



MONTSERRAT

CHAPTER 11.17

MUTUAL FUNDS ACT and Subsidiary Legislation

Revised Edition

showing the law as at 1 January 2019

This is a revised edition of the law, prepared by the Law Revision Commissioner under the authority of the Revised Edition of the Laws Act.

This edition contains a consolidation of the following laws—

MUTUAL FUNDS ACT

Act 9 of 2007 .. in force 30 November 2007

Amended by Act 9 of 2011 .. in force 27 September 2011 (S.R.O. 40/2011)

MUTUAL FUNDS REGULATIONS – Section 39

S.R.O. 1/2008 .. in force 17 January 2008

MUTUAL FUNDS (FEES) REGULATIONS – Section 39

S.R.O. 2/2008 .. in force 17 January 2008

Page

3

29

31



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Page

3

29

31

CHAPTER 11.17

MUTUAL FUNDS ACT

ARRANGEMENT OF SECTIONS

PART 1

PRELIMINARY

SECTION

1. Short title
2. Interpretation

PART 2

ADMINISTRATION

3. Duties of the Commission
4. Registers of the Commission
5. Mutual Funds Advisory Committee

PART 3

PUBLIC FUNDS

6. Registration
7. Application for registration
8. Power to grant registration
9. Registration procedure
10. Accounting records and financial statements
11. Duty to publish and file a prospectus
12. Certificate of compliance
13. Investors' rights
14. Limitation of action and amount recoverable

PART 4

PRIVATE AND PROFESSIONAL FUNDS

15. Recognition
16. Application for recognition
17. Power to grant recognition
18. Recognition procedure
19. Accounting records and financial statements
20. Duty to publish and file an offering memorandum

PART 5

MANAGERS AND ADMINISTRATORS

21. Licensing
22. Application for a licence
23. Power to grant licences
24. Licensing procedure
25. Code of Practice

PART 6

GENERAL

26. Notices to accompany applications
27. Form and conditions of certificates and licences
28. Annual fees
29. Cancellation of certificates or licences
30. Cancellation procedure
31. Appeal of cancellations
32. Appeal procedure
33. Grant or cancellation to be published
34. Power to grant exemptions
35. Restriction on the use of the words “**fund**”, “**mutual fund**” or “**unit trust**”
36. Access to information and records
37. Exemption from certain enactments
38. Offences and penalties
39. Regulations
40. Transitional

CHAPTER 11.17

MUTUAL FUNDS ACT

(Acts 9 of 2007 and 9 of 2011)

AN ACT TO PROVIDE FOR THE REGULATION, AUTHORISATION AND CONTROL OF MUTUAL FUNDS AND THEIR MANAGERS AND ADMINISTRATORS CARRYING ON BUSINESS IN OR FROM WITHIN MONTSERRAT AND FOR RELATED MATTERS.

Commencement

[30 November 2007]

PART 1

PRELIMINARY

Short title

1. This Act may be cited as the Mutual Funds Act.

Interpretation

2. (1) In this Act, unless the context otherwise requires—

“**administrator**” means a person who—

- (a) for valuable consideration provides a mutual fund with administrative services alone or together with accounting services;
- (b) is entitled to provide to mutual funds (by whatever name called), such services and facilities as provided in paragraph (a) under the laws of a recognized country or jurisdiction;

“**auditor**” means a person who is entitled to practice as public accountant and to perform audits under the laws of Montserrat or of a recognised country or jurisdiction;

“**Commission**” means the Montserrat Financial Services Commission established under the Financial Services Commission Act;

“**company**” means a body corporate, wherever incorporated or constituted;

“**constitutional documents**” means—

- (a) in the case of a company, the memorandum and articles of association, the articles of incorporation or other instrument of incorporation;
- (b) in the case of a partnership, the agreement or other instrument by which the partnership is formed and governed;

(c) in the case of a unit trust, the trust deed or other instrument by which the unit trust is organised or governed;

“Court” means the High Court;

“custodian” means the person who holds the property of the mutual fund in safe keeping;

“dollar” or **“\$”** means the currency of the United States of America;

“existing entity” means—

- (a) a public fund,
- (b) a private or professional fund, or
- (c) a manager or administrator,

which was carrying on its business in or from within Montserrat immediately before the coming into force of this Act;

“family trust fund” means a fund which has been established for the benefit of one or more members of the same family including father, sons, daughters, including adopted and stepchildren and the immediate blood relations and respective spouses of any of these persons;

“financial year” means the period at the end of which the balance of accounts is determined for the purpose of preparing the financial statements of a mutual fund, which period may be up to eighteen months in the case of the first or last such period, or in the case of a change in the date from which the period is determined, but which shall not otherwise exceed twelve months in duration;

“Governor” means the Governor acting on the advice of Cabinet; (*Amended by Act 9 of 2011*)

“investor” means a person who owns or holds shares (as herein defined) issued by a mutual fund;

“manager” means a person, not being an officer or an employee of a person licensed under this Act or a mutual fund which has delegated management functions to a person licensed under this Act who—

- (a) for valuable consideration provides a mutual fund with management services alone or together with investment advice or administrative services; or
- (b) is entitled to provide mutual funds (by whatever name called), with such services and facilities as provided in paragraph (a) under the laws of a recognized country or jurisdiction;

“material change” means a change in management, a change in 20% of the underlying assets or a change in more than 15% of the ownership of the fund as held by one person or related group of persons;

“mutual fund” or **“fund”** means a company incorporated, a partnership formed, a unit trust organised or other similar body formed or organised under the laws of Montserrat or of any other country or jurisdiction which—

