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STATUTORY INSTRUMENTS

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**1996 No. 2827**

**FINANCIAL SERVICES**

**The Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996**

*Made - - - - 11th November 1996*

*Coming into force - - 6th January 1997*

Whereas the Treasury are a government department designated<sup>(1)</sup> for the purposes of section 2(2) of the European Communities Act 1972<sup>(2)</sup> in relation to measures relating to open-ended collective investment schemes which have as their purpose investment in transferable securities, with the aim of spreading investment risk, of funds raised from the public;

And whereas a draft of these Regulations has been approved by a resolution of each House of Parliament pursuant to section 2(2) of, and paragraph 2(2) of Schedule 2 to, that Act;

Now therefore the Treasury in exercise of the powers conferred on them by section 2(2) of that Act and of all other powers enabling them in that behalf hereby make the following Regulations:—

**PART I**

**GENERAL**

**Citation, commencement and extent**

1.—(1) These Regulations may be cited as the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996.

(2) These Regulations shall come into force on 6th January 1997.

(3) Except for paragraph 7(b) of Schedule 1 to these Regulations which has effect in relation to certain collective investment schemes which have head offices in Northern Ireland, these Regulations shall have effect in relation to any investment company with variable capital which has its head office situated in Great Britain.

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(1) S.I. 1988/2240 designates the Secretary of State; the Treasury is designated in place of the Secretary of State by virtue of article 9(b) of the Transfer of Functions (Financial Services) Order 1992 (S.I. 1992/1315).

(2) 1972 c. 68. By virtue of the amendment of section 1(2) of the European Communities Act 1972 by section 1 of the European Economic Area Act 1993 (c. 51), regulations may be made under section 2(2) of the European Communities Act for the purpose of implementing rights, powers, liabilities, obligations and restrictions of the United Kingdom created or arising by or under the agreement on the European Economic Area signed at Oporto on 2nd May 1992 (Cm 2073) as adjusted by the Protocol signed at Brussels on 17th March 1993 (Cm 2183).

## Interpretation

- 2.—(1) In these Regulations, except where the context otherwise requires—
- “the 1985 Act” means the Companies Act 1985(3);
  - “the 1986 Act” means the Financial Services Act 1986(4);
  - “annual general meeting” has the meaning given in regulation 31(1) below;
  - “annual report” has the meaning given in regulation 60(1)(a) below;
  - “authorisation order” means an order made by SIB under regulation 9 below;
  - “bearer shares” has the meaning given in regulation 42 below;
  - “court”, in relation to any proceedings under these Regulations involving an investment company with variable capital the head office of which is situated in England and Wales, means the High Court and in relation to such a company the head office of which is situated in Scotland, means the Court of Session;
  - “depository”, in relation to an investment company with variable capital, has the meaning given in regulation 5(1) below;
  - “director”, in relation to an investment company with variable capital, includes a person occupying in relation to it the position of director (by whatever name called);
  - “investment company with variable capital” has the meaning given in regulation 3(2) below;
  - “larger denomination share” has the meaning given in regulation 39(5) below;
  - “officer”, in relation to an investment company with variable capital, includes a director or any secretary or manager;
  - “participating issuer” and “participating security” have the same meaning as in the Uncertificated Securities Regulations 1995(5);
  - “prospectus” has the meaning given in regulation 6(2) below;
  - “register of shareholders” means the register kept under paragraph 1(1) of Schedule 4 to these Regulations;
  - “scheme property”, in relation to an investment company with variable capital, means the property subject to the collective investment scheme constituted by the company;
  - “shadow director”, in relation to an investment company with variable capital, means a person in accordance with whose directions or instructions (not being advice given in a professional capacity) the directors of that company are accustomed to act;
  - “share certificate” has the meaning given in regulation 40(1) below;
  - “SIB” means the body known as the Securities and Investments Board(6);
  - “SIB regulations” means any regulations made by SIB under regulation 6(1) below;
  - “smaller denomination share” has the meaning given in regulation 39(5) below;
  - “transfer documents” has the meaning given in paragraph 5(3) of Schedule 5 to these Regulations;
  - “transferable securities” has the same meaning as in the UCITS Directive;

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(3) 1985 c. 6.

(4) 1986 c. 60; various functions of the Secretary of State under the Financial Services Act 1986 have been transferred to the Treasury by the Transfer of Functions (Financial Services) Order 1992 (S.I. 1992/1315).

(5) S.I. 1995/3272.

(6) Various functions under the Financial Services Act 1986 have been transferred to the Securities and Investments Board by the Financial Services Act 1986 (Delegation) Order 1987 (S.I. 1987/942), the Financial Services Act 1986 (Delegation) (No. 2) Order 1988 (S.I. 1988/738), the Companies Act 1989 (Commencement No. 3, Transitional Provisions and Transfer of Functions under the Financial Services Act 1986) Order 1990 (S.I. 1990/354), the Financial Services Act 1986 (Delegation) Order 1991 (S.I. 1991/200) and the Financial Services Act 1986 (Delegation) (No. 2) Order 1991 (S.I. 1991/1256).

“UCITS Directive” means the Council Directive co-ordinating the laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (No.85/611/EEC(7));

“umbrella company” means an investment company with variable capital whose instrument of incorporation provides for such pooling as is mentioned in subsection (3)(a) of section 75 of the 1986 Act (collective investment schemes: interpretation) in relation to separate parts of the scheme property and whose shareholders are entitled to exchange rights in one part for rights in another; and

“uncertificated unit of a security” has the same meaning as in the Uncertificated Securities Regulations 1995.

(2) In these Regulations any reference to a shareholder of an investment company with variable capital is a reference to—

- (a) the person who holds the share certificate, or other documentary evidence of title, mentioned in regulation 42 below; and
- (b) the person whose name is entered on the company’s register of shareholders in relation to any share or shares other than a bearer share.

(3) In these Regulations, any reference to a controller shall be construed in accordance with subsection (5) of section 207 of the 1986 Act (interpretation); and any reference to a manager shall be construed in accordance with subsection (6) of that section.

(4) In these Regulations, unless the contrary intention appears, expressions which are also used in the 1985 Act or the 1986 Act have the same meanings as in that Act.

## PART II

### FORMATION, SUPERVISION AND CONTROL

#### *General*

#### **Investment company with variable capital**

3.—(1) If SIB makes an authorisation order then, immediately upon the coming into effect of the order, a body shall be incorporated (notwithstanding that, at the point of its incorporation by virtue of this paragraph, the body will not have any shareholders or property).

(2) Any body incorporated by virtue of paragraph (1) above shall be known as an investment company with variable capital.

(3) The name of an investment company with variable capital shall be the name mentioned in the authorisation order made in respect of the company or, if it changes its name in accordance with these Regulations and SIB regulations, by its new name.

#### **Registration by registrar of companies**

4.—(1) As soon as is reasonably practicable after the coming into effect of an authorisation order in respect of an investment company with variable capital, SIB shall send a copy of the order to—

- (a) the registrar of companies for England and Wales, if the instrument of incorporation of the company states that the company’s head office is to be situated in England and Wales, or that it is to be situated in Wales; or

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(7) OJ No. L 375, 31.12.1985, p. 3—18, as amended by Council Directive 88/220/EEC (OJ No. L 100, 19.04.1988, p. 31—32).

- (b) the registrar of companies for Scotland, if the instrument of incorporation of the company states that the head office of the company is to be situated in Scotland.
- (2) The registrar shall, upon receipt of the copy of the authorisation order, forthwith register—
  - (a) the instrument of incorporation of the company; and
  - (b) the details in relation to the company, its directors and its depository which are contained in the other papers retained by him under regulation 13(3) below.
- (3) A company shall not carry on any business unless its instrument of incorporation has been registered under paragraph (2) above.
- (4) Schedule 1 to these Regulations (which makes provision with respect to the registration of, and the functions of the registrar of companies in relation to, investment companies with variable capital) shall have effect.
- (5) In this regulation any reference to the instrument of incorporation of a company is a reference to the instrument of incorporation which was supplied for the purposes of regulation 9(1)(a) below.

#### **Safekeeping of scheme property by depository**

- 5.—(1) Subject to paragraph (2) below, all the scheme property of an investment company with variable capital shall be entrusted for safekeeping to a person appointed for the purpose (“a depository”).
- (2) Nothing in paragraph (1) above—
  - (a) shall apply to any scheme property designated for the purposes of this regulation by SIB regulations;
  - (b) shall prevent a depository from—
    - (i) entrusting to a third party all or some of the assets in its safekeeping; or
    - (ii) in a case falling within paragraph (i) above, authorising the third party to entrust all or some of those assets to other specified persons.
- (3) Schedule 2 to these Regulations (which makes provision with respect to depositories of investment companies with variable capital) shall have effect.

#### **SIB regulations**

- 6.—(1) SIB’s powers to make regulations under section 81 (constitution and management) and section 85 (publication of scheme particulars) of the 1986 Act<sup>(8)</sup> in relation to authorised unit trust schemes shall be exercisable in relation to investment companies with variable capital—
  - (a) for like purposes; and
  - (b) subject to the same conditions.
- (2) In these Regulations any document complying with regulations made by SIB under paragraph (1) above for purposes of the like nature as the purposes for which power is conferred by section 85 of the 1986 Act shall be known as a prospectus.

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(8) Sections 81 and 85 conferred power to make regulations on the Secretary of State. Most of these powers have been transferred to the Securities and Investments Board by the Financial Services Act 1986 (Delegation) (No. 2) Order 1988 (S.I. 1988/738) and the Financial Services Act 1986 (Delegation) (No. 2) Order 1991 (S.I. 1991/1256). The regulations made by the Board which are in force (July 1996) are The Financial Services (Regulated Schemes) Regulations 1991 (Release 148). The remaining functions of the Secretary of State have been transferred to the Treasury by the Transfer of Functions (Financial Services) Order 1992 (S.I. 1992/1315).

## Authorisation

### Applications for authorisation

7.—(1) Any application for an authorisation order in respect of an investment company with variable capital—

- (a) shall be made in such manner as SIB may direct;
- (b) shall state with respect to each person named in the application as a director of the company the particulars set out in regulation 8 below;
- (c) shall state the corporate name and registered or principal office of the person named in the application as depositary of the company; and
- (d) shall contain or be accompanied by such other information as SIB may reasonably require for the purpose of determining the application.

(2) At any time after receiving an application and before determining it SIB may require the applicant to furnish additional information.

(3) The directions and requirements given or imposed under paragraphs (1) and (2) above may differ as between different applications.

(4) Any information to be furnished to SIB under this regulation shall, if SIB so requires, be in such form or verified in such manner as it may specify.

(5) A person commits an offence if—

- (a) for the purposes of or in connection with any application under this regulation; or
- (b) in purported compliance with any requirement imposed on him by or under this regulation;

he furnishes information which he knows to be false or misleading in a material particular or recklessly furnishes information which is false or misleading in a material particular.

(6) A person guilty of an offence under paragraph (5) above shall be liable—

- (a) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both;
- (b) on summary conviction, to imprisonment for a term not exceeding three months or to a fine not exceeding the statutory maximum or to both.

### Particulars of directors

8.—(1) Subject to paragraph (2) below, an application for an authorisation order shall contain the following particulars with respect to each person named as director of an investment company with variable capital, that is to say—

- (a) in the case of an individual, his present name, any former name, his usual residential address, his nationality, his business occupation (if any), particulars of any other directorships held by him or which have been held by him and his date of birth;
- (b) in the case of a corporation or Scottish firm, its corporate or firm name and the address of its registered or principal office.

