

AS TABLED IN THE HOUSE OF ASSEMBLY

A BILL

entitled

INVESTMENT FUNDS AMENDMENT ACT 2013

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WHEREAS it is expedient to amend the Investment Funds Act 2006 to provide for new criteria for exempting funds from authorisation and for connected matters:

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:

Citation

1 This Act, which amends the Investment Funds Act 2006 (the "principal Act"), may be cited as the Investment Funds Amendment Act 2013.

Amends section 2

2 Section 2 of the principal Act is amended by inserting in the appropriate alphabetical order the following definition—

“prime broker” means a person who provides services under a prime brokerage agreement which may include any one or more of the following—

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- (a) custody of assets or arranging safe keeping of assets;
- (b) clearing services and financing;
- (c) capital introduction;
- (d) margin financing;
- (e) stock lending;
- (f) entering into repurchase or reverse repurchase transactions;
- (g) consolidated reporting and other operational support;”.

Amends section 5

3 Section 5(2) of the principal Act is amended by deleting “section 7” where it occurs and substituting in each case “sections 6A and 8A”.

Inserts section 6A

4 The principal Act is amended by inserting the following section after section 6—

“Class A Exempt Fund: qualification

6A (1) A fund that satisfies the requirements of subsection (2) is designated as a Class A Exempt Fund and is exempt from the requirement for authorisation.

(2) The requirements referred to under subsection (1) are that—

- (a) the fund is open only to qualified participants;
- (b) the operator of the fund has appointed as an investment manager for the fund a person who—
 - (i) is licensed under the Investment Business Act 2003;
 - (ii) is authorised or licensed by a foreign regulator recognised by the Authority; or
 - (iii) for the purposes of this Act is carrying on business in or from Bermuda or in a jurisdiction recognised by the Authority, being a person who—
 - (A) has gross assets under management of an amount that is not less than one hundred million dollars; or
 - (B) is a member of an investment management group that has consolidated gross assets under management of an amount that is not less than \$100 million;
- (c) the operator of the fund has appointed for the fund an officer, trustee or representative resident in Bermuda who has authority to access the books and records of the fund;
- (d) the operator of the fund has appointed the following persons (‘service providers’) to provide services to the fund—

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- (i) a fund administrator;
 - (ii) a registrar;
 - (iii) an auditor; and
 - (iv) a custodian or prime broker; and
 - (e) the financial statements of the fund are prepared in accordance with any one of the following standards—
 - (i) International Financial Reporting Standards (“IFRS”);
 - (ii) Generally Accepted Accounting Principles (“GAAP”) in Bermuda, Canada, the United Kingdom or the United States of America; or
 - (iii) any such other GAAP as the Authority may recognise.
- (3) In this section—
- “investment management group” means a group that carries on the business of managing investments within the meaning of paragraph 3 of Part 2 of the First Schedule to the Investment Business Act 2003;
- “qualified participants” has the meaning given in sections 9(2) and 9(3).”.

Inserts section 6B

5 The principal Act is amended by inserting the following section after section 6A—

“Class A Exempt Fund: procedure for exemption

6B (1) The operator of a Class A Exempt Fund must, on or before the date of commencement of the fund’s business, certify to the Authority, in such form as the Authority may direct, that the requirements for exemption specified in section 6A(2) are satisfied.

(2) The operator must also certify to the Authority annually on or before 30th June in such form as the Authority may direct that the fund satisfies the requirements for exemption specified in section 6A(2) and will continue to satisfy them.

- (3) The operator of a Class A Exempt Fund must—
- (a) at the time of filing the certificate required by subsection (1) also file with the Authority a copy of the fund’s prospectus;
 - (b) at the time of filing the annual certificate required by subsection (2), also file with the Authority—
 - (i) a copy of the fund’s audited financial statements for the preceding year; and
 - (ii) a statement of any material changes to the fund’s prospectus.”.

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Repeals and replaces section 7

6 Section 7 of the principal Act is repealed and the following substituted—

“Class B Exempt Fund: qualification

7 (1) The Authority may exempt from the requirements of authorisation a fund designated as a Class B Exempt Fund that satisfies the requirements of subsection (2).

(2) The requirements referred to under subsection (1) are that—

- (a) the fund is only open to qualified participants;
- (b) the operator of the fund has appointed for the fund an officer, trustee or representative resident in Bermuda who has authority to access the books and records of the fund;
- (c) the operator of the fund has appointed the following persons (“service providers”) to provide services to the fund—
 - (i) an investment manager;
 - (ii) a fund administrator;
 - (iii) a registrar;
 - (iv) an auditor; and
 - (v) a custodian or prime broker,

being persons who, in the Authority’s view, are fit and proper to perform the respective functions of their office; and

- (d) the financial statements of the fund are prepared in accordance with any one of the following standards—
 - (i) International Financial Reporting Standards (“IFRS”);
 - (ii) Generally Accepted Accounting Principles (“GAAP”) in Bermuda, Canada, the United Kingdom or the United States of America; or
 - (iii) any such other GAAP as the Authority may recognise.