- (a) collects and pools investor funds for the purpose of collective investment; and
- (b) issues shares (as herein defined) that entitle the holder to receive on demand or within a specified period after demand an amount computed by reference to the value of a proportionate interest in the whole or in a part of the net assets of the company, the partnership, the unit trust or other similar body, as the case may be—

and includes—

- (i) an umbrella fund whose shares are split into a number of different class funds or sub-funds; and
- (ii) a fund which has a single investor which is a mutual fund not registered or recognised under this Act,

but excludes any arrangements which are designed by regulations as not being mutual funds;

“offering memorandum” means a short form prospectus;

“officer” includes—

- (a) a director, alternate director, the president, a vice-president, and any other person designated as an officer of a company by by-law, by resolution of the directors or by any other instrument;
- (b) a general partner of a partnership; and
- (c) a trustee of a unit trust;

“partnership” means a contractual relationship which subsists between persons carrying on a business in common with a view of profit and includes a partnership formed under the laws of Montserrat or the laws of such other country or jurisdiction thereof notwithstanding any statutory definition to the contrary;

“person” includes an individual natural person, a mutual fund, any company, partnership, unit trust or trustee or other legal entity recognised as such under the laws of another country or jurisdiction;

“private fund” means a mutual fund—

- (a) the constitutional documents of which specify that it will have no more than fifty investors;
- (b) the constitutional documents of which specify that an invitation to subscribe for or purchase shares issued by the

mutual fund is not to be made to the public. An invitation is not made to the public if it is made—

- (i) to specified persons (however described but not numbering more than 300 persons in total) and is not calculated to result in shares becoming available to other persons; or
- (ii) by reason of a private or business connection between the person making the invitation and the investor; or
- (c) which is designated as a private fund by regulations;

“professional fund” means a mutual fund—

- (a) the shares of which are made available only to professional investors and the initial investment in which, in respect of each of the persons constituting a majority of such investors, is not less than \$100,000 or its equivalent in any other currency, but this minimum initial investment limit shall not apply in respect of an investment made by the manager, administrator, promoter or underwriter of the professional fund;
- (b) (i) that was carrying on business or engaged in an activity as a mutual fund on the date of the coming into force of the Act; and
- (ii) the initial investments in respect of the majority of each of the investors in the mutual fund have been not less than \$100,000 or its equivalent in any other currency; and
- (iii) the shares of the mutual fund are, after the date of the coming into force of the Act, made available only to professional investors;
- (c) or, which is designated as a professional fund by regulations;

“professional investor” means a person—

- (a) whose ordinary business involves dealing in investments; or
- (b) who has signed a declaration that he, whether individually or jointly with his spouse, has net worth in excess of \$500,000 or its equivalent in any other currency and that he consents to being treated as a professional investor;

“promoter” means a person acting alone or in conjunction with others directly or indirectly who takes the initiative in forming or organising a mutual fund, but does not include an underwriter who receives an underwriting commission without taking any part in the founding or organising of the mutual fund business;

“prospectus” means any document the purpose of which is to make an invitation to the public or any section thereof to subscribe for or purchase shares issued by a public fund;

“public fund” means a mutual fund which is not a private fund or a professional fund and whose shares are offered to the public at large;

“recognised Country or Jurisdiction” means any Country or Jurisdiction recognised by the Commission under subsection (3);

“security” includes—

- (a) any document, instrument or writing commonly known as a security within the investment industry;
- (b) any document constituting evidence of title to or interest in the capital, assets, property, profits, earnings or royalties of any person or company;
- (c) any document constituting evidence of an interest in an association of legatees or heirs;
- (d) any document constituting evidence of an option, subscription or other interest in or to a security as otherwise defined herein;
- (e) any bond, debenture, note or other evidence of indebtedness, share, stock, unit, unit certificate, participation certificate, certificate of share or interest, pre-organization certificate or subscription other than a contract of insurance issued by an insurance company licensed under the Insurance Act and an evidence of deposit issued by a bank licensed under the Banking Act, by a credit union or league to which the Co-operative Societies Act applies or by a Building Society registered under the Building Societies Act;
- (f) any agreement under which the interest of the purchaser is valued for purposes of conversion or surrender by reference to the value of a proportionate interest in a specified portfolio of assets, except a contract issued by an insurance company licensed under the Insurance Act which provides for payment at maturity of an amount not less than $\frac{3}{4}$ of the premiums paid by the purchaser for a benefit payable at maturity;
- (g) any agreement providing that money received will be repaid or treated as a subscription to shares, stock, units or interests at the option of the recipient or of any person or company;
- (h) any certificate of share or interest in a trust, estate or association;
- (i) any profit-sharing agreement or certificate;
- (j) any certificate of interest in an oil, natural gas or mining lease, claim or royalty voting trust certificate;
- (k) any oil or natural gas royalties or leases or fractional or other interest therein;
- (l) any collateral trust certificate;

- (m) any income or annuity contract not issued by an insurance company;
- (n) any investment contract;
- (o) any commodity futures contract or any commodity futures option that is not trade on a commodity futures exchange recognized by the Commission;
- (p) whether any of the foregoing relate to a licensed or recognised person;

“share” includes an interest in a mutual fund partnership and a unit in a mutual fund unit trust;

“underwriter” means a person or company who, as principal, agrees to purchase securities with a view to distribution or who, as agent, offers for sale or sells securities in connection with a distribution and includes a person or company who has a direct or indirect participation in any such distribution, but does not include—

- (a) a person or company whose interest in the transaction is limited to receiving the usual and customary distributor’s or seller’s commission payable by an underwriter or issuer;
- (b) a mutual fund that, under the laws of the jurisdiction to which it is subject, accepts its shares or units for surrender and resells them;
- (c) a company that, under the laws of the jurisdiction to which it is subject, purchases its shares and resells them;

“unit trust” means an arrangement creating a trust under the laws of Montserrat or of any other country or jurisdiction approved by the Commission, in which unit holders participating in the arrangement are the beneficiaries of the trust.