(2) It is not necessary for the application to contain particulars of a directorship—

- (a) which has not been held by a director at any time during the 5 years preceding the date on which the application is delivered to SIB;
- (b) which is held by a director in a body corporate which is dormant and, if he also held that directorship for any period during those 5 years, which was dormant for the whole of that period; or

- (c) which was held by a director for any period during those 5 years in a body corporate which was dormant for the whole of that period.
- (3) For the purposes of paragraph (2) above, a body corporate is dormant during a period in which no significant transaction occurs; and it ceases to be dormant on the occurrence of such a transaction.
- (4) In paragraph (1)(a) above—
  - (a) name means a person’s Christian name (or other forename) and surname, except that in the case of a peer, or an individual usually known by a title, the title may be stated instead of his Christian name (or other forename) and surname or in addition to either or both of them;
  - (b) the reference to a former name does not include—
    - (i) in the case of a peer, or an individual normally known by a British title, the name by which he was known previous to the adoption of or succession to the title; or
    - (ii) in the case of any person, a former name which was changed or disused before he attained the age of 18 years or which has been changed or disused for 20 years or more; or
    - (iii) in the case of a married woman, the name by which she was known previous to the marriage; and
  - (c) the reference to directorships is a reference to directorships of any body corporate whether or not incorporated in Great Britain.
- (5) In paragraph (3) above the reference to significant transaction is, in relation to a company within the meaning of section 735(1) of the 1985 Act, a reference to a significant accounting transaction within the meaning of section 250(3) of that Act<sup>(9)</sup>.

### **Authorisation**

- 9.—**(1) SIB may, on an application duly made in accordance with regulation 7 above and after being furnished with all such information as it may require under that regulation, make an order (an “authorisation order”) in respect of a company under these Regulations if—
- (a) it has been furnished with a copy of the proposed company’s instrument of incorporation and a certificate signed by a solicitor to the effect that the instrument of incorporation complies with Schedule 3 to these Regulations and with such of the requirements of SIB regulations as relate to the contents of that instrument of incorporation;
  - (b) it appears to SIB that the criteria mentioned in regulation 10 below will, on the coming into effect of the authorisation order, be satisfied in respect of the company; and
  - (c) it has received a notification under regulation 13(3) below from the registrar of companies.
- (2) In determining whether the criterion of fitness and properness mentioned in regulation 10(5) below is satisfied in respect of any proposed director of a company, SIB may take into account any matter relating to—
- (a) any person who is or will be employed by or associated with the proposed director, for the purposes of the business of the company;
  - (b) if the proposed director is a body corporate, to any director, shadow director or controller of the body, to any other body corporate in the same group or to any director, shadow director or controller of any such other body corporate;
  - (c) if the proposed director is a partnership, to any of the partners; and
  - (d) if the proposed director is an unincorporated association, to any member of the governing body of the association or any officer or controller of the association.

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(9) Section 250 was substituted by section 14 of the Companies Act 1989 (c. 40).

(3) SIB shall inform the applicant of its decision on the application not later than six months after the date on which the application was received.

(4) An authorisation order shall specify the date on which it is to come into effect.

(5) Schedule 3 to these Regulations (which makes provision with respect to the contents, alteration and binding nature of the instrument of incorporation of an investment company with variable capital) shall have effect.

(6) In paragraph (2)(b) above, “shadow director”, in relation to a body corporate, means any person in accordance with whose directions or instructions (not being advice given in a professional capacity) the directors of that body are accustomed to act.

### **Criteria for authorisation**

**10.**—(1) The criteria referred to in regulation 9(1)(b) above are as follows.

(2) The company and its instrument of incorporation must comply with the requirements of these Regulations and SIB regulations.

(3) The head office of the company must be situated in England and Wales, Wales or Scotland.

(4) The company must have at least one director.

(5) The directors of the company must be fit and proper persons to act as directors of an investment company with variable capital.

(6) If the company has only one director, that director must be a body corporate which is an authorised person and which is not prohibited from acting as director of an investment company with variable capital by or under rules under section 48 of the 1986 Act (conduct of business rules)(**10**), by or under the rules of any recognised self-regulating organisation of which the body corporate is a member or by a prohibition imposed under section 65 of the 1986 Act (restriction of business).

(7) If the company has two or more directors, the combination of their experience and expertise must be such as is appropriate for the purposes of carrying on the business of the company.

(8) The person appointed as the depositary of the company—

(a) must be a body corporate incorporated in the United Kingdom or another EEA State;

(b) must have a place of business in the United Kingdom;

(c) must have its affairs administered in the country in which it is incorporated;

(d) must be an authorised person;

(e) must not be prohibited from acting as depositary, or as trustee of a unit trust, by or under rules under section 48 of the 1986 Act, by or under the rules of any recognised self-regulating organisation of which it is a member or by a prohibition imposed under section 65 of the 1986 Act; and

(f) must be independent of the company and of the persons appointed as directors of the company.

(9) The name of the company must not be undesirable or misleading.

(10) The aims of the company must be reasonably capable of being achieved.

(11) The company must be an open-ended investment company which meets one or both of the following requirements—

(a) the rights of participants referred to in paragraph (b)(i) of the definition of open-ended investment company in section 75(8) of the 1986 Act (collective investment schemes: interpretation) are that shareholders are entitled to have their shares redeemed

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(10) Section 48 was amended by section 206 of, and paragraph 2 of Schedule 23 to, the Companies Act 1989 (c. 40); there are other amendments not relevant to these Regulations.

or repurchased upon request at a price related to the net value of the scheme property and determined in accordance with the company's instrument of incorporation and SIB regulations; or

- (b) the rights of participants referred to in paragraph (b)(ii) of that definition are that shareholders are able to sell their shares on an investment exchange at a price not significantly different from that mentioned in sub-paragraph (a) above.

(12) In paragraph (8)(a) above, "EEA state" means a State which is a contracting party to the agreement on the European Economic Area signed at Oporto on 2nd May 1992<sup>(11)</sup> as adjusted by the Protocol signed at Brussels on 17th March 1993<sup>(12)</sup>.

### **Representations against refusal of authorisation**

**11.**—(1) Where SIB proposes to refuse an application for an authorisation order, it shall give the applicant written notice of its intention to do so, stating the reasons for which it proposes to refuse the application and giving particulars of the rights conferred by paragraph (2) below.

(2) A person on whom a notice is served under paragraph (1) above may, within 21 days of the date of service, make written representations to SIB and, if desired, oral representations to a person appointed for that purpose by SIB.

(3) SIB shall have regard to any representations made in accordance with paragraph (2) above in determining whether to refuse the application.

### **UCITS certificate**

**12.** Where SIB has made an authorisation order in respect of an investment company with variable capital, it may (whether at the same time as the making of that order or afterwards) upon request issue a certificate to the effect that the company complies, or (as the case may be) on the coming into effect of the order will comply, with the conditions necessary for it to enjoy the rights conferred by the UCITS Directive.

### *Registrar's approval of names*

### **Registrar's approval of names**

**13.**—(1) Where, in respect of a proposed investment company with variable capital, it appears to SIB that the requirements of sub-paragraphs (a) and (b) of regulation 9(1) above are or will be met, SIB shall send the papers mentioned in paragraph (2) below—

- (a) to the registrar of companies for England and Wales, if the instrument of incorporation of the company states that the company's head office is to be situated in England and Wales, or that it is to be situated in Wales; or
- (b) to the registrar of companies for Scotland if the instrument of incorporation of the company states that the head office of the company is to be situated in Scotland.

(2) The papers referred to in paragraph (1) above are—

- (a) a copy of the instrument of incorporation;
- (b) a statement of the address of the proposed company's head office;
- (c) a statement with respect to each person named in the application as director of the company of the particulars set out in regulation 8 above; and

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(11) Cm 2073.

(12) Cm 2183.



(d) a statement of the corporate name and registered or principal office of the person named in the application for authorisation as the first depositary.

(3) The registrar shall retain the papers delivered to him under paragraph (1) above and if it appears to him that the provisions of regulation 14(1) below are not contravened in relation to the proposed company, he shall notify SIB to that effect.

(4) In this regulation any reference to the instrument of incorporation of a company is a reference to the instrument of incorporation which was supplied for the purposes of regulation 9(1)(a) above.

### **Prohibition on certain names**

**14.**—(1) No investment company with variable capital shall have a name that—

(a) includes any of the following words or expressions, that is to say—

(i) limited, unlimited or public limited company, or their Welsh equivalents (“cyfyngedig”, “anghyfyngedig” and “cwmni cyfyngedig cyhoeddus” respectively);  
or

(ii) European Economic Interest Grouping or any equivalent set out in Schedule 3 to the European Economic Interest Grouping Regulations 1989<sup>(13)</sup>;

(b) includes an abbreviation of any of the words or expressions referred to in sub-paragraph (a) above; or

(c) is the same as any other name appearing in the registrar’s index of company names.

(2) In determining for the purposes of paragraph (1)(c) above whether one name is the same as another, there shall be disregarded—

(a) the definite article, where it is the first word of the name;

(b) the following words and expressions where they appear at the end of the name, that is to say—

“company” or its Welsh equivalent (“cwmni”);

“and company” or its Welsh equivalent (“a'r cwmni”);

“company limited” or its Welsh equivalent (“cwmni cyfyngedig”);

“limited” or its Welsh equivalent (“cyfyngedig”);

“unlimited” or its Welsh equivalent (“anghyfyngedig”);

“public limited company” or its Welsh equivalent (“cwmni cyfyngedig cyhoeddus”);

“European Economic Interest Grouping” or any equivalent set out in Schedule 3 to the European Economic Interest Grouping Regulations 1989;

“investment company with variable capital” or its Welsh equivalent (“cwmni buddsoddi â chyfalaf newidiol”);

(c) abbreviations of any of those words or expressions where they appear at the end of the name; and

(d) type and case of letters, accents, spaces between letters and punctuation marks;

and “and” and “&” are to be taken as the same.

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<sup>(13)</sup> S.I. 1989/638. The regulations were amended by virtue of section 2(1) of the European Economic Area Act 1994 (c. 51) so that, for any limitation in the Regulations that proceeds by reference to the Communities, there is substituted a corresponding limitation relating to the European Economic Area.

### *Alterations*

#### **SIB approval for certain changes in respect of company**

**15.**—(1) An investment company with variable capital shall give written notice to SIB of—

- (a) any proposed alteration to the company’s instrument of incorporation;
- (b) any proposed alteration to the company’s prospectus which, if made, would be significant;
- (c) any proposed reconstruction or amalgamation involving the company;
- (d) any proposal to wind up the affairs of the company otherwise than by the court;
- (e) any proposal to replace a director of the company, to appoint any additional director or to decrease the number of directors in post; and
- (f) any proposal to replace the depository of the company.

(2) Any notice given under paragraph (1)(a) above shall be accompanied by a certificate signed by a solicitor to the effect that the change in question will not affect the compliance of the instrument of incorporation with Schedule 3 to these Regulations and with such of the requirements of SIB regulations as relate to the contents of that instrument.

(3) Effect shall not be given to any proposal falling within paragraph (1) above unless—

- (a) SIB has given its approval to the proposal; or
- (b) three months have elapsed since the date on which the notice was given under paragraph (1) above without SIB having notified the company that the proposal is not approved.

(4) No change falling within paragraph (1)(e) above shall be made if any of the criteria set out in regulation 10(4) to (7) and (8)(f) would not be satisfied if the change were made and no change falling within paragraph (1)(f) above shall be made if any of the criteria set out in regulation 10(8) above would not be satisfied if the change were made.

### *Intervention*

#### **Revocation of authorisation**

**16.**—(1) SIB may revoke an authorisation order if it appears to it—

- (a) that any of the requirements for the making of the order are no longer satisfied;
- (b) that it is undesirable in the interests of shareholders, or potential shareholders, of the investment company with variable capital concerned that it should continue to be authorised; or
- (c) without prejudice to sub-paragraph (b) above, that the company, any of its directors or its depository—
  - (i) has contravened any relevant provision;
  - (ii) in purported compliance with any such provision, has furnished SIB with false, inaccurate or misleading information; or
  - (iii) has contravened any prohibition or requirement imposed under a provision falling within paragraph (5)(a), (c) or (e) below.