(3) In this section “qualified participants” has the meaning given in sections 9(2) and 9(3). ”.

Repeals and replaces section 8

7 The principal Act is amended by repealing section 8 and substituting the following—

“Class B Exempt Fund: procedure for exemption

8 (1) The operator of a fund that qualifies for exemption as a Class B Exempt Fund may apply to the Authority for exemption.

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(2) An application must be in such form as the Authority may direct and be accompanied by a copy of the fund's prospectus.”.

Inserts section 8A

8 The principal Act is amended by inserting the following section after section 8—

“Class B Exempt Fund: grant of exemption

8A (1) The Authority may grant an application for exemption made under section 8 if it is satisfied that the fund meets the requirements for exemption specified in section 7(2).

(2) The Authority must notify the applicant in writing of its decision within ten days from date of the application.

(3) In considering an application for exemption, the Authority may serve notice on the applicant requiring him to provide it with such information and documents as it requires for the purpose.

(4) Where the Authority has requested information or documents pursuant to a notice under subsection (3), the time between the giving of the notice and the receipt of the information or documents shall be added to the period mentioned in subsection (2).

(5) If the Authority fails to notify the applicant of its decision within the time specified in subsection (2), as increased by subsection (4) where notice has been served under subsection (3), the Authority shall be considered to have granted the exemption.

(6) The operator of a Class B Exempt Fund must certify to the Authority annually on or before 30th June in such form as the Authority may direct that the fund satisfies the requirements for exemption under section 7(2) and will continue to satisfy them.

(7) The operator of a Class B Exempt Fund must, at the time of filing the certificate required by subsection (6), also file with the Authority—

- (a) a statement of any material changes to the fund's prospectus;
- (b) a copy of its audited financial statements for the preceding year; and
- (c) a schedule of any changes made to its directors and service providers.

(8) The operator of a Class B Exempt Fund shall not appoint a person to act as a director or service provider of the fund unless it applies to the Authority in writing seeking the Authority's approval to the proposed appointment.

(9) Where the Authority is not satisfied that a director or service provider of a Class B Exempt Fund is, in the Authority's view, a fit and proper person to perform the functions of his office, the Authority must within 14 days of receipt of

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the application for approval inform the applicant in writing of its objection to the appointment; otherwise the Authority must notify the applicant of its decision.

(10) Where the Authority fails to give the notice required by subsection (9) within the prescribed time, the Authority shall be considered as having no objection to the application for appointment of the service provider, as the case may be.

(11) The Authority may, on the application of the operator of a Class B Exempt Fund, waive any requirement of section 7(2), if it is satisfied that appropriate arrangements are in place to safeguard the interests of investors in the fund. ”.

Amends section 9

9 Section 9 of the principal Act is amended—

- (a) by repealing subsections (1), (1A) and (1B); and
- (b) in subsections (2) and (3), by deleting the words “In this section” where they appear and substituting in each case “In sections 6A(2) and 7(2)”.

Inserts section 9A

10 The principal Act is amended by inserting the following section after section 9—

“Exempt fund: notice of disqualifying event

9A (1) The operator of an exempt fund of any class must give notice in writing to the Authority of the occurrence of any default (“a disqualifying event”) of a requirement under section 6A(2) or 7(2).

(2) Such notice must be given within 14 days of the operator becoming aware of the occurrence of the disqualifying event.

(3) In addition to the notice under subsection (2), the operator must, within 45 days of becoming aware of the occurrence of a disqualifying event, give notice in writing to the Authority specifying the particular circumstances leading to the disqualifying event and of the manner and time within which the operator intends to rectify the default.

(4) The Authority may give such directions to the operator of the fund as it considers appropriate to safeguard the interests of investors in the fund, and may direct that the fund ceases to qualify as an exempt fund of the class for which it has been made exempt.

(5) An operator who fails to notify the Authority as required by subsection (2) or (3) is liable to a default fine of \$5000 and a further fine of \$500 for every day that the fund is in default.

(6) An operator who fails to comply with a direction given by the Authority under subsection (4) is liable to a civil penalty of an amount not exceeding \$100,000.

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(7) The Authority may recover as a civil debt owing to it any unpaid fine imposed under subsection (5) or (6) in a court of competent jurisdiction.”.

Amends section 17

11 Section 17(1) of the principal Act is amended by deleting “and” at the end of paragraph (b) and inserting the following paragraphs after paragraph (b)—

- “(ba) on the initial filing of the certificate of exemption in accordance with section 6B, in relation to a Class A Exempt Fund;
- (bb) on the making of an application for exemption under section 8, in relation to a Class B Exempt Fund; and.”.