(2) In this Act—

- (a) every company incorporated and every partnership formed or trust organised under the laws of Montserrat for the purpose of carrying on business as a mutual fund, a manager or administrator shall, if carrying on business anywhere outside Montserrat, be deemed to be carrying on business from within Montserrat;
- (b) the expression **“carrying on business from within Montserrat”** includes carrying on business outside Montserrat from a place of business or a registered office within Montserrat;
- (c) a mutual fund which is not incorporated, formed or organised or carrying on its business in or from within Montserrat shall be deemed to be carrying on business in Montserrat if it makes an invitation to subscribe for or purchase shares to an individual natural person within Montserrat, except where

the purchase is a result of an approach made by the individual natural person in Montserrat without any invitation to subscribe for or purchase shares being made.

(3) The Commission may recognise any Country or Jurisdiction for the purposes of this Act and shall cause a notice of such recognition to be published in the *Gazette*.

PART 2

ADMINISTRATION

Duties of the Commission

3. (1) The Commission has—

- (a) the duty to regulate mutual funds and managers and administrators in accordance with this Act;
- (b) the powers conferred upon it by this Act and the Financial Services Commission Act to discharge those duties;
- (c) the authority to prescribe such forms as it considers necessary for the purposes of this Act or the regulations; and
- (d) the authority to issue directions and policy guidelines for the purposes of this Act or the regulations.

(2) The Commission may, upon request by any person to whom this Act applies and the payment of the fee set out in of such amount as may be prescribed by regulations, issue to such person a certificate of good standing in such form as the Commission thinks fit.

(3) The Commission or any of its employees shall not knowingly have any financial interest in any person registered, recognised or licensed under this Act.

Registers of the Commission

4. (1) The Commission shall keep separate registers for all—

- (a) registered public funds;
- (b) recognised private funds;
- (c) recognised professional funds; and
- (d) licensed managers and administrators.

(2) The registers required under subsection (1) shall show—

- (a) the information required under section 26(1) with respect to each registered public fund, recognised private fund and licensed manager or administrator;
- (b) the date of registration, recognition or licence, as the case may be; and

(c) the status of such registration, recognition or licence if suspended or cancelled and the date thereof.

(3) Registers kept by the Commission shall be in such form as it may determine and shall be open to public inspection during ordinary office hours on payment of an inspection fee as may be prescribed by regulations.

Mutual Funds Advisory Committee

5. (1) There shall be a Committee called the Mutual Funds Advisory Committee which shall consist of not more than 5 persons appointed by the Commission from among members of the private sector who are known to it to have adequate knowledge of and experience in the mutual funds industry.

(2) The Commission shall designate one of the persons appointed under subsection (1) as Chairman of the Mutual Funds Advisory Committee.

(3) The Commissioner, or his delegate, shall be an ex-officio member of the Committee.

(4) The Mutual Funds Advisory Committee shall—

(a) advise the Commission on any matter referred to it by the Commission relating to the mutual funds industry;

(b) on its own motion, report and make recommendations to the Commission on any matter relating to mutual funds as it sees fit; and

(c) have power to establish subject to the approval of the Commission—

(i) its own working rules and procedures; and

(ii) as many sub-committees as it thinks necessary.

(5) The existence of a Mutual Funds Advisory Committee does not absolve the commission from requesting or receiving advice or recommendations from any other interested parties or advisers when and if required.

PART 3

PUBLIC FUNDS

Registration

6. No public fund shall carry on its business or manage or administer its affairs in or from within Montserrat unless it is registered under this Act.

Application for registration

7. (1) A public fund may apply to the Commission for registration to carry on its business or manage or administer its affairs in or from within Montserrat.

(2) An application for registration under subsection (1) shall be—

- (a) made in the form and contain the information as set out in the regulations; and
- (b) accompanied by—
 - (i) a statement setting out the nature and scope of the business to be carried on by the applicant in or from within Montserrat, including the name of any other country or jurisdiction where the applicant is carrying on or intends to carry on business;
 - (ii) the application fee or such other amount as may be prescribed by regulations;
 - (iii) certified copies of the instruments by which the applicant is constituted or such other proof as may be satisfactory to the Commission that the applicant is lawfully constituted under the laws of Montserrat or of any other country or jurisdiction;
 - (iv) the notices required under section 26(1); and
 - (v) such other documents or information as the Commission may reasonably require for the purpose of determining the application.

Power to grant registration

8. (1) The Commission may, in its discretion, grant or refuse to grant registration under section 7.

(2) Notwithstanding subsection (1), the Commission shall refuse to grant registration if—

- (a) the public fund or proposed public fund, as the case may be, has a name which is undesirable or misleading;
- (b) the public fund or proposed public fund, as the case may be, does not have a custodian who is independent of the manager or administrator or who is not acceptable to the Commission; or
- (c) it determines that it is not in the public interest that such registration should be granted.