(2) For the purposes of paragraph (1)(b) above, SIB may take into account—

- (a) any matter relating to the company or its depository;
- (b) any matter relating to any director or controller of the depository of the company;

- (c) any matter relating to any person employed by or associated, for the purposes of the business of the company, with the company or its depositary; or
  - (d) any matter relating to—
    - (i) any director of the company; or
    - (ii) any person who would be such a person as is mentioned in any of sub-paragraphs (a) to (d) of paragraph (2) of regulation 9 above if that paragraph applied in respect of a director of the company as it applies in respect of a proposed director.
- (3) Before revoking any authorisation order that has come into effect, SIB shall ensure that such steps as are necessary and appropriate to secure the winding up of the company (whether by the court or otherwise) have been taken.
- (4) This regulation confers the same powers in relation to a shadow director of an investment company with variable capital as it confers in relation to a director of such a company.
- (5) In paragraph (1)(c) above, “relevant provision” means any provision of—
- (a) the 1986 Act;
  - (b) any rules or regulations made under that Act;
  - (c) these Regulations;
  - (d) SIB regulations; and
  - (e) any rules of a recognised self-regulating organisation of which an investment company with variable capital, or any director or depositary of such a company, is a member.

### **Representations against revocation**

**17.—**(1) Where, in respect of an investment company with variable capital, SIB proposes to revoke an authorisation order on any of the grounds set out in regulation 16(1) above, SIB shall give the company, its depositary and any other person who appears to SIB to be interested written notice of its intention to do so.

(2) A notice under paragraph (1) above shall state the reasons for which SIB proposes to revoke the order and give particulars of the rights conferred by paragraph (3) below.

(3) A person on whom notice is served under paragraph (1) above may, within 21 days of the date of service, make written representations to SIB and, if desired, oral representations to a person appointed for that purpose by SIB.

(4) SIB shall have regard to any representations made in accordance with paragraph (3) above in determining whether to revoke the authorisation order.

### **Directions**

**18.—**(1) SIB may give a direction under this regulation in relation to an investment company with variable capital if it appears to it—

- (a) that any of the requirements for the making of an authorisation order in respect of the company are no longer satisfied;
- (b) that the exercise of the power conferred by this paragraph is desirable in the interests of shareholders, or potential shareholders, of the company; or
- (c) without prejudice to sub-paragraph (b) above, that the company, any of its directors or its depositary—
  - (i) has contravened any relevant provision;
  - (ii) in purported compliance with any such provision, has furnished SIB with false, inaccurate or misleading information; or

(iii) has contravened any prohibition or requirement imposed under a provision falling within paragraph (9)(a), (c) or (e) below.

(2) A direction under this regulation may—

- (a) require the company to cease the issue or redemption, or both the issue and redemption, of shares or any class of shares in the company on a date specified in the direction until such further date as is specified in that or another direction;
- (b) in the case of a director of the company who is the person designated in the company's instrument of incorporation for the purposes of paragraph 4 of Schedule 5 to these Regulations, require that director to cease transfers to or from, or both to and from, his own holding of shares, or of any class of shares, in the company on a date specified in the direction until such further date as is specified in that or another direction;
- (c) in the case of an umbrella company, require that investments made in respect of one or more parts of the scheme property which are pooled separately be realised and, following the discharge of such liabilities of the company as are attributable to the relevant part or parts of the scheme property, that the resulting funds be distributed to shareholders in accordance with SIB regulations;
- (d) require any director of the company, by such date as is specified in the direction or if no date is specified as soon as practicable, to present a petition to the court to wind up the company;
- (e) require that the affairs of the company be wound up otherwise than by the court.

(3) Subject to paragraph (4) below, the revocation of an authorisation order in respect of a company shall not affect the operation of any direction under this regulation which is then in force; and a direction under this regulation may be given in relation to a company in the case of which an authorisation order has been revoked if a direction under this regulation was already in force at the time of revocation.

(4) Where a winding up order has been made by the court, no direction under this regulation shall have effect in relation to the company concerned.

(5) For the purposes of paragraph (1)(b) above, SIB may take into account—

- (a) any matter relating to the company or its depositary;
- (b) any matter relating to any director or controller of the depositary of the company;
- (c) any matter relating to any person employed by or associated, for the purposes of the business of the company, with the company or its depositary; or
- (d) any matter relating to—
  - (i) any director of the company; or
  - (ii) any person who would be such a person as is mentioned in any of sub-paragraphs (a) to (d) of paragraph (2) of regulation 9 above if that paragraph applied in respect of a director of the company as it applies in respect of a proposed director.

(6) Sections 60 (public statement as to person's misconduct), 61 (injunctions and restitution orders) and 62 (actions for damages) of the 1986 Act shall have effect in relation to a contravention of a direction under this regulation as they have effect in relation to any such contravention as is mentioned in those sections.

(7) SIB may, either of its own motion or on the application of the company or its depositary, withdraw or vary a direction given under this regulation if it appears to SIB that it is no longer necessary for the direction to take effect or continue in force or, as the case may be, that it should take effect or continue in force in a different form.

(8) This regulation confers the same powers in relation to a shadow director of an investment company with variable capital as it confers in relation to a director of such a company.

(9) In paragraph (1)(c) above, “relevant provision” means any provision of—

- (a) the 1986 Act;
- (b) any rules or regulations made under that Act;
- (c) these Regulations;
- (d) SIB regulations; and
- (e) any rules of a recognised self-regulating organisation of which an investment company with variable capital, or any director or depositary or such a company, is a member.

### **Notice of directions**

**19.**—(1) The power to give a direction under regulation 18 above in relation to an investment company with variable capital shall be exercisable by written notice served by SIB on the company and its depositary, and any such notice shall take effect on such date as is specified in the notice.

(2) If SIB refuses to withdraw or vary a direction on the application of the company concerned or of the depositary of that company, it shall serve the applicant with a written notice of the refusal.

(3) A notice—

- (a) giving a direction or varying it otherwise than on the application of the company concerned or of the depositary of that company; or
- (b) refusing to withdraw or vary a direction on the application of such a person;

shall state the reasons for which the direction was given or varied or, as the case may be, why the application was refused.

(4) SIB may give public notice of a direction given by it under regulation 18 above and of any withdrawal or variation of such a direction; and any such notice may, if SIB thinks fit, include a statement of the reasons for which the direction was given, withdrawn or varied.

### **Applications to the court**

**20.**—(1) In any case in which SIB has power to give a direction under regulation 18 above in relation to an investment company with variable capital, it may apply to the court for an order—

- (a) removing any director of the company; or
- (b) removing the depositary of the company;

and replacing any of them with a person or persons nominated by SIB and appearing to it to satisfy the criteria set out in paragraphs (4) to (7) or, as the case may be, paragraph (8) of regulation 10 above.

(2) On an application under this regulation the court may make such order as it thinks fit.

(3) SIB shall—

- (a) give written notice of the making of an application under this section to—
  - (i) the company concerned;
  - (ii) its depositary; and
  - (iii) where the application seeks the removal of any director of the company, that director; and
- (b) take such steps as it considers appropriate for bringing the making of the application to the attention of the shareholders of the company.

## *Investigations*

### **Investigations: functions of Secretary of State and SIB**

**21.** In regulations 22 to 24 below, “relevant authority” means the Secretary of State or SIB and, in relation to any investigation carried out by an inspector, means the person who appointed the inspector in question.

### **Investigations: powers and duties of inspectors**

**22.**—(1) A relevant authority may appoint one or more competent inspectors to investigate and report on the affairs of, or of any director or depositary of, an investment company with variable capital if it appears to the authority that it is in the interests of shareholders of the company to do so or that the matter is of public concern.

(2) An inspector appointed under paragraph (1) above to investigate the affairs of, or of any director or depositary of, a company may also, if he thinks it necessary for the purposes of that investigation, investigate the affairs of, or (as the case may be) of the directors, depositary, trustee or operator of,—

- (a) an investment company with variable capital the directors of which include any of the directors of the company whose affairs are being investigated by virtue of that paragraph;
- (b) an investment company with variable capital the directors of which include any of the directors of the depositary whose affairs are being investigated by virtue of that paragraph;
- (c) an investment company with variable capital the depositary of which is—
  - (i) the same as the depositary of the company whose affairs are being investigated by virtue of that paragraph; or
  - (ii) the depositary whose affairs are being investigated by virtue of that paragraph;
- (d) an investment company with variable capital the directors of which include—
  - (i) the director whose affairs are being investigated by virtue of that paragraph; or
  - (ii) any director of a body corporate which is the director whose affairs are being investigated by virtue of that paragraph;
- (e) a collective investment scheme the manager or operator of which is a director of the company whose affairs are being investigated by virtue of that paragraph;
- (f) a collective investment scheme the trustee of which is—
  - (i) the same as the depositary of the company whose affairs are being investigated by virtue of that paragraph; or
  - (ii) the depositary whose affairs are being investigated by virtue of that paragraph; or
- (g) a collective investment scheme the manager or operator of which is—
  - (i) the director whose affairs are being investigated by virtue of that paragraph; or
  - (ii) a director of a body corporate which is the director whose affairs are being investigated by virtue of that paragraph.

(3) Sections 434 and 436 of the 1985 Act<sup>(14)</sup> (production of documents and evidence to inspectors) shall apply in relation to an inspector appointed under this regulation as they apply to an inspector appointed under section 431 of that Act but with the modifications specified in paragraph (4) below.

(4) In the provisions applied by paragraph (3) above—

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<sup>(14)</sup> Sections 434 and 436 were amended by section 56 of the Companies Act 1989 (c. 40).

- (a) for any reference to a company there shall be substituted a reference to the company, director or depositary under investigation by virtue of paragraph (1) above;
  - (b) any reference to an officer of the company shall include a reference to—
    - (i) any director of the company or depositary under investigation by virtue of paragraph (1) above; or
    - (ii) where the director under investigation by virtue of that paragraph is a body corporate, any director of that body;
  - (c) for any reference to any other body corporate whose affairs are investigated under section 433(1) of the 1985 Act there shall be substituted a reference to any other investment company with variable capital or collective investment scheme under investigation by virtue of paragraph (2) above; and
  - (d) any reference to an officer of such a body corporate shall include a reference to the depositary and directors of an investment company with variable capital or the trustee and operator of a collective investment scheme.
- (5) This regulation and regulations 23 and 24 below confer the same powers in relation to a shadow director of an investment company with variable capital as they confer in relation to a director of such a company.

#### **Investigations: disclosure**

**23.**—(1) A person shall not under regulation 22 above be required to disclose any information or produce any document which he would be entitled to refuse to disclose or produce on grounds of legal professional privilege in proceedings in the High Court or on grounds of confidentiality as between client and professional legal adviser in proceedings in the Court of Session except that a lawyer may be required to furnish the name and address of his client.

(2) Nothing in regulation 22 above requires a person (except as mentioned in paragraph (3) below) to disclose any information or produce any document in respect of which he owes an obligation of confidence by virtue of carrying on the business of banking unless—

- (a) the person to whom the obligation of confidence is owed consents to the disclosure or production; or
- (b) the making of the requirement was authorised by the relevant authority.

(3) Paragraph (2) above does not apply where the person owing the obligation of confidence or to whom it is owed is—

- (a) an investment company with variable capital, director or depositary under investigation by virtue of paragraph (1) of regulation 22 above; or
- (b) an investment company with variable capital, or any other person, under investigation by virtue of paragraph (2) of that regulation.

#### **Investigations: supplementary**

**24.**—(1) Where a person claims a lien on a document its production under regulation 22 above shall be without prejudice to the lien.

(2) An inspector appointed under regulation 22 above may, and if directed by the relevant authority shall, make interim reports to the authority and on the conclusion of his investigation shall make a final report to the authority.

(3) If it appears to the relevant authority that matters have come to light in the course of an inspector's investigation which suggest that a criminal offence has been committed, and those matters have been referred to the appropriate prosecuting authority, the relevant authority may direct

the inspector to take no further steps in the investigation or to take only such steps as are specified in the direction.

(4) Where an investigation is the subject of a direction under paragraph (3) above, the inspector shall make a final report to the relevant authority only where it directs him to do so.

(5) Each final report shall be written or printed as the relevant authority may direct and the authority may, if it thinks fit—

- (a) furnish a copy, on request and on payment of the prescribed fee—
  - (i) to any director or shareholder, or to the depository, of a company under investigation by virtue of paragraph (1) of regulation 22 above;
  - (ii) where a director under investigation by virtue of that paragraph is a body corporate, to any director of that body;
  - (iii) to any director of a depository under investigation by virtue of that paragraph; or
  - (iv) to any other person whose conduct is referred to in the report; and
- (b) cause the report to be published.

