of an investment fund, to potential investors.
- “**master fund**” means a company, partnership, unit trust or investment condominium that—
- (a) has as its investors other investment funds or feeder funds;
 - (b) holds investments and conducts trading activities for the principal purpose of implementing the overall investment strategy of the feeder funds; or
 - (c) has as its investors one or more feeder funds either directly or through an intermediary entity established to invest in the master fund,
- and for the purposes of this Act such master fund shall be deemed to be an investment fund;
- “**Member State**” means a state which is a member of the EU in which the AIFMD has been implemented;
- “**Minister**” means the Minister of Finance;
- “**Non-Bahamas based investment fund**” means an investment fund that is incorporated, registered or established in a jurisdiction other than The Bahamas but has a nexus to The Bahamas through it being administered or managed in or from The Bahamas;
- “**Non-EU AIF**” means an alternative investment fund that is not established in a Member State;
- “**NPPR**” or “**National Private Placement Regime**” means the national regulatory regime of each Member State which determines how —
- (a) investment funds or EU AIFs are marketed by AIFMs in the Member State; and
 - (b) EU AIFs established in the Member State are managed by EU AIFMs, AIFMs and investment fund managers;
- “**offering document**” in respect of an investment fund, means a document or series of documents on the basis of which —
- (a) equity interests in the investment fund are offered for sale; or

- (b) persons are invited to subscribe for or purchase equity interests in the investment fund, but does not include any other notice, advertisement, letter or other communication used in connection with the offer for sale of any equity interest in the investment fund or the invitation to any person to subscribe for or purchase any equity interest in the investment fund if before the offer or invitation is accepted or taken up the prospective investor is given the opportunity to consider an offering document containing the information set out under section 10(1);

“operator” in respect of the investment fund, means where the investment fund is —

- (a) a unit trust, a trustee of that trust;
- (b) a partnership, a general partner in that partnership;
- (c) a company, a director of that company; or
- (d) an investment condominium, the governing administrator as defined in section 2 of the Investment Condominium Act, 2014 (*No 38 of 2014*);

“overseas regulatory authority” means an authority in a jurisdiction outside The Bahamas that exercises functions corresponding to any function of the Commission;

“own funds” means assets that are set aside to cover risks and includes paid-up share capital, reserves and undistributed profits;

“party related to an investment fund” or its derivatives means an investment fund administrator, operator, promoter, custodian, valuer, investment fund manager, investment fund advisor, EU AIFM, AIFM or AIFMD custodian;

“participation interest” means a unit of ownership interest in an investment condominium;

“partnership” means a partnership, general or otherwise, constituted under the laws of The Bahamas or any other jurisdiction;

“partnership interest” means the interest of a partner general or otherwise, in respect of profit, capital and voting or other rights, benefits or obligations to which he is entitled or subject under the partnership agreement or the laws of The Bahamas or any other jurisdiction;

“person” includes an individual, company, partnership, party, trust, fund, association and any other organized or incorporated group of persons and the personal or other legal representatives of any person to whom the context can apply;

“prescribe” or **“prescribed”** means prescribed by regulations or rules;

“prescribed jurisdiction” means a jurisdiction prescribed by the Commission in rules;

“prime broker” means a credit institution, a regulated investment firm or another entity subject to prudential regulation and ongoing supervision, offering services to professional investors primarily to finance or execute transactions in financial instruments as counterparty and which may also provide other services such as clearing and settlement of trades, custodial services, securities lending, customised technology and operational support facilities;

“principal office” means the address of the primary place of business of an investment fund;

“professional advisor” means —

- (a) an investment fund advisor or investment fund manager;
- (b) a counsel and attorney; or
- (c) an accountant;

“professional fund” means an investment fund that is offered to any person who comes within any of the following categories at the time of issue of the equity interest —

- (a) any bank or trust company licensed under the Banks and Trust Companies Regulation Act (*Ch. 316*) or licensed under the laws of another jurisdiction; whether acting in its individual or fiduciary capacity;
- (b) any firm registered under Part VI of the Securities Industry Act, 2011 (*No. 10 of 2011*) that maintains a minimum capital of one hundred and twenty thousand dollars of regulatory capital or is registered or licenced to carry on equivalent securities activities in a prescribed jurisdiction;
- (c) any insurance company licensed under the Insurance Act (*Ch. 347*) or licensed under the laws of another jurisdiction;
- (d) any investment fund licensed or registered under this Act or regulated under the laws of another jurisdiction;
- (e) any pension fund where a professional investment fund manager has been appointed to manage the fund's assets;
- (f) any natural person whose individual net worth, or joint net worth with the person's spouse exceeds one million dollars;
- (g) any natural person who had an individual income in excess of two hundred thousand dollars in each of the two most recent years or joint income with that person's spouse in excess of three hundred thousand dollars in each of those years and has a reasonable expectation of reaching the same income level in the current year;

- (h) any trust with total assets in excess of five million dollars;
- (i) any entity where all the equity owners satisfy one of the requirements in paragraphs (a) to (g); or
- (j) any entity with net assets in excess of five million dollars;

“promoter” in respect of an investment fund or proposed investment fund, means any person whether within or outside The Bahamas who directly or indirectly is responsible for the formation of an investment fund and who causes the preparation or distribution of an offering document in respect of the investment fund or proposed investment fund but does not include a professional advisor or underwriter acting for or on behalf of such a person;

“qualifying holding” means a direct or indirect holding in an AIFM which represents ten per cent or more of the capital or of the voting rights, in accordance with Articles 9 and 10 of Directive 2004/109/EC, taking into account the conditions regarding aggregation of the holding laid down in Article 12(4) and (5) of Directive 2004/109/EC, or which makes it possible to exercise a significant influence over the management of the AIFM in which that holding subsists;

“record” means any means by which information may be stored;

“registered marketplace” means a marketplace registered under Part V of the Securities Industry Act (*No. 10 of 2011*);

“registered office” means in the case of —

- (a) a company incorporated under the Companies Act (*Ch. 308*), an office registered in accordance with section 17 of that Act;
- (b) a foreign company registered under section 172 of the Companies Act (*Ch. 308*), an office registered in accordance with section 181 of that Act;
- (c) a company incorporated under the International Business Companies Act (*Ch. 309*), an office registered in accordance with section 37 of that Act;
- (d) a partnership registered under the Exempted Limited Partnership Act (*Ch. 312*), the registered office of that partnership for the purposes of that Act;
- (e) any other partnership, its principal place of business;
- (f) a unit trust, the registered office of the trustee in The Bahamas or the place of business of an individual trustee; or
- (g) an investment condominium, the registered office of the administrator;