(3) Where the Commission, in the exercise of its powers under subsection (2)(c), makes a decision refusing to grant registration it shall not be bound to assign any reasons for its decision and which decision shall not be subject to appeal or review.

Registration procedure

9. (1) Where the Commission grants registration pursuant to section 7, it shall—

- (a) register the public fund in the register maintained by it for the purpose under section 4; and
- (b) issue a certificate to the registered public fund showing the date of registration.

(2) The Commission shall not register the proposed public fund if the public fund has not complied with any of the requirements of section 7(2).

Accounting records and financial statements

10. (1) Every registered public fund shall—

- (a) maintain adequate accounting records and prepare financial statements in respect of each financial year in accordance with generally accepted accounting principles;
- (b) prepare financial statements in respect of each semi-annual financial year in accordance with generally accepted accounting principles; and
- (c) keep such accounting records and financial statements available for examination by the Commission or any person authorised by the Commission at—
 - (i) the public fund's place of business or registered office in Montserrat; and
 - (ii) such other place as the public fund's officers may see fit, provided that, copies of such records and statements or such other documents or information as the Commission may consider necessary are made available to the Commission.

(2) The financial statements required under subsection (1)(a) shall be—

- (a) audited by an auditor acceptable to the Commission in accordance with generally accepted auditing standards;
- (b) accompanied by the report of the auditor thereon which shall include a statement of the accounting principles under which statements have been prepared and a statement of the auditing standards which have been applied in the audit of such statements; and
- (c) provided to all investors of the registered public fund within ninety days of the financial year end.

(3) The financial statements required under subsection (1)(b) shall be provided to all investors of the registered public fund within sixty days of the date of the semi-annual financial year.

Duty to publish and file a prospectus

11. (1) No registered public fund shall in or outside Montserrat make an invitation to the public or any section thereof to purchase its shares unless prior to such invitation it publishes in writing a prospectus signed by or on behalf of the board of directors (or by whatever name called) or in the case of a partnership, every partner other than a limited partner, and in the case of a unit trust, every trustee, and the Commission, in writing, has approved the prospectus.

(2) Every prospectus published pursuant to subsection (1) shall—

- (a) provide full and accurate disclosure of all such information as investors would reasonably require and expect to find for the purpose of making an informed investment decision;
- (b) contain a summary statement of investors' rights as provided in section 13;
- (c) include or be accompanied by the financial statements for the last financial year of the fund and the auditor's report thereon if the fund has completed a financial year in operation;
- (d) a statement as to the risk involved; and
- (e) such other information as the Commission deems is required.

(3) If all or any part of the prospectus is not in the English language, an English translation of the prospectus or that part of the prospectus, verified in a manner satisfactory to the Commission must be filed along with the prospectus.

(4) Where in a prospectus any of the disclosures required under subsection (2)(a) ceases to be accurate in a material particular, the registered public fund shall within fourteen days of the change occurring publish an amendment thereto, approved by the Commission, giving accurate disclosures and provide a copy thereof to each of its investors.

(5) Approval of a prospectus or amendment to a prospectus by the Commission does not in any way mean that the Commission has approved the investment described therein and there is no liability or obligation upon the Commission for any failure whatsoever of the investment covered in the prospectus by the giving of approval to the prospectus or the amendment.

Certificate of compliance

12. (1) Every registered public fund, wherever it is constituted, which carries on business outside Montserrat shall every year, within three months of the end of its financial year, file with the Commission a certificate of compliance from the competent authority that is responsible for the

regulation and supervision of the conduct of its business in that other country or jurisdiction.

(2) A registered public fund to which subsection (1) applies is deemed to have complied with that subsection if it is proven to the satisfaction of the Commission that the required certificate could not be obtained for reasons beyond the control of the fund.

(3) Where a registered public fund which carries on business outside Montserrat carries on business in more than one country or jurisdiction other than Montserrat, the certificate required to be filed under subsection (1) shall be from the competent authority in the country or jurisdiction in or from which it carries on its principal business and such other of the jurisdictions as the Commission may require.

Investors' rights

13. (1) If a registered public fund publishes a prospectus or any amendment thereto that contains misrepresentation relating to any of the disclosures required under section 11(2)(a), a person who purchased any shares pursuant to such prospectus or amendment thereto is deemed to have relied upon the misrepresentation and shall have the rights provided in subsection (2).

(2) A person referred to in subsection (1) may elect to exercise a right of action—

- (a) for the rescission of the purchase; or
- (b) for damages, against the fund.

(3) For the purposes of this section, “**misrepresentation**” means—

- (a) an untrue or misleading statement of any of the disclosures required under sections 11(2)(a) and 11(4); or
- (b) an omission to disclose any of such disclosures.

(4) No person is liable under this section if he proves that the purchaser purchased the shares offered by the prospectus or amendment thereto with knowledge of the misrepresentation.

(5) The right of action for rescission or for damages conferred by subsection (2) is in addition to and without derogation from any other right the plaintiff may have at law.

Limitation of action and amount recoverable

14. (1) Notwithstanding any provision of law to the contrary, any action pursuant to section 13(2) may not be commenced after—

- (a) 180 days from the day that the plaintiff first had knowledge of the misrepresentation; or
- (b) one year from the date of the purchase transaction that gave rise to the cause of action,

whichever is earlier.

(2) In any action under section 13(2), the amount recoverable shall not exceed the amount for which the shares were purchased or subscribed, including any fees or other charges paid by the plaintiff.