(6) A person who is convicted on a prosecution instituted as a result of an investigation under regulation 22 above may, in the same proceedings, be ordered to pay the expenses of the investigation to such extent as may be specified in the order.

(7) For the purposes of paragraph (6) above, there shall be treated as expenses of the investigation, in particular, such reasonable sums as the relevant authority may determine in respect of general staff costs and overheads.

(8) The powers in section 205(15) of the 1986 Act (general power to make regulations), as they apply in relation to fees to be prescribed for the purposes of section 94(9) of that Act (investigations in respect of authorised unit trusts etc), shall be exercisable in relation to fees to be prescribed for the purposes of paragraph (5)(a) above—

- (a) for like purposes; and
- (b) subject to the same conditions.

### *Winding up*

#### **Winding up by the court**

**25.**—(1) Where an investment company with variable capital is wound up as an unregistered company under Part V of the Insolvency Act 1986(16), the provisions of that Act shall apply for the purposes of the winding up with the following modifications.

(2) A petition for the winding up of an investment company with variable capital may be presented by the depository of the company as well as by any person authorised under section 124 or 124A of the Insolvency Act 1986, (as those sections apply by virtue of Part V of that Act) to present a petition for the winding up of the company.

(3) Where a petition for the winding up of an investment company with variable capital is presented by a person other than SIB—

- (a) that person shall serve a copy of the petition on SIB; and
- (b) SIB shall be entitled to be heard on the petition.

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(15) Section 205 was substituted by section 206(1) of, and paragraph 18 of Schedule 23 to, the Companies Act 1989 (c. 40) and amended by the Transfer of Functions (Financial Services) Order 1992 (S.I. 1992/1315).

(16) 1986 c. 45.



(4) If, before the presentation of a petition for the winding up by the court of an investment company with variable capital as an unregistered company under Part V of the Insolvency Act 1986, the affairs of the company are being wound up otherwise than by the court—

- (a) section 129(2) of the Insolvency Act 1986 (commencement of winding up by the court) shall not apply; and
- (b) any winding up of the company by the court shall be deemed to have commenced—
  - (i) at the time at which SIB gave its approval to a proposal mentioned in paragraph (1) (d) of regulation 15 above; or
  - (ii) in a case falling within paragraph (3)(b) of that regulation, on the day next following the end of the three month period mentioned in that paragraph.

### **Dissolution on winding up by the court**

**26.**—(1) This regulation applies where, in respect of an investment company with variable capital, the registrar of companies receives—

- (a) a notice served for the purposes of section 172(8) of the Insolvency Act 1986 (final meeting of creditors and vacation of office by liquidator), as that section applies by virtue of Part V of that Act; or
- (b) a notice from the official receiver that the winding up by the court of the company is complete.

(2) The registrar shall, on receipt of the notice, forthwith register it; and, subject as follows, at the end of the period of three months beginning with the day of the registration of the notice, the company shall be dissolved.

(3) The Secretary of State may, on the application of the official receiver or any other person who appears to the Secretary of State to be interested, give a direction deferring the date at which the dissolution of the company is to take effect for such period as the Secretary of State thinks fit.

(4) An appeal to the court lies from any decision of the Secretary of State on an application for a direction under paragraph (3) above.

(5) Paragraph (3) above does not apply to a case where the winding up order was made by the court in Scotland, but in such a case the court may, on an application by any person appearing to the court to have an interest, order that the date at which the dissolution of the company is to take effect shall be deferred for such period as the court thinks fit.

(6) It is the duty of the person—

- (a) on whose application a direction is given under paragraph (3) above;
- (b) in whose favour an appeal with respect to an application for such a direction is determined; or
- (c) on whose application an order is made under paragraph (5) above;

not later than seven days after the giving of the direction, the determination of the appeal or the making of the order, to deliver to the registrar of companies for registration a copy of the direction or determination or, in respect of an order, a certified copy of the interlocutor.

(7) If a person without reasonable excuse fails to deliver a copy as required by paragraph (6) above, he is guilty of an offence.

(8) A person guilty of an offence under paragraph (7) above is liable, on summary conviction—

- (a) to a fine not exceeding level 1 on the standard scale; and
- (b) on a second or subsequent conviction, instead of the penalty set out in sub-paragraph (a) above, to a fine of £100 for each day on which the contravention is continued.

### **Dissolution in other circumstances**

27.—(1) Where the affairs of an investment company with variable capital have been wound up otherwise than by the court, SIB shall ensure that, as soon as is reasonably practicable after the winding up is complete, the registrar of companies is sent notice of that fact.

(2) The registrar shall, upon receipt of the notice, forthwith register it; and, subject as follows, at the end of the period of three months beginning with the day of the registration of the notice, the company shall be dissolved.

(3) The court may on the application of SIB or the company make an order deferring the date at which the dissolution of the company is to take effect for such period as the court thinks fit.

(4) It is the duty of the person on whose application an order of the court under paragraph (3) above is made to deliver, not later than seven days after the making of the order, to the registrar of companies a copy of the order for registration.

(5) Where any company, the head office of which is situated in England and Wales, or Wales, is dissolved by virtue of paragraph (2) above, any sum of money (including unclaimed distributions) standing to the account of the company at the date of the dissolution shall, on such date as is determined in relation to the dissolution of that company in accordance with SIB regulations, be paid into court.

(6) Where any company, the head office of which is situated in Scotland, is dissolved by virtue of paragraph (2) above, any sum of money (including unclaimed dividends and unapplied or undistributable balances) standing to the account of the company at the date of the dissolution shall—

- (a) on such date as is determined in relation to the dissolution of that company in accordance with SIB regulations, be lodged in an appropriate bank or institution as defined in section 73(1) of the Bankruptcy (Scotland) Act 1985<sup>(17)</sup> (interpretation) in the name of the Accountant of the Court; and
- (b) thereafter be treated as if it were a sum of money lodged in such an account by virtue of section 193 of the Insolvency Act 1986 (unclaimed distributions), as that section applies by virtue of Part V of that Act.

## **PART III**

### **CORPORATE CODE**

#### *Organs*

#### **Directors**

28.—(1) On the coming into effect of an authorisation order in respect of an investment company with variable capital, the persons named in the application under regulation 7 above as directors of the company shall be deemed to be appointed as its first directors.

(2) Subject to regulations 15 and 20 above, any subsequent appointment as a director of a company shall be made by the company in general meeting; except that the directors of the company may appoint a person to act as director to fill any vacancy until such time as the next following annual general meeting of the company takes place.

(3) Any act of a director is valid notwithstanding—

- (a) any defect that may thereafter be discovered in his appointment or qualifications; or

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<sup>(17)</sup> 1985 c. 66; the definition of “appropriate bank or institution” was substituted by section 108(1) of, and paragraph 20 of Schedule 6 to, the Banking Act 1987 (c. 22).

- (b) that it is afterwards discovered that his appointment had terminated by virtue of any provision contained in SIB regulations which requires a director to retire upon attaining a specified age.
- (4) The business of a company shall be managed—
  - (a) where a company has only one director, by that director; or
  - (b) where a company has more than one director, by the directors but subject to any provision contained in SIB regulations as to the allocation between the directors of responsibilities for the management of the company (including any provision there may be as to the allocation of such responsibility to one or more directors to the exclusion of others).
- (5) Subject to the provisions of these Regulations, SIB regulations and the company's instrument of incorporation, the directors of a company may exercise all the powers of the company.

#### **Directors to have regard to interests of employees**

**29.**—(1) Without prejudice to the generality of the powers and duties that any director of an investment company with variable capital has apart from this regulation, the matters to which such a director is to have regard in the performance of his functions include the interests of the company's employees in general, as well as its shareholders.

(2) Accordingly, the duty imposed by this regulation on any director of a company is owed by him to the company (and the company alone) and is enforceable in the same way as any other fiduciary duty owed to an investment company with variable capital by its directors.

(3) This regulation applies to a shadow director of an investment company with variable capital as it applies to a director of such a company.

#### **Inspection of directors' service contracts**

- 30.**—(1) Every investment company with variable capital shall keep at an appropriate place—
- (a) in the case of each director whose contract of service with the company is in writing, a copy of that contract; and
  - (b) in the case of each director whose contract of service with the company is not in writing, a written memorandum setting out its terms.
- (2) All copies and memoranda kept by a company in accordance with paragraph (1) above shall be kept in the same place.
- (3) The following are appropriate places for the purposes of paragraph (1) above—
- (a) the company's head office;
  - (b) the place where the company's register of shareholders is kept; and
  - (c) where any person designated in the company's instrument of incorporation for the purposes of paragraph 4 of Schedule 5 to these Regulations is a director of the company and is a body corporate, the registered or principal office of that person.
- (4) Every copy and memorandum required by paragraph (1) above to be kept shall be open to the inspection of any shareholder of the company.
- (5) If such an inspection is refused, the court may by order compel an immediate inspection of the copy or memorandum concerned.
- (6) Every copy and memorandum required by paragraph (1) above to be kept shall be made available by the company for inspection by any shareholder at the company's annual general meeting.
- (7) Paragraph (1) above applies to a variation of a director's contract of service as it applies to the contract.

### **General meetings**

**31.**—(1) Subject to paragraph (2) below, every investment company with variable capital shall in each year hold a general meeting (“annual general meeting”) in addition to any other meetings, whether general or otherwise, it may hold in that year.

(2) If a company holds its first annual general meeting within 18 months of the date on which the authorisation order made by SIB in respect of the company comes into effect, paragraph (1) above shall not require the company to hold any other meeting as its annual general meeting in the year of its incorporation or in the following year.

(3) Subject to paragraph (2) above, not more than 15 months shall elapse between the date of one annual general meeting of a company and the date of the next.

### **Capacity of company**

**32.**—(1) The validity of an act done by an investment company with variable capital shall not be called into question on the ground of lack of capacity by reason of anything in these Regulations, SIB regulations or the company’s instrument of incorporation.

(2) Nothing in paragraph (1) above shall affect the duty of the directors to observe any limitations on their powers.

### **Power of directors and general meeting to bind the company**

**33.**—(1) In favour of a person dealing in good faith, the following powers, that is to say—

- (a) the power of the directors of an investment company with variable capital (whether or not acting as a board) to bind the company, or authorise others to do so; and
- (b) the power of such a company in general meeting to bind the company, or authorise others to do so;

shall be deemed to be free of any limitation under the company’s constitution.

(2) For the purposes of this regulation—

- (a) a person “deals with” a company if he is party to any transaction or other act to which the company is a party;
- (b) subject to paragraph (4) below, a person shall not be regarded as acting in bad faith by reason only of his knowing that, under the company’s constitution, an act is beyond any of the powers referred to in sub-paragraph (a) or (b) of paragraph (1) above; and
- (c) subject to paragraph (4) below, a person shall be presumed to have acted in good faith unless the contrary is proved.

(3) The reference in paragraph (1) above to any limitation under the company’s constitution on the powers set out in sub-paragraph (a) or (b) of that paragraph shall include any limitation deriving from these Regulations, from SIB regulations or from a resolution of the company in general meeting or of a meeting of any class of shareholders.

(4) Paragraph (2)(b) and (c) above do not apply where—

- (a) by virtue of a limitation deriving from these Regulations or from SIB regulations, an act is beyond any of the powers referred to in paragraph (1)(a) or (b) above; and
- (b) the person in question—
  - (i) has actual knowledge of that fact; or
  - (ii) has deliberately failed to make enquiries in circumstances in which a reasonable and honest person would have done so.

(5) Paragraph (1) above does not affect any liability incurred by the directors or any other person by reason of the directors exceeding their powers.

#### **No duty to enquire as to capacity etc**

**34.** Subject to regulation 33(4)(b)(ii) above, a party to a transaction with an investment company with variable capital is not bound to enquire—

- (a) as to whether the transaction is permitted by these Regulations, SIB regulations or the company's instrument of incorporation; or
- (b) as to any limitation on the powers referred to in paragraph (1)(a) or (b) of regulation 33 above.