Consequential amendments

12 The Fourth Schedule to the Bermuda Monetary Authority Act 1969 is amended under the heading “Investment Funds Act 2006” by deleting paragraphs (6) to (10) and substituting the following—

“(6) Initial filing fee pursuant to section 17(1)(ba) in relation to a Class A Exempt Fund	\$1500
(7) Application fee pursuant to section 17(1)(bb) in relation to a Class B Exempt Fund	\$1000
(7A) Annual fee pursuant to section 17(1)(c) in relation to a Class A Exempt Fund	\$1500
(7B) Annual fee pursuant to section 17(1)(c) in relation to a Class B Exempt Fund	\$1000
(8) Application fee - fund administrator’s licence	\$8,270
(9) Annual fee - fund administrator	\$9,100
(10) Transaction fee - all section 25 changes and notifications and section 6 notifications	\$250

”.

Transitional and savings

13 (1) Notwithstanding the repeal of section 7 of the principal Act (“the repealed provisions”) by this Act, every fund that on the date of commencement of this Act qualified for exemption under the repealed provisions (“pre-repeal exempt funds”) shall continue to be exempt in accordance with the repealed provisions and shall be subject to such repealed provisions which shall continue to apply to it.

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(2) Subsection (1) shall cease to have effect on the third anniversary of commencement of this Act.

(3) On such anniversary, a pre-repeal exempt fund shall cease to qualify for exemption unless it otherwise satisfies the requirements for a Class A or Class B Exempt Fund under sections 6A and 7 respectively of the principal Act.

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EXPLANATORY MEMORANDUM

This Bill seeks to amend the Investment Funds Act 2006 so as to provide for new criteria for the exemption of funds from the requirements of authorisation and supervision. The Bill repeals the existing provisions on exemption and makes provision for two new classes of exempt funds. Funds that are currently exempt, however, would be “grandfathered” by the Act and continue to be exempt under the repealed provisions for a period of 3 years.

Clause 1 provides a citation for the Bill.

Clause 2 inserts a new definition for the term “prime broker”.

Clause 3 makes consequential amendments to section 5.

Clause 4 inserts a new section 6A, which makes provision for a new class of exempt funds: Class A Exempt Funds. These funds are only open to qualified investors as defined in sections 9(2) and (3) of the current Act. In relation to the fund, it must satisfy the requirements set out in the proposed section 6A(2) with respect to the appointment by the fund of designated service providers, especially the investment manager who must be a licensed and supervised person whether by the BMA in Bermuda or by a recognised foreign regulator or is carrying on business in Bermuda or in a recognised jurisdiction and who has assets under management of not less than \$100 million. The fund is also required to appoint in Bermuda an officer, trustee or representative who has access to the fund’s books and records.

Clause 5 inserts a new section 6B, which sets out the procedure for exemption of Class A Exempt Funds. In their case, the operator of the fund must certify to the Authority on or before the commencement of the fund business, and annually thereafter, that the fund meets the requirements for exemption as a Class A Exempt Fund and will continue to do so.

Clause 6 provides for the repeal and substitution of section 7 so as to provide for the other new class of exempt funds: Class B Exempt Funds. Like the Class A Exempt Funds, this Class is also only open to qualified investors. The proposed section 7(2) imposes requirements relating to the appointment of designated service providers but does not however, require the investment manager to have a minimum of \$100 million in assets under management. It does require the fund to have appointed the same set of service providers as a Class A Exempt Fund including the appointment in Bermuda of an officer, trustee or representative who has access to the fund’s books and records.

Clauses 7 and 8 provide for the repeal and substitution of section 8 and the insertion of section 8A so as to make provision for the procedure for exemption of Class B Exempt Funds. Unlike the self-certification of a Class A Exempt Fund, the exemption in this case must be given by the Authority on the application of the operator of the fund. However, provision is made that requires the Authority to notify the applicant of its decision within 10 days of the application. Failure by the Authority to notify the applicant of its decision

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within 10 days would be considered as an approval of the application by the Authority. The operator is also required to certify to the Authority on an annual basis that the fund meets the requirements for exemption and will continue to do so.

Clause 9 makes consequential amendments to section 9 of the principal Act.

Clause 10 inserts a new section 9A, which makes provision for termination of an exemption status. A fund ceases to qualify as a Class A or Class B Exempt Fund if any of the requirements for exemption for a fund in its class are not met ('a disqualification event'). The operator of a fund in any class is required to inform the Authority of any disqualification event within 14 days of its occurrence. Failure to do so attracts a civil penalty. The operator is also required to serve notice on the Authority within 45 days of the disqualification event, setting out its proposals as to the manner and time within which it proposes to address the default. The Authority is also given power to issue directions to the operator of the fund in the interests of investors.

Clause 11 makes provision for fees in relation to the new exempt funds.

Clause 12 amends the Fourth Schedule to the Bermuda Monetary Authority Act 1969 to provide for new fees in relation to the new exempt funds.

Clause 13 makes transitional provisions to "grandfather" funds exempted under the repealed provisions. Such funds would continue to be exempt for a further three years notwithstanding the repealed provisions,