PART 4

PRIVATE AND PROFESSIONAL FUNDS

Recognition

15. (1) No private fund and subject to subsection (2), no professional fund, shall carry on its business or manage or administer its affairs in or from within Montserrat unless it is recognised under this Act.

(2) A professional fund may carry on its business or manage or administer its affairs in or from within Montserrat for a period of up to seven days without being recognised under this Act.

(3) Notwithstanding subsection (1), a private or professional fund which is a fund maintained by a group of family trusts, (which trusts are for members of the same family) for the sole purpose of facilitating investment and without any solicitation being made for the sale of a right to participate in such fund shall be exempt from recognition under this Act.

Application for recognition

16. (1) A private or professional fund that is constituted under the laws of Montserrat may be recognised under this Act if it provides—

- (a) proof satisfactory to the Commission that it—
 - (i) is a private or professional fund within the meaning of this Act; and
 - (ii) is lawfully constituted under the laws of Montserrat; and
- (b) the notices required under section 26(1).

(2) A private or professional fund that is constituted under the laws of a country or jurisdiction other than Montserrat may apply for recognition under this Act by sending to the Commission a letter setting out the nature and scope of its business to be carried on from or within Montserrat which shall be accompanied by—

- (a) the application fee set out in the regulations or such other amount as may be prescribed by regulations;
- (b) the notices required under section 26(1); and
- (c) proof satisfactory to the Commission that the applicant is—
 - (i) a private or professional fund within the meaning of this Act; and
 - (ii) lawfully constituted under the laws of another country or jurisdiction.

(3) In the case of a professional fund, the matters required by sections (1) and (2) shall be provided within fourteen days of the commencement of its business.

Power to grant recognition

17. (1) The Commission may, in its discretion, grant or refuse to grant recognition under section 16(1) or (2).

(2) Where the Commission, in the exercise of its powers under section 16(2), makes a decision refusing to grant registration it shall not be bound to assign any reasons for its decision and which decision shall not be subject to appeal or review.

(3) The Commission shall not refuse to grant recognition under section 16(1) unless—

- (a) the applicant fails to comply with the requirements of that subsection; or
- (b) it determines that it is not in the interests of investors or in the public interest that recognition should be granted.

(4) Where the Commission refuses to grant recognition on the ground set out in subsection (3)(a), it shall give the applicant notice in writing of its decision.

(5) Where the Commission, in the exercise of its powers under subsection (3)(b), makes a decision refusing to grant registration it shall not be bound to assign any reasons for its decision and which decision shall not be subject to appeal or review.

Recognition procedure

18. Where the Commission grants recognition to a private or professional fund, it shall—

- (a) enter the particulars relating to the private or professional fund in the relevant register maintained by it for the purpose under section 4; and
- (b) issue a certificate of recognition to the private or professional fund showing the date of recognition.

Accounting records and financial statements

19. (1) Every professional fund shall—

- (a) maintain adequate accounting records and prepare financial statements in respect of each financial year in accordance with generally accepted accounting principles;
- (b) keep such accounting records and financial statements available for examination by the Commission or any person authorised by the Commission at—

- (i) the professional fund's place of business or registered office in Montserrat; and
 - (ii) such other place as the professional fund's officers may see fit, provided that, copies of such records and statements or such other documents or information as the Commission may consider necessary are made available to the Commission.
- (2) The financial statements required under subsection (1)(a) shall be—
- (a) audited by an auditor acceptable to the Commission in accordance with generally accepted auditing standards;
 - (b) accompanied by the report of the auditor thereon which shall include a statement of the accounting principles under which statements have been prepared and a statement of the auditing standards which have been applied in the audit of such statements; and
 - (c) provided to all investors of the professional fund within ninety days of the financial year end.

Duty to publish and file an offering memorandum

20. (1) No registered professional fund shall in or outside Montserrat make an invitation to the public or any section thereof to purchase its shares unless prior to such invitation it publishes in writing an offering memorandum signed by or on behalf of the board of directors (or by whatever name called) or in the case of a partnership, every partner other than a limited partner, and in the case of a unit trust, every trustee and such offering memorandum must be filed with the Commission.

- (2) Every offering memorandum published pursuant to subsection (1) shall—
- (a) provide an accurate summary of the activity or proposed activity of the fund, the persons involved in directing and managing the fund and whether the fund can borrow money and the amount of money in relation to the total assets of the fund;
 - (b) contain a short statement of investors' rights as provided in section 13;
 - (c) include or be accompanied by a summary of the financial statements for the last financial year of the fund and the auditor's report thereon if the fund has completed a financial year in operation;
 - (d) a short statement as to the risk involved.

(3) If all or any part of the offering memorandum is not in the English language, an English translation of the offering memorandum or

that part of the offering memorandum, verified in a manner satisfactory to the Commission must be filed along with the offering memorandum.

(4) Where in an offering memorandum any of the disclosures required under subsection (2)(a) ceases to be accurate in a material particular, the professional fund shall within fourteen days of the change occurring publish an amendment thereto, and filing same with the Commission, giving accurate disclosures and provide a copy thereof to each of its investors.

(5) An offering memorandum and any amendments thereto filed with the Commission will not be marked for receipt or approval purposes but are filed with the Commission for information purposes only although they may be used by the Commission for such regulatory purposes as they may deem fit.

PART 5

MANAGERS AND ADMINISTRATORS

Licensing

21. (1) No person shall carry on or hold himself out as carrying on business in or from within Montserrat as a manager or administrator of a mutual fund unless that person is licensed for the purpose under this Act.