#### **Exclusion of deemed notice**

**35.—**(1) A person shall not be taken to have notice of any matter merely because of its being disclosed in any document made available by an investment company with variable capital for inspection; but this does not affect the question whether a person is affected by notice of any matter by reason of a failure to make such enquiries as ought reasonably to be made.

(2) In paragraph (1) above, “document” includes any material which contains information.

#### **Restraint and ratification by shareholders**

**36.—**(1) A shareholder of an investment company with variable capital may bring proceedings to restrain the doing of an act which but for regulation 32(1) above would be beyond the company's capacity.

(2) Paragraph (1) of regulation 33 above does not affect any right of a shareholder of an investment company with variable capital to bring proceedings to restrain the doing of an act which is beyond any of the powers referred to in that paragraph.

(3) No proceedings shall lie under paragraph (1) above in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the company; and paragraph (2) above shall not have the effect of enabling proceedings to be brought in respect of any such act.

(4) Any action by the directors of a company—

- (a) which, but for paragraph (1) of regulation 32 above, would be beyond the company's capacity; or
- (b) which is within the company's capacity but beyond the powers referred to in paragraph (1) (a) of regulation 33 above;

may only be ratified by resolution of the company in general meeting.

(5) A resolution ratifying such action shall not affect any liability incurred by the directors or any other person; relief from any such liability must be agreed to separately by resolution of the company in general meeting.

(6) Nothing in this regulation affects any power or right conferred by or arising under section 61 (injunctions and restitution orders) or 62 (actions for damages) of the 1986 Act.

#### **Events affecting company status**

**37.—**(1) Where either of the conditions mentioned in paragraph (2) below are satisfied, an investment company with variable capital is not entitled to rely against other persons on the happening of any of the following events, that is to say—

- (a) any alteration of the company's instrument of incorporation;

- (b) any change among the directors of the company;
  - (c) as regards service of any document on the company, any change in the situation of the head office of the company; or
  - (d) the making of a winding up order in respect of the company or, in circumstances in which the affairs of a company are to be wound up otherwise than by the court, the commencement of the winding up.
- (2) The conditions referred to in paragraph (1) above are that—
- (a) the event in question had not been officially notified at the material time and is not shown by the company to have been known at that time by the other person concerned; and
  - (b) if the material time fell on or before the 15th day after the date of official notification (or where the 15th day was a non-business day, on or before the next day that was a business day), it is shown that the other person concerned was unavoidably prevented from knowing of the event at that time.
- (3) In this regulation “official notification” means the notification in the Gazette by virtue of paragraph 6 of Schedule 1 to these Regulations of any document containing the information referred to in paragraph (1) above and “officially notified” shall be construed accordingly.

### **Invalidity of certain transactions involving directors**

- 38.**—(1) This regulation applies where—
- (a) an investment company with variable capital enters into a transaction to which the parties include any of the following, that is to say—
    - (i) a director of the company; or
    - (ii) any person who is an associate of such a director; and
  - (b) in connection with the transaction, the directors of the company (whether or not acting as a board) exceed any limitation on their powers under the company’s constitution.
- (2) The transaction is voidable at the instance of the company.
- (3) Whether or not the transaction is avoided, any such party to the transaction as is mentioned in paragraph (i) or (ii) of paragraph (1)(a) above, and any director of the company who authorised the transaction, is liable—
- (a) to account to the company for any gain which he has made directly or indirectly by the transaction; and
  - (b) to indemnify the company for any loss or damage resulting from the transaction.
- (4) Nothing in paragraphs (1) to (3) above shall be construed as excluding the operation of any other enactment or rule of law by virtue of which the transaction may be called into question or any liability to the company may arise.
- (5) The transaction ceases to be voidable if—
- (a) restitution of any money or other asset which was the subject-matter of the transaction is no longer possible; or
  - (b) the company is indemnified for any loss or damage resulting from the transaction; or
  - (c) rights which are acquired, bona fide for value and without actual notice of the directors concerned exceeding their powers, by a person who is not a party to the transaction would be affected by the avoidance; or
  - (d) the transaction is ratified by resolution of the company in general meeting.

(6) A person other than a director of the company is not liable under paragraph (3) above if he shows that at the time the transaction was entered into he did not know that the directors concerned were exceeding their powers.

(7) This regulation does not affect the operation of regulation 33 above in relation to any party to the transaction not within paragraph (i) or (ii) of paragraph (1)(a) above; but where a transaction is voidable by virtue of this regulation and valid by virtue of that regulation in favour of such a person, the court may, on the application of that person or of the company, make such order affirming, severing or setting aside the transaction, on such terms, as appear to the court to be just.

(8) For the purposes of this regulation—

- (a) “associate”, in relation to any person who is a director of the company, means that person’s wife, husband or minor child or step-child, any body corporate of which that person is a director, any person who is an employee or partner of that person and, if that person is a body corporate, any subsidiary of that body corporate and any employee of such a subsidiary;
- (b) “transaction” includes any act; and
- (c) the reference in paragraph (1)(b) above to any limitation on directors’ powers under the company’s constitution shall include any limitation deriving from these Regulations, from SIB regulations or from a resolution of the company in general meeting or of a meeting of any class of shareholders.

### *Shares*

#### **Shares**

**39.**—(1) Without prejudice to the generality of regulation 6(1) above, an investment company with variable capital may issue more than one class of shares.

(2) A shareholder shall have no interest in the scheme property of the company.

(3) The rights that attach to each share of any given class are—

- (a) the right in accordance with the instrument of incorporation to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the scheme property;
- (b) the right in accordance with the instrument of incorporation to vote at any general meeting of the company or at any relevant class meeting; and
- (c) such other rights as may be provided for, in relation to shares of that class, in the instrument of incorporation of the company.

(4) In respect of any class of shares, the rights referred to in paragraph (3) above may, if the company’s instrument of incorporation so provides, be expressed in two denominations; and in the case of any such class, one (the “smaller”) denomination shall be such proportion of the other (the “larger”) denomination as is fixed by the instrument of incorporation.

(5) In respect of any class of shares within paragraph (4) above, any share to which are attached rights expressed in the smaller denomination shall, in these Regulations, be known as a smaller denomination share and any share to which are attached rights expressed in the larger denomination shall, in these Regulations, be known as a larger denomination share.

(6) In respect of any class of shares, the rights that attach to each share of that class shall be—

- (a) except in respect of a class of shares within paragraph (4) above, equal to the rights that attach to each other share of that class; and

- (b) in respect of a class of shares within that paragraph, equal to the rights that attach to each other share of that class of the same denomination.

(7) In respect of any class of shares within paragraph (4) above, the rights that attach to any smaller denomination share of that class shall be a proportion of the rights that attach to any larger denomination share of that class and that proportion shall be the same as the proportion referred to in paragraph (4) above.

### **Share certificates**

**40.**—(1) Subject to regulation 41 below, an investment company with variable capital shall prepare documentary evidence of title to its shares (“share certificates”) as follows—

- (a) in respect of any new shares issued by it;
- (b) where a shareholder has transferred part only of his holding back to the company, in respect of the remainder of that holding;
- (c) where a shareholder has transferred part only of his holding to any person who is designated in the company’s instrument of incorporation for the purposes of paragraph 4 of Schedule 5 to these Regulations, in respect of the remainder of that holding;
- (d) where a company has registered a transfer of shares made to a person other than either the company or a person designated as mentioned in sub-paragraph (c) above—
  - (i) in respect of the shares transferred to the transferee; and
  - (ii) in respect of any shares retained by the transferor which were evidenced by any certificate sent to the company for the purposes of registering the transfer;
- (e) in respect of any holding of bearer shares for which a certificate evidencing title has already been issued but where the certificate has been surrendered to the company for the purpose of being replaced by two or more certificates which between them evidence title to the shares comprising that holding;
- (f) in respect of any shares for which a certificate has already been issued but where it appears to the company that the certificate needs to be replaced as a result of having been lost, stolen or destroyed or having become damaged or worn out.

(2) A company shall exercise due diligence and take all reasonable steps to ensure that certificates prepared in accordance with paragraphs (1) (a) to (e) above are ready for delivery as soon as reasonably practicable.

(3) Certificates need be prepared in the circumstances referred to in paragraphs (1)(e) and (f) above only if the company has received—

- (a) a request for new certificate;
- (b) the old certificate (if there is one);
- (c) such indemnity as the company may require; and
- (d) such reasonable sum as the company may require in respect of the expenses incurred by it in complying with the request.

(4) Each share certificate shall state—

- (a) the number of shares the title to which is evidenced by the certificate;
- (b) where the company has more than one class of shares, the class of shares title to which is evidenced by the certificate; and
- (c) except in the case of bearer shares, the name of the holder.



(5) Where, in respect of any class of shares, the rights that attach to shares of that class are expressed in two denominations, the reference in paragraph (4)(a) above (as it applies to shares of that class) to the number of shares is a reference to the total of—

$$N + \frac{n}{p}$$

(6) In paragraph (5) above—

- (a)  $N$  is the relevant number of the larger denomination shares of the class in question;
- (b)  $n$  is the relevant number of the smaller denomination shares of that class; and
- (c)  $p$  is the number of smaller denomination shares of that class that are equivalent to one larger denomination share of that class.

(7) Nothing in these Regulations shall be taken as preventing the total arrived at under paragraph (5) above being expressed on the certificate as a single entry representing the result derived from the formula set out in that paragraph.

(8) In England and Wales, a share certificate specifying any shares held by any person which is—

- (a) under the common seal of the company; or
- (b) authenticated in accordance with regulation 53 below;

is prima facie evidence of that person's title to the shares.

(9) In Scotland, a share certificate specifying any shares held by any person which is—

- (a) under the common seal of the company; or
- (b) subscribed by the company in accordance with the Requirements of Writing (Scotland) Act 1995(18);

is, unless the contrary is shown, sufficient evidence of that person's title to the shares.

#### **Exceptions from regulation 40**

**41.**—(1) An investment company with variable capital which is a participating issuer shall not prepare share certificates in respect of any share in the company which is an uncertificated unit of a security.

(2) Nothing in regulation 40 above requires a company to prepare share certificates in Cases 1 to 4 set out below.

(3) Case 1 is any case where the company's instrument of incorporation states that share certificates will not be issued and contains provision as to other procedures for evidencing a person's entitlement to shares.

(4) Case 2 is any case where a shareholder has indicated to the company in writing that he does not wish to receive a certificate.

(5) Case 3 is any case where shares are issued or transferred to the person who is designated in the company's instrument of incorporation for the purposes of paragraph 4 of Schedule 5 to these Regulations.

(6) Case 4 is any case where shares are issued or transferred to a nominee of a recognised investment exchange who is designated for the purposes of this paragraph in the rules of the investment exchange in question.

### **Bearer shares**

**42.** An investment company with variable capital may, if its instrument of incorporation so provides, issue shares (“bearer shares”) evidenced by a share certificate, or by any other documentary evidence of title for which provision is made in the instrument of incorporation, which indicates—

- (a) that the holder of the document is entitled to the shares specified in it; and
- (b) that no entry will be made on the register of shareholders identifying the holder of those shares.

### **Register of shareholders**

**43.** Schedule 4 to these Regulations (which makes provision with respect to the register of shareholders of an investment company with variable capital) shall have effect.

### **Power to close register**

**44.—(1)** Subject as mentioned in paragraph (2) below, an investment company with variable capital may, on giving notice by advertisement in a national newspaper circulating in all the countries in which shares in the company are sold, close the register of shareholders for any time or times not exceeding in the whole 30 days in each year.

(2) Sub-paragraph (1) above has effect—

- (a) in the case of a company which is a participating issuer, subject to regulation 22 of the Uncertificated Securities Regulations 1995(19) (consent of Operator of system required to close register) and to any requirements contained in SIB regulations, in so far as such requirements are not inconsistent with that regulation; and
- (b) in the case of any other company, subject to any requirements contained in SIB regulations.

### **Power of court to rectify register**

**45.—(1)** An application to the court may be made under this regulation if—

- (a) the name of any person is, without sufficient cause, entered in or omitted from the register of shareholders of an investment company with variable capital;
- (b) default is made as to the details contained in any entry on the register in respect of a person’s holding of shares in the company; or
- (c) default is made or unnecessary delay takes place in amending the register so as to reflect the fact of any person having ceased to be a shareholder.