(2) Subsection (1) does not apply to a person who—

- (a) is not ordinarily resident or domiciled in Montserrat;
- (b) is a manager or administrator of mutual funds (by whatever name called) formed or organised under the laws of a recognised country or jurisdiction; and
- (c) has received written permission from the Commission to carry on business as manager or administrator of mutual funds in or from within Montserrat.

(3) The Commission may exempt a person from the provisions of subsection (1) if, upon application made to it accompanied by the prescribed application fee, the Commission is satisfied that the applicant will not be managing or administering more than one specified mutual fund, whether registered or recognized in Montserrat or another jurisdiction, as evidenced by a written undertaking.

(4) The Commission may otherwise exempt a person from the provisions of subsection (1) in accordance with the provisions of section 34.

Application for a licence

22. (1) A person who wishes to do so may make an application for a licence under subsection (1) to the Commission to carry on business in or from within Montserrat as—

- (a) manager;
 - (b) administrator; or
 - (c) both manager and administrator of mutual funds.
- (2) An application shall be accompanied by—
- (a) the application fee or such other amount as may be prescribed by regulations;
 - (b) a statement of the financial and human resources and administrative facilities available to the applicant for the competent and efficient conduct of its business; and
 - (c) such other documents or information as the Commission may reasonably require for the purpose of considering the application.

Power to grant licences

23. (1) The Commission may, in its discretion, grant or refuse to grant a licence to any applicant.

(2) The Commission shall not grant a licence unless it is satisfied that the applicant—

- (a) is a fit and proper person to be engaged in the business proposed;
- (b) has or has available to him adequate knowledge, expertise, resources and facilities necessary for the nature and scope of the business proposed; and
- (c) has appointed an auditor satisfying such conditions as may be prescribed by the Commission.

(3) An applicant which provides services to one private mutual fund or one professional mutual fund and whose business is only to appoint other service providers or to receive fees or both, is exempted from the requirement to appoint an auditor under subsection (2)(c).

(4) Notwithstanding subsections (1) and (2), the Commission shall refuse to grant a licence if it determines that it is not in the public interest that a licence should be granted.

(5) Where the Commission, in the exercise of its powers under subsection (4), makes a decision refusing to grant registration it shall not be bound to assign any reasons for its decision and which decision shall not be subject to appeal or review.

Licensing procedure

24. Where the Commission grants a licence to an applicant, it shall—

- (a) enter the particulars of the applicant in the register maintained by it for the purpose under section 4; and

- (b) issue a licence to the applicant showing the date on which the licence is granted.

Code of Practice

25. (1) The Commission may prescribe a Code of Practice directing the holder of a licence under section 23 to comply with the requirements of the Code which may include matters relating to but not limited to—

- (a) conduct of business;
- (b) financial resources;
- (c) the giving of notice of specified events;
- (d) advertising;
- (e) clients' money and custody of investments; and
- (f) accounting records and audit requirements.

(2) A Code of Practice prescribed under subsection (1) may provide for such enforcement mechanisms as the Commission may consider necessary to ensure compliance with the provisions of the Code and this Act.

PART 6

GENERAL

Notices to accompany applications

26. (1) In addition to any other requirement under this Act, every application for registration, recognition or a licence made under this Act shall be accompanied by a notice of—

- (a) the address of the applicant's place of business and its address for service in Montserrat;
- (b) the name and address of a person resident in Montserrat who is authorised to represent the applicant and to accept service on its behalf; and
- (c) the address of any place or places of business that the applicant may have outside Montserrat.

(2) If any information contained in any of the notices required to accompany the application pursuant to subsection (1) is changed at any time thereafter, the applicant, upon being a registered public fund, a recognised private or professional fund or a licensed manager or administrator, as the case may be, shall give in writing to the Commission particulars of the change within fourteen days after the change is made.

Form and conditions of certificates and licences

27. (1) A certificate of registration or recognition or a licence may be granted subject to terms, conditions, restrictions or limitations as the Commission sees fit to specify therein.

(2) The terms, conditions, restrictions or limitations imposed by the Commission under subsection (1) may be amended, removed or added to as the Commission may deem necessary.

(3) A certificate of registration or recognition or a licence shall—

- (a) be in such form as may be directed by the Commission;
- (b) be admitted in all courts as *prima facie* evidence of the facts stated therein; and
- (c) remain in force until it is cancelled.

Annual fees

28. (1) Where—

- (a) a public fund is granted registration;
- (b) a private or professional fund is granted recognition; or
- (c) a person is granted a licence,

there shall be payable for the year, in which such registration, recognition or licence is granted, the fees as may be prescribed by regulations.

(2) On or before 15 January every year following the year in which registration, recognition or a licence is granted there shall be payable the annual fee and any penalties for late payment of such fee as may be prescribed by regulations.

(3) In addition to any other remedy herein, an unpaid annual fee may be sued for by the Commission by action as a civil debt to be recoverable summarily and the Commission may require, and the court may order, the payment of a further penalty in an amount equal to the amount of the fee plus any late penalty as prescribed.

Cancellation of certificates or licences

29. With respect to a registered public fund or a recognised private or professional fund, or a licensed manager or administrator, the Commission, may, subject to sections 30 and 31, cancel a certificate or a licence, as the case may be—

- (a) at the request of the holder thereof; or
- (b) where the holder thereof—
 - (i) has ceased to carry on business in or from within Montserrat;

- (ii) has contravened any provision of this Act, the regulations or the Code of Practice prescribed under section 25, or any term, condition, restriction or limitation attached to the holder's certificate or licence, as the case may be;
- (iii) has been convicted of an offence under section 38(1) of this Act or of a serious criminal offence in any country or jurisdiction;
- (iv) has knowingly and wilfully supplied false, misleading or inaccurate information or failed to disclose information required for the purposes of any provision of this Act or the regulations;
- (v) is carrying on business in a manner detrimental to the interests of mutual funds investors or to the public interest; or
- (vi) is declared bankrupt or is being wound-up or otherwise dissolved.

Cancellation procedure

30. (1) Before cancelling a certificate or a licence under paragraph (b) of section 29, the Commission shall—

- (a) give the holder thereof notice in writing of the grounds on which it intends to do so;
- (b) afford the holder an opportunity to make written representations to it within a period of fifteen days after receipt of the notice; and
- (c) take any such representations into consideration.

(2) Where in the exercise of its powers under section 29(b) the Commission decides to cancel a certificate or licence, it shall give notice in writing to the holder thereof of such cancellation and the reasons therefor.

Appeal of cancellations

31. The holder of a certificate or a licence aggrieved by the decision cancelling such certificate or licence may appeal such decision in accordance with section 32.

Appeal procedure

32. An appeal lies to the High Court from a decision of the Commission to suspend or revoke a licence and unless the Court otherwise orders, an appeal does not operate to suspend the decision of the Commission during the appeal process.

Grant or cancellation to be published

33. The Commission may publish in the *Gazette* notice of every grant or cancellation of a certificate or a licence under this Act.

Power to grant exemptions

34. (1) Where the Commission is satisfied that to do so, would not be prejudicial to the public interest, it may direct that all or any of the provisions of this Act or the regulations shall—

- (a) not apply; or
 - (b) apply subject to such modifications as it may specify in the direction, to any person or any class of persons.
- (2) A direction under this section may be—
- (a) subject to any conditions as the Commission may see fit to specify therein; and
 - (b) revoked at any time at the discretion of the Commission.

Restriction on the use of the words “fund”, “mutual fund” or “unit trust”

35. Except with the written consent of the Commission, no person shall—

- (a) use or continue to use the words “**fund**”, “**mutual fund**” or “**unit trust**” either in English or in any other language, in the name, description or title under which that person is carrying on business in or from within Montserrat; and
- (b) make or continue to make any representation in any advertisement, billhead, circular, letter, letterhead, notice, paper or in any other manner that that person is carrying on business as a fund or mutual fund.

Access to information and records

36. For the purpose of discharging its duties under this Act and the regulations and subject to the provisions of the Financial Services Commission Act, the Commission or any person acting under its authority may, at all reasonable times, in writing or in person, direct any person to whom this Act applies to—

- (a) furnish information; or
 - (b) provide access to any records, books, or other documents,
- relating to the business of that person being carried on under this Act which, are reasonably necessary to enable the Commission or any person acting under its authority to ascertain compliance with the provisions of this Act or the regulations or of regulations made under section 183 of the

Proceeds of Crime Act¹ or of such Acts, Regulations, Guidelines Codes relating to anti-money laundering or the financing of terrorism as may be prescribed.

Exemption from certain enactments

37. (1) No company which is licensed under this Act is—

- (a) required to be licensed under the Trades Licence Act;
- (b) subject to the provisions of the Stamp Act.

(2) Notwithstanding any statutory provision or rule of law to the contrary—

- (a) a public fund that is registered or a private or professional fund that is recognised under this Act; and
- (b) an investor in any such registered public fund or recognised private fund or professional fund who is not ordinarily resident or domiciled in Montserrat,

is in all respects exempt from any and all stamp duty, income tax and any other levy and tax and charge that may be imposed by the Government of Montserrat other than as set out herein.

Offences and penalties

38. (1) A person who—

- (a) wilfully makes a misrepresentation in any document required to be filed, furnished or delivered under this Act or the regulations, or in any prospectus issued in respect of a private or professional mutual fund;
- (b) wilfully makes any statement or gives any information required for the purposes of this Act or the regulations that he knows to be false or misleading;
- (c) knowingly fails to disclose any fact or information required to be disclosed for the purposes of this Act or the regulations; or
- (d) being in charge of or having possession of or control over any information, records, books or other documents referred to in section 36, refuses or wilfully neglects to comply with any lawful direction given under that section,

commits an offence under this Act and is liable on summary conviction to a fine of not less than \$10,000 and not more than \$25,000 or to imprisonment for a period of twelve months.

(2) Any person who, without reasonable cause, contravenes a provision of this Act or the regulations for which no penalty is provided

¹ This section has been corrected to reflect the renumbering of the Proceeds of Crime Act.

commits an offence against this Act or the regulations, as the case may be and is liable on summary conviction—

- (a) in the case of a body corporate or unincorporated, or a trust, a fine of not more than \$50,000; and
- (b) in the case of an individual natural person, to a fine of not more than \$5,000 or to imprisonment for a period of one month or to both such fine and imprisonment.

(3) A prosecution for an offence under this Act may be commenced within five years from the date of the commission of the offence but not thereafter.