(2) An application under this regulation may be made by the person aggrieved, by any shareholder of the company or by the company itself.

(3) The court may either refuse the application or may order rectification of the register of shareholders and payment by the company of any damages sustained by any party aggrieved.

(4) On such an application the court may decide any question necessary or expedient to be decided for rectification of the register of shareholders including, in particular, any question relating to the right of a person who is a party to the application to have his name entered in or omitted from the register (whether the question arises as between shareholders and alleged shareholders or as between shareholders or alleged shareholders on the one hand and the company on the other hand).

## Share transfers

46. Schedule 5 to these Regulations (which makes provision for the transfer of registered and bearer shares in an investment company with variable capital) shall have effect.

## Operation

### Power incidental to carrying on business

47. An investment company with variable capital shall have power to do all such things as are incidental or conducive to the carrying on of its business.

### Name to appear in correspondence etc

48.—(1) Every investment company with variable capital shall have its name mentioned in legible characters in all letters of the company and in all other documents issued by the company in the course of business.

(2) If an officer of a company or a person on the company's behalf signs or authorises to be signed on behalf of the company any cheque or order for money or goods in which the company's name is not mentioned as required by paragraph (1) above he is personally liable to the holder of the cheque or order for money or goods for the amount of it (unless it is duly paid by the company).

### Particulars to appear in correspondence etc

49.—(1) Every investment company with variable capital shall have the following particulars mentioned in legible characters in all letters of the company and in all other documents issued by the company in the course of business, that is to say—

- (a) the company's place of registration;
- (b) the number with which it is registered;
- (c) the address of its head office; and
- (d) the fact that it is an investment company with variable capital.

(2) Where, in accordance with section 705 of the 1985 Act<sup>(20)</sup> (companies' registered numbers) (as that section has effect by virtue of Schedule 1 to these Regulations), the registrar of companies makes any change of existing registered numbers in respect of any investment company with variable capital then, for a period of three years beginning with the date on which the notification of the change is sent to the company by the registrar, the requirement of paragraph (1)(b) above is satisfied by the use of either the old number or the new.

### Contracts: England and Wales

50. Under the law of England and Wales a contract may be made—

- (a) by an investment company with variable capital by writing under its common seal; or
- (b) on behalf of such a company, by any person acting under its authority (whether express or implied);

and any formalities required by law in the case of a contract made by an individual also apply, unless a contrary intention appears, to a contract made by or on behalf of an investment company with variable capital.

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<sup>(20)</sup> Section 705 was substituted by section 149 of, and paragraph 14 of Schedule 19 to, the Companies Act 1989 (c. 40).

### **Execution of documents: England and Wales**

**51.**—(1) Under the law of England and Wales the following provisions have effect with respect to the execution of documents by an investment company with variable capital.

(2) A document is executed by a company by the affixing of its common seal.

(3) A company need not have a common seal, however, and the following provisions of this regulation apply whether it does or not.

(4) A document that is signed by at least one director and expressed (in whatever form of words) to be executed by the company has the same effect as if executed under the common seal of the company.

(5) A document executed by a company which makes it clear on its face that it is intended by the person or persons making it to be a deed has effect, upon delivery, as a deed; and it shall be presumed, unless a contrary intention is proved, to be delivered upon its being executed.

(6) In favour of a purchaser a document shall be deemed to have been duly executed by a company if it purports to be signed by at least one director or, in the case of a director which is a body corporate, it purports to be executed by that director; and, where it makes it clear on its face that it is intended by the person or persons making it to be a deed, it shall be deemed to have been delivered upon its being executed.

(7) In paragraph (6) above, “purchaser” means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property.

### **Execution of deeds overseas: England and Wales**

**52.**—(1) Under the law of England and Wales an investment company with variable capital may, by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place elsewhere than in the United Kingdom.

(2) A deed executed by such an attorney on behalf of the company has the same effect as if it were executed under the company’s common seal.

### **Authentication of documents: England and Wales**

**53.** A document or proceeding requiring authentication by an investment company with variable capital is sufficiently authenticated for the purposes of the law of England and Wales—

(a) by the signature of a director or other authorised officer of the company; or

(b) in the case of a director which is a body corporate, if it is executed by that director.

### **Official seal for share certificates**

**54.**—(1) An investment company with variable capital which has a common seal may have, for use for sealing shares issued by the company and for sealing documents creating or evidencing shares so issued, an official seal which is a facsimile of its common seal with the addition on its face of the word “securities”.

(2) The official seal when duly affixed to a document has the same effect as the company’s common seal.

(3) Nothing in this regulation shall affect the right of an investment company with variable capital registered in Scotland to subscribe such shares and documents in accordance with the Requirements of Writing (Scotland) Act 1995(21).

#### **Personal liability for contracts and deeds**

**55.**—(1) A contract which purports to be made by or on behalf of an investment company with variable capital at a time before the company's instrument of incorporation has been registered in accordance with regulation 4(2) above shall have effect, subject to any agreement to the contrary, as a contract made with the person purporting to act for the company or as agent for it, and he shall be personally liable on the contract accordingly.

(2) Paragraph (1) above applies—

- (a) to the making of a deed under the law of England and Wales; and
- (b) to the undertaking of an obligation under the law of Scotland;

as it applies to the making of a contract.

(3) If a company enters into a transaction at a time after the authorisation order made in respect of the company has been revoked and the company fails to comply with its obligations in respect of that transaction within 21 days from being called upon to do so, the person who authorised the transaction is liable, and where the transaction was authorised by two or more persons they are jointly and severally liable, to indemnify the other party to the transaction in respect of any loss or damage suffered by him by reason of the company's failure to comply with those obligations.

#### **Exemptions from liability to be void**

**56.**—(1) This regulation applies to any provision, whether contained in the instrument of incorporation of an investment company with variable capital or in any contract with the company or otherwise—

- (a) which exempts any officer of the company or any person (whether or not an officer of the company) employed by the company as auditor from, or indemnifies him against, any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company; or
- (b) which exempts the depositary of the company from, or indemnifies him against, any liability for any failure to exercise due care and diligence in the discharge of his functions in respect of the company.

(2) Except as provided by the following paragraph, any such provision is void.

(3) This regulation does not prevent a company—

- (a) from purchasing and maintaining for any such officer, auditor or depositary insurance against any such liability; or
- (b) from indemnifying any such officer, auditor or depositary against any liability incurred by him—
  - (i) in defending any proceedings (whether civil or criminal) in which judgment is given in his favour or he is acquitted; or
  - (ii) in connection with any application under regulation 57 below in which relief is granted to him by the court.

### **Power of court to grant relief in certain cases**

57.—(1) This regulation applies to—

- (a) any proceedings for negligence, default, breach of duty or breach of trust against an officer of an investment company with variable capital or a person (whether or not an officer of the company) employed by the company as auditor; or
  - (b) any proceedings against the depositary of such a company for failure to exercise due care and diligence in the discharge of his functions in respect of the company.
- (2) If in any proceedings to which this regulation applies it appears to the court hearing the case—
- (a) that the officer, auditor or depositary is or may be liable in respect of the cause of action in question;
  - (b) that, nevertheless, he has acted honestly and reasonably; and
  - (c) that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused from the liability sought to be enforced against him;

the court may relieve him, either wholly or partly, from his liability on such terms as it may think fit.

(3) If any such officer, auditor or depositary has reason to apprehend that any claim will or might be made against him in proceedings to which this regulation applies, he may apply to the court for relief.

(4) The court, on an application under paragraph (3) above, has the same power to relieve the applicant as under this regulation it would have had if it had been a court before which the relevant proceedings against the applicant had been brought.

(5) Where a case to which paragraph (2) above applies is being tried by a judge with a jury, the judge, after hearing the evidence, may, if he is satisfied that the defendant or defender ought in pursuance of that paragraph to be relieved either in whole or in part from the liability sought to be enforced against him, withdraw the case in whole or in part from the jury and forthwith direct judgment to be entered for the defendant or defender on such terms as to costs or otherwise as the judge may think proper.

### **Punishment for fraudulent trading**

58.—(1) If any business of an investment company with variable capital is carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, every person who was knowingly a party to the carrying on of the business in that manner is guilty of an offence and liable—

- (a) on conviction on indictment, to imprisonment not exceeding a term of two years or to a fine or to both;
- (b) on summary conviction, to imprisonment not exceeding a term of three months or to a fine not exceeding the statutory maximum or to both.

(2) This regulation applies whether or not the company has been, or is in the course of being, wound up (whether by the court or otherwise).

### **Power to provide for employees on cessation or transfer of business**

59.—(1) The powers of an investment company with variable capital include power to make the following provision for the benefit of persons employed or formerly employed by the company, that is to say, provision in connection with the cessation or the transfer to any person of the whole or part of the undertaking of the company.

(2) The power conferred by paragraph (1) above is exercisable notwithstanding that its exercise is not in the best interests of the company.

(3) The power which a company may exercise by virtue of paragraph (1) above shall only be exercised by the company if sanctioned—

- (a) in a case not falling within sub-paragraph (b) or (c) below, by a resolution of the company in general meeting;
- (b) if so authorised by the instrument of incorporation—
  - (i) in the case of a company that has only one director, by a resolution of that director; and
  - (ii) in any other case, by such resolution of directors as is required by SIB regulations; or
- (c) if the instrument of incorporation requires the exercise of the power to be sanctioned by a resolution of the company in general meeting for which more than a simple majority of the shareholders voting is necessary, by a resolution of that majority;

and in any case after compliance with any other requirements of the instrument of incorporation applicable to the exercise of the power.

### *Reports*

#### **Reports: preparation**

**60.**—(1) The directors of an investment company with variable capital shall—

- (a) prepare a report (“annual report”) for each annual accounting period of the company; and
- (b) subject to paragraph (2) below, prepare a report (“half-yearly report”) for each half-yearly accounting period.

(2) Where a company’s first annual accounting period is a period of less than 12 months, a half-yearly report need not be prepared for any part of that period.

(3) The directors of a company shall lay copies of the annual report before the company in general meeting.

(4) Nothing in this regulation or in regulation 61 below shall prejudice the generality of regulation 6(1) above.

(5) In this regulation any reference to annual and half-yearly accounting periods of a company is a reference to those periods as determined in relation to that company in accordance with SIB regulations.

#### **Reports: accounts**

**61.**—(1) The annual report of an investment company with variable capital shall, in respect of the annual accounting period to which it relates, contain accounts of the company.

(2) The company’s auditors shall make a report to the company’s shareholders in respect of the accounts of the company contained in its annual report.

(3) A copy of the auditors’ report shall form part of the company’s annual report.

#### **Reports: voluntary revision**

**62.**—(1) If it appears to the directors of an investment company with variable capital that any annual report of the company did not comply with the requirements of these Regulations or SIB regulations, they may prepare a revised annual report.

(2) Where copies of the previous report have been laid before the company in general meeting or delivered to the registrar of companies, the revisions shall be confined to—

- (a) the correction of anything in the previous report which did not comply with the requirements of these Regulations or SIB regulations; and
- (b) the making of any necessary consequential alterations.

#### **Auditors**

**63.** Schedule 6 to these Regulations (which makes provision with respect to the auditors of investment companies with variable capital) shall have effect.

#### *Mergers and divisions*

#### **Mergers and divisions**

**64.** Schedule 7 to these Regulations (which makes provision with respect to mergers and divisions involving investment companies with variable capital) shall have effect.

### **PART IV**

#### **MISCELLANEOUS**

#### **Notifications to registrar of companies**

**65.**—(1) An investment company with variable capital shall as soon as is reasonably practicable after the coming into effect of an authorisation order in respect of the company send to the registrar of companies a copy of the company's prospectus.

(2) A company shall—

- (a) not later than 14 days after the coming into effect of an authorisation order in respect of the company send to the registrar of companies notice of—

- (i) the place where the copies and memoranda required to be kept by regulation 30 above are kept; and

- (ii) the place where the register of shareholders is kept; and

- (b) not later than 14 days after the occurrence of any change in any such place send to the registrar of companies notice of that change.