Regulations

39. The Governor may, on the advice of the Commission, make regulations—

- (a) prescribing fees payable under this Act;
- (b) designating arrangements which are not mutual funds;
- (c) designating mutual funds or a class or classes thereof as private or professional funds;
- (d) designating a class or sub-classes of a public fund;
- (e) authorising the Commission to require that any document, statement, report, certificate, release, agreement, or other information that are reasonably necessary to enable the Commission to ascertain compliance with this Act be filed with, furnished or delivered to it;
- (f) defining, for the purposes of this Act, terms or expressions used in this Act that are not defined in this Act;
- (g) prescribing any matter required to be or which may be prescribed under this Act;
- (h) relating to—
 - (i) the constitution, powers and duties of the manager, administrator and custodian;
 - (ii) the issue and redemption of shares;
 - (iii) the appointment, removal and powers and duties of auditors;
 - (iv) the restriction or regulation of investment and borrowing powers;
 - (v) the preparation of periodical reports;
 - (vi) the rights of investors; and
 - (vii) the contents of constitutional documents, in respect of a registered public fund or a sub-class of such fund;

- (i) relating to the matters which should be contained in a prospectus of a registered public fund or a sub-class of such fund; and
- (j) generally for the better administration of this Act and for carrying the intent and purpose of its provisions into effect.

Transitional

40. (1) Any manager or administrator who, on the date of the coming into force of this Act, is carrying on any business or engaged in any activity in relation to which he is required to be licensed under this Act shall, within three months of the coming into force of this Act, comply with the provisions of this Act.

(2) Any mutual fund which, on the date of the coming into force of this Act, is carrying on its business or managing or administering its affairs in or from within Montserrat shall, within four months from that date, comply with the provisions of this Act.

(3) Where a mutual fund fails to comply with subsection (2), it shall pay a non-compliance penalty of \$10,000 for each month or part thereof during which it fails to comply with that subsection.

(4) If after the period of four months prescribed under subsection (2) a mutual fund fails to comply with the provisions of the Act, it commits an offence and may be proceeded against under section 38(2).

(5) Where a mutual fund is proceeded against under section 38(2), it shall, in addition to any penalty imposed on it, pay the non-compliance penalty to which it is liable under subsection (3).

MUTUAL FUNDS REGULATIONS – SECTION 39

(S.R.O. 1/2008)

Commencement

[17 January 2008]

Short title

1. These Regulations may be cited as the Mutual Funds Regulations.

Application for licence

2. (1) An application should contain all information that may be reviewed by the Commission under subsection (2) as well as any other information which the applicant considers should be disclosed to the Commission.

(2) In considering an application for registration or recognition of a fund, or for a licence under the Act, the Commission may review and investigate the—

- (a) validity of the documents submitted by the applicant;
- (b) financial condition and history of the applicant, including its owners and directors;
- (c) nature and reputation of the business of the applicant, including its owners and directors;
- (d) legal and management structure of the applicant;
- (e) experience of the person or persons who are to constitute its management;
- (f) adequacy of its financial structure;
- (g) business plan, which should include: the applicant's proposed fund description, marketing and operational plans, including policies and procedures to monitor and control major risk areas and three year financial projections covering investments, income and expenditure;
- (h) references supplied by the owners, directors and trustees of the applicant;
- (i) certificate of compliance of the supervisor in any jurisdiction where the fund may presently be registered or offered;
- (j) other documentation and information as the Commission deems necessary.

Fit and proper criteria

3. In conducting a test as to whether a person is a fit and proper person, the Commission shall have regard to the following minimum criteria—

- (a) the skills and experience in the relevant financial activity being applied for;
 - (b) that person's probity, competence and soundness of judgement for fulfilling the responsibilities of that position;
 - (c) the diligence with which that person is fulfilling or likely to fulfil the responsibilities of that position;
 - (d) whether the interests of depositors, or potential depositors of the licensee or settlors and beneficiaries and potential settlors and beneficiaries are, or likely to be, in any way threatened by that person holding that position;
 - (e) the previous conduct and activities in business or financial matters of that person;
 - (f) whether there is evidence that that person has committed an offence involving fraud or other dishonesty or violence;
 - (g) whether there is evidence that that person has contravened any provision under any enactment designed for protecting members of the public against financial loss due to dishonesty, incompetence or malpractice or from financial loss due to the conduct of a discharged or undischarged bankrupt;
 - (h) whether there is evidence that that person has been engaged in any business appearing to be deceitful or improper (whether lawful or not) or which otherwise reflects on that person's method of conducting business;
 - (i) whether there is evidence of an employment record, which leads to the belief that that person carried out an improper act in the handling of his employer's or client's business;
 - (j) whether there is evidence that that person has been associated with any other business practices or otherwise conducted himself in such a way as to cast doubt on his competence and soundness of judgement.
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MUTUAL FUNDS (FEES) REGULATIONS – SECTION 39

(S.R.O. 2/2008)

Commencement

[17 January 2008]

Short title

1. These Regulations may be cited as the Mutual Funds (Fees) Regulations.

Fees

2. The fees and penalties under the Act are prescribed as follows—

		US\$
(a)	the non-refundable fees payable for processing an application for—	
	(i) a public or professional fund	2,500
	(ii) a private fund	2,000
	(iii) a manager or administrator	1,000
(b)	the annual fees payable to carry on the business	
	(i) a public or professional fund	5,000
	(ii) a private fund	3,000
	(iii) a manager or administrator	2,500
(c)	the penalty for the late payment of an annual fee as a percentage of the annual fee	
	(i) less than eight days late	5%
	(ii) eight to thirty days	10%
	(iii) thirty-one to ninety days	25%
	(iv) ninety-one to one hundred and eighty (180) days	60%
	(v) after 180 days	100%
(d)	for filing amendments	250
(e)	copies of any document	15
(f)	certified true copies of document	30
(g)	Certificate of Good Standing	250