(3) A company shall not later than 14 days after the making of any alteration to the company's instrument of incorporation send to the registrar of companies—

- (a) any document making or evidencing the alteration; and
- (b) a printed copy of the instrument of incorporation as altered.

(4) A company shall not later than 14 days after the occurrence of the change in question notify the registrar of companies of—

- (a) any change in the address of the head office of the company;
- (b) any change in the directors of the company;
- (c) any change in the depositary of the company; and
- (d) in respect of any director or depositary, any change in the information mentioned in regulation 7(1)(b) or (c) above.



(5) A company shall before the end of the period allowed by SIB regulations for the publication of the company's annual report send to the registrar of companies—

- (a) a copy of that report; and
- (b) a copy of the most recent revision of the company's prospectus.

(6) A company shall not later than 14 days after the completion of a revised annual report under regulation 62 above send to the registrar of companies a copy of that revised report.

(7) Where a resolution removing an auditor is passed at a general meeting of a company under paragraph 12 of Schedule 6 to these Regulations, a company shall not later than 14 days after the holding of the meeting notify the registrar of companies of the passing of the resolution.

(8) Where an auditor of a company deposits a notice of his resignation from office under paragraph 15 of Schedule 6 to these Regulations, a company shall not later than 14 days after the deposit of the notice send a copy of the notice to the registrar of companies.

(9) Where the affairs of a company are to be wound up otherwise than by the court, the company shall as soon as reasonably practicable after the commencement of the winding up notify the registrar of companies of that fact.

### **Contraventions**

**66.** Any of the following persons, that is to say—

- (a) a person who contravenes any provision of these Regulations; and
- (b) an investment company with variable capital, or any director or depositary of such a company, which contravenes any provision of SIB regulations;

shall be treated as having contravened rules made under Chapter V of Part I of the 1986 Act or, in the case of a person who is an authorised person by virtue of his membership of a recognised self-regulating organisation or certification by a recognised professional body, the rules of that organisation or body.

### **Prosecutions**

**67.—**(1) Proceedings in respect of an offence under regulation 26 above or paragraph 3(3) or 19(1) of Schedule 6 to these Regulations shall not be instituted, in England and Wales, except by or with the consent of the Secretary of State or the Director of Public Prosecutions.

(2) Proceedings in respect of an offence under any other provision of these Regulations shall not be instituted, in England and Wales, except by SIB or by or with the consent of the Secretary of State or the Director of Public Prosecutions.

(3) SIB shall exercise the function conferred by this regulation of instituting proceedings subject to such conditions or restrictions as the Treasury may from time to time impose.

### **Offences: bodies corporate, partnerships and unincorporated associations**

**68.—**(1) Where an offence under these Regulations committed by an investment company with variable capital is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director of the company, or a person purporting to act in any such capacity, he, as well as the company, is guilty of the offence and liable to be proceeded against and punished accordingly.

This paragraph applies to a shadow director of an investment company with variable capital as it applies to a director of such a company.

(2) Where an offence under these Regulations committed by any body corporate other than an investment company with variable capital is proved to have been committed with the consent or

connivance of, or to be attributable to any neglect on the part of, a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity, he, as well as the body corporate, is guilty of the offence and liable to be proceeded against and punished accordingly.

(3) Where the affairs of any body corporate other than an investment company with variable capital are managed by its members, paragraph (2) above applies in relation to the acts and defaults of a member in connection with his functions of management as it applies in relation to the acts and defaults of a director of a body corporate.

(4) Where an offence under these Regulations committed by a partnership is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a partner, he, as well as the partnership is guilty of the offence and liable to be proceeded against and punished accordingly.

(5) Where an offence under these Regulations committed by an unincorporated association (other than a partnership) is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any officer of the association or any member of its governing body, he as well as the association is guilty of the offence and liable to be proceeded against and punished accordingly.

#### **Time limits for prosecution of offences**

**69.**—(1) Any information relating to an offence under these Regulations which is triable by a magistrates' court in England and Wales may be so tried on an information laid at any time within 12 months after the date on which evidence sufficient in the opinion of the relevant authority to justify the proceedings comes to its knowledge.

(2) Proceedings in Scotland for an offence triable only summarily which is alleged to have been committed under these Regulations may be commenced at any time within 12 months after the date on which evidence sufficient in the Lord Advocate's opinion to justify the proceedings came to his knowledge or, where such evidence was reported to him by the Secretary of State or SIB, within 12 months after the date on which it came to the knowledge of the Secretary of State or SIB (as the case may be).

For the purposes of this paragraph proceedings shall be deemed to be commenced on the date on which a warrant to apprehend or to cite the accused is granted, if the warrant is executed without undue delay.

(3) Paragraph (1) above does not authorise the trial of an information laid, and paragraph (2) does not authorise the commencement of proceedings, more than three years after the commission of the offence.

(4) For the purposes of these Regulations a certificate by the relevant authority or the Lord Advocate as to the date on which such evidence as is referred to above came to its or his knowledge is conclusive evidence of that fact.

(5) Nothing in this regulation affects proceedings within the time limits prescribed by section 127(1) of the Magistrates' Courts Act 1980<sup>(22)</sup> or section 136 of the Criminal Procedure (Scotland) Act 1995<sup>(23)</sup> (the usual time limits for criminal proceedings).

(6) In this regulation "relevant authority", in relation to an offence, means—

(a) in a case where the person instituting proceedings in respect of the offence is a person who, by virtue of regulation 67(1) or (2) above, may not do so without the consent of the Secretary of State or the Director of Public Prosecutions, the Secretary of State or the Director of Public Prosecutions; and

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(22) 1980 c. 43.

(23) 1995 c. 46.

- (b) in any other case where proceedings are instituted in England and Wales, the person instituting the proceedings.

### **Jurisdiction and procedure in respect of offences**

**70.**—(1) Summary proceedings for an offence under these Regulations may, without prejudice to any jurisdiction exercisable apart from this regulation, be taken against an investment company with variable capital or other body corporate, or an unincorporated association, at any place at which it has a place of business and against an individual at any place where he is for the time being.

(2) Proceedings for an offence alleged to have been committed under these Regulations by an unincorporated association shall be brought in the name of the association (and not in that of any of its members), and for the purposes of any such proceedings any rules of court relating to the service of documents apply as in relation to a body corporate.

(3) Section 33 of the Criminal Justice Act 1925<sup>(24)</sup> and Schedule 3 to the Magistrates' Courts Act 1980<sup>(25)</sup> (procedure on charge of offence against a corporation) apply in a case in which an unincorporated association is charged in England and Wales with an offence under these Regulations as they apply in the case of a corporation.

(4) In relation to proceedings on indictment in Scotland for an offence alleged to have been committed under these Regulations by an unincorporated association, section 70 of the Criminal Procedure (Scotland) Act 1995<sup>(26)</sup> (proceedings on indictment against bodies corporate) applies as if the association were a body corporate.

(5) A fine imposed on an unincorporated association on its conviction of such an offence shall be paid out of the funds of the association.

### **Service of documents**

**71.**—(1) This regulation has effect in relation to any notice, direction or other document required or authorised by these Regulations or SIB regulations to be given or served on any person other than the registrar of companies.

(2) Any such document may be given to or served on the person in question—

- (a) by delivering it to him;
- (b) by leaving it at his proper address; or
- (c) by sending it by post to him at that address.

(3) Any such document may—

- (a) in the case of an investment company with variable capital, be given to or served on any director of the company;
- (b) in the case of any other body corporate (including any director referred to in subparagraph (a) above which is a body corporate) be given to or served on the secretary or clerk of that body;
- (c) in the case of a partnership, be given to or served on any partner; and
- (d) in the case of an unincorporated association other than a partnership, be given to or served on any member of the governing body of that association.

(4) For the purposes of this regulation and section 7 of the Interpretation Act 1978<sup>(27)</sup> (service of documents by post) in its application to this regulation, the proper address of any person is his last

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<sup>(24)</sup> 1925 c. 86.

<sup>(25)</sup> 1980 c. 43.

<sup>(26)</sup> 1995 c. 46.

<sup>(27)</sup> 1978 c. 30.

known address (whether of his residence or of a place where he carries on business or is employed) and also—

- (a) in the case of an investment company with variable capital or any of its directors, the company's head office;
- (b) in the case of any other body corporate (including any director referred to in paragraph (3) (a) above which is a body corporate) or its secretary or clerk, the address of its registered or principal office in the United Kingdom.
- (c) in the case of an unincorporated association (other than a partnership) or a member of its governing body, its principal office in the United Kingdom.

### **Evidence of grant of probate etc**

**72.** The production to a company of any document which is by law sufficient evidence of probate of the will, or letters of administration of the estate, or confirmation as executor, of a deceased person having been granted to some person shall be accepted by the company as sufficient evidence of the grant.

### **SIB's functions under the Regulations**

**73.—**(1) The functions of SIB under these Regulations, except its function of instituting proceedings, shall be treated for the purposes of the 1986 Act and the Transfer of Functions (Financial Services) Order 1992<sup>(28)</sup> as if they were functions to which section 114 of that Act applies which—

- (a) had been functions of the Secretary of State; and
- (b) had been transferred to SIB by the Financial Services Act 1986 (Delegation) Order 1987<sup>(29)</sup>.

(2) The function of SIB of instituting proceedings under these Regulations shall be treated for the purposes of the 1986 Act and the Transfer of Functions (Financial Services) Order 1992 as if it were a function to which section 114 of the 1986 Act applies by virtue of the provisions of section 201(4) of that Act which had been transferred to SIB by the Financial Services Act 1986 (Delegation) Order 1987 so as to be exercisable concurrently with the Secretary of State.

### **Fees**

**74.—**(1) Every application under regulation 7 above shall be accompanied by such fee as may be prescribed by SIB by virtue of paragraph (3)(a) below; and no such application shall be regarded as duly made unless this paragraph is complied with.

(2) Each investment company with variable capital shall pay such periodical fees to SIB as may be prescribed by SIB by virtue of paragraph (3)(b) below.

(3) SIB may, with respect to investment companies with variable capital, make regulations prescribing fees for purposes of the like nature as the purposes for which power is conferred by—

- (a) section 112(5) of the 1986 Act (application fees) in respect of applications under section 77 of that Act (applications for authorisation of unit trust scheme);
- (b) section 113(8) of that Act (periodical fees)<sup>(30)</sup> in respect of managers of authorised unit trust schemes and operators of recognised schemes.

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<sup>(28)</sup> S.I. 1992/1315.

<sup>(29)</sup> S.I. 1987/942.

<sup>(30)</sup> The functions under section 112 with respect to fees in respect of applications under section 77 of the 1986 Act, and the functions under section 113 with respect to periodical fees in respect of managers of authorised unit trust schemes and operators

### **Minor and consequential amendments**

75. The enactments mentioned in Schedule 8 to these Regulations (being minor amendments and amendments consequential on the provisions of these Regulations) shall have effect subject to the amendments specified in that Schedule.

11th November 1996

*Patrick McLoughlin*  
*Richard Ottaway*  
Two of the Lords Commissioners of Her  
Majesty's Treasury

## SCHEDULE 1

Regulation 4

## APPLICATION OF PART XXIV OF 1985 ACT

1. Part XXIV of the 1985 Act (the registrar of companies, his functions and offices) shall, subject to the modifications set out in paragraphs 2 to 8 below, apply for the purposes of the registration of, and the functions of the registrar of companies in relation to, investment companies with variable capital under these Regulations as it applies to the registration of, and the functions of the registrar in relation to, companies within the meaning given by section 735(1) of that Act.

(2) Except in the expressions “the registrar of companies” and “the Companies Acts”, any reference to companies (including any such reference in section 711 of the 1985 Act as it applies with the modifications set out in paragraph 6 below) shall be taken to be a reference to investment companies with variable capital.

(3) Any reference to the Companies Acts (including any reference to the 1985 Act, however expressed) shall be taken to be a reference to these Regulations and SIB regulations.

(4) Any reference to the memorandum of a company shall be taken to be a reference to the instrument of incorporation of an investment company with variable capital; and any reference to the registered office of a company shall be taken to be a reference to the head office of an investment company with variable capital.

(5) Any power to make regulations under Part XXIV of the 1985 Act in relation to companies shall be exercisable in relation to investment companies with variable capital—

- (a) for like purposes; and
- (b) subject to the same conditions.

(6) Section 711 of the 1985 Act (public notice by registrar of receipt and issue of certain documents) shall apply as if for paragraphs (a) to (z) of subsection (1) there were substituted the following paragraphs—

- (a) any document making or evidencing an alteration in a company’s instrument of incorporation;
- (b) any notice of a change in the address of a company’s head office;
- (c) any notice of a change in the directors of a company;
- (d) any notice of a change in the depositary of a company;
- (e) any annual report of a company delivered under regulation 65(5) or (6) above;
- (f) any copy of an order in respect of a company made by virtue of regulation 64 above;
- (g) any copy of a winding up order in respect of a company; and
- (h) any copy of any instrument providing for the dissolution of a company on a winding up.

7. Section 714 (registrar’s index of company and corporate names) shall have effect as if the bodies listed in subsection (1) of that section included—

- (a) investment companies with variable capital in respect of which an authorisation order has come into effect; and
- (b) collective investment schemes which are open-ended investment companies and which have head offices situated in Northern Ireland and which comply with the conditions necessary for them to enjoy the rights conferred by the UCITS Directive.

8. The following provisions of Part XXIV of the 1985 Act shall not apply, that is to say—

- (a) in section 705, the words in subsection (4) from “but for a period” to the end and subsection (5);
- (b) section 705A;

- (c) section 707A(4);
- (d) section 710;
- (e) section 710B(6) and (7);
- (f) section 711(2);
- (g) in section 711A, in subsection (1) the words “or made available by the company for inspection” and subsection (4); and
- (h) section 714(2).

## SCHEDULE 2

Regulation 5

### DEPOSITARIES

#### **Appointment**

1. On the coming into effect of an authorisation order in respect of an investment company with variable capital, the person named in the application under regulation 7 above as depositary of the company shall be deemed to be appointed as its first depositary.

2. Subject to regulations 15 and 20 above, any subsequent appointment of the depositary of a company shall be made by the directors of the company.

#### **Retirement**

3. The depositary of a company may not retire voluntarily except upon the appointment of a new depositary.

#### **Rights**

4.—(1) The depositary of a company is entitled—

- (a) to receive all such notices of, and other communications relating to, any general meeting of the company as a shareholder of the company is entitled to receive;
- (b) to attend any general meeting of the company;
- (c) to be heard at any general meeting which it attends on any part of the business of the meeting which concerns it as depositary;
- (d) to convene a general meeting of the company when it sees fit;
- (e) to require from the company’s officers such information and explanations as it thinks necessary for the performance of its functions as depositary; and
- (f) to have access, except in so far as they concern its appointment or removal, to any reports, statements or other papers which are to be considered at any meeting held by the directors of the company (when acting in their capacity as such), at any general meeting of the company or at any meeting of holders of shares of any particular class.

(2) Sub-paragraph (1)(e) above applies to a shadow director of an investment company with variable capital as it applies to an officer of such a company.

#### **Statement by depositary ceasing to hold office**

5.—(1) Where the depositary of a company ceases, for any reason other than by virtue of a court order made under regulation 20 above, to hold office, it may deposit at the head office of the company

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a statement of any circumstances connected with its ceasing to hold office which it considers should be brought to the attention of the shareholders or creditors of the company or, if it considers that there are no such circumstances, a statement that there are none.

(2) If the statement is of circumstances which the depositary considers should be brought to the attention of the shareholders or creditors of the company, the company shall not later than 14 days after the deposit of the statement either—

- (a) send a copy of the statement to each of the shareholders whose name appears on the register of shareholders (other than the person who is designated in the company's instrument of incorporation for the purposes of paragraph 4 of Schedule 5 to these Regulations) and take such steps as SIB regulations may require for the purpose of bringing the fact that the statement has been made to the attention of the holders of any bearer shares; or
- (b) apply to the court;

and, where an application is made under paragraph (b) above, the company shall notify the depositary.

(3) Unless the depositary receives notice of an application to the court before the end of the period of 21 days beginning with the day on which it deposited the statement, it shall not later than seven days after the end of that period send a copy of the statement to each of the registrar of companies and SIB.

(4) If the court is satisfied that the depositary is using the statement to secure needless publicity for defamatory matter—

- (a) it shall direct that copies of the statement need not be sent out and that the steps required by SIB regulations need not be taken; and
- (b) it may further order the company's costs on the application to be paid in whole or in part by the depositary notwithstanding that the depositary is not a party to the application;

and the company shall not later than 14 days after the court's decision take such steps in relation to a statement setting out the effect of the order as are required by sub-paragraph (2)(a) above in relation to the statement deposited under sub-paragraph (1) above.

(5) If the court is not so satisfied, the company shall not later than 14 days after the court's decision take the steps required by sub-paragraph (2)(a) above and notify the depositary of the court's decision.

(6) The depositary shall not later than seven days after receiving such a notice send a copy of the statement to each of the registrar of companies and SIB.

(7) Where a notice of appeal is filed not later than 14 days after the court's decision, any reference to that decision in sub-paragraphs (4) and (5) above shall be construed as a reference to the final determination or withdrawal of that appeal, as the case may be.

**6.—(1)** This paragraph applies where copies of a statement have been sent to shareholders under paragraph 5 above.

(2) The depositary who made the statement has, notwithstanding that it has ceased to hold office, the rights conferred by paragraph 4(1)(a) to (c) above in relation to the general meeting of the company next following the date on which the copies were sent out.

(3) The reference in paragraph 4(1)(c) above to business concerning the depositary as depositary shall be construed in relation to a depositary who has ceased to hold office as a reference to business concerning it as former depositary.



## SCHEDULE 3

Regulation 9

### INSTRUMENT OF INCORPORATION

1. The instrument of incorporation of an investment company with variable capital shall—
  - (a) contain the statements set out in paragraph 2 below; and
  - (b) contain provision made in accordance with paragraphs 3 and 4 below.
2. The statements referred to in paragraph 1(a) above are—
  - (a) the head office of the company is situated in England and Wales, Wales or Scotland (as the case may be);
  - (b) the company is an open-ended investment company with variable share capital;
  - (c) the shareholders are not liable for the debts of the company;
  - (d) the scheme property is entrusted to a depositary for safekeeping (subject to any exceptions permitted by SIB regulations); and
  - (e) charges or expenses of the company may be taken out of the scheme property.
- 3.—(1) The instrument of incorporation shall contain provision as to the following matters—
  - (a) the object of the company;
  - (b) any matter relating to the procedure for the appointment, retirement and removal of any director of the company for which provision is not made in these or SIB regulations; and
  - (c) the currency in which the accounts of the company are to be prepared.

(2) Subject to sub-paragraph (3) below, the provision referred to in sub-paragraph (1)(a) above as to the object of an investment company with variable capital shall be a statement that the object of the company is to invest the scheme property in transferable securities with the aim of spreading investment risk and giving its shareholders the benefit of the results of the management of that property.

(3) The object of the company may differ from that set out in sub-paragraph (2) above only to the extent that it provides for restriction of the range of transferable securities in which investment may be made.
- 4.—(1) The instrument of incorporation shall also contain provision as to the following matters—
  - (a) the name of the company;
  - (b) the category, as specified in SIB regulations, to which the company belongs;
  - (c) the maximum and minimum sizes of the company's capital;
  - (d) in the case of an umbrella company, the investment objectives applicable to each part of the scheme property that is pooled separately;
  - (e) the classes of shares that the company may issue indicating, in the case of an umbrella company, which class or classes of shares may be issued in respect of each part of the scheme property that is pooled separately;
  - (f) the rights attaching to shares of each class (including any provision for the expression in two denominations of such rights);
  - (g) if the company is to be able to issue bearer shares, a statement to that effect together with details of any limitations on the classes of the company's shares which are to include bearer shares;

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- (h) in the case of a company which is a participating issuer, a statement to that effect together with an indication of any class of shares in the company which is a class of participating securities;
  - (i) if the company is to dispense with the requirements of regulation 40 above, the details of any substituted procedures for evidencing title to the company's shares; and
  - (j) the form, custody and use of the company's common seal (if any).

(2) For the purposes of sub-paragraph (1)(c) above, the size at any time of a company's capital shall be taken to be the value at that time, as determined in accordance with SIB regulations, of the scheme property of the company less the liabilities of the company.

**5.—(1)** Once an authorisation order has been made in respect of a company, no amendment may be made to the statements contained in the company's instrument of incorporation which are required by paragraph 2 above.

(2) Subject to paragraph 3(3) above and to any restriction imposed by SIB regulations, a company may amend any other provision which is contained in its instrument of incorporation.

(3) No amendment to a provision which is contained in a company's instrument of incorporation by virtue of paragraph 3 above may be made unless it has been approved by the shareholders of the company in general meeting.

**6.—(1)** The provisions of a company's instrument of incorporation shall be binding on the officers and depositary of the company and on each of its shareholders; and all such persons (but no others) shall be taken to have notice of the provisions of the instrument.

(2) A person is not debarred from obtaining damages or other compensation from a company by reason only of his holding or having held shares in the company.

## SCHEDULE 4

Regulation 43

### REGISTER OF SHAREHOLDERS

#### General

**1.—(1)** Subject to sub-paragraph (2) below, every investment company with variable capital shall keep a register of persons who hold shares in the company.

(2) Except to the extent that the aggregate numbers of shares mentioned in paragraphs 5(1)(b) and 7 below include bearer shares, nothing in this Schedule requires any entry to be made in the register in respect of bearer shares.

**2.—(1)** Subject as mentioned in sub-paragraph (2) below, the register of shareholders shall be prima facie evidence of any matters which are by these Regulations directed or authorised to be contained in it.

(2) In the case of a register kept by a company which is a participating issuer, sub-paragraph (1) above has effect subject to regulation 23(7) of the Uncertificated Securities Regulations 1995<sup>(31)</sup> (purported registration of transfer of title to uncertificated unit other than in accordance with that regulation to be of no effect).

**3.** In the case of companies registered in England and Wales, no notice of any trust, express, implied or constructive, shall be entered on the company's register or be receivable by the company.

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(31) S.I. 1995/3272.

4. A company shall exercise all due diligence and take all reasonable steps to ensure that the information contained in the register is at all times complete and up to date.

## Contents

5.—(1) The register of shareholders shall contain an entry consisting of—

- (a) the name of the person who is designated in the company’s instrument of incorporation for the purposes of paragraph 4 of Schedule 5 to these Regulations (in this Schedule referred to as the designated person);
- (b) a statement of the aggregate number of all shares in the company held by that person; and
- (c) in the case of a company which is a participating issuer, a statement in respect of shares of any class that is a class of participating securities of how many shares of that class are held by that person in uncertificated form and certificated form respectively.

(2) In sub-paragraph (1) above—

- (a) for the purposes of paragraph (b), the designated person shall be taken as holding all shares in the company which are in issue and in respect of which no other person’s name is entered on the register; and
- (b) in paragraph (c), “uncertificated form” and “certificated form” have the same meaning as in the Uncertificated Securities Regulations 1995<sup>(32)</sup>.

(3) The statements referred to in paragraphs (b) and (c) of sub-paragraph (1) above shall be updated at least once a day.

6.—(1) This paragraph shall not apply to any issue of shares to the designated person or to any transfer of shares to the designated person to which paragraph 4 of Schedule 5 to these Regulations applies.

(2) Where a company issues a share to any person and the name of that person is not already entered on the register, the company shall enter his name on the register.

(3) In respect of any person whose name is entered on the register in accordance with sub-paragraph (2) above or paragraph 6 of Schedule 5 to these Regulations, the register shall contain an entry consisting of—

- (a) the address of the shareholder;
- (b) the date on which the shareholder’s name was entered on the register;
- (c) a statement of the aggregate number of shares held by the shareholder, distinguishing each share by its number (if it has one) and, where the company has more than one class of shares, by its class; and
- (d) in the case of a company which is a participating issuer, a statement in respect of shares of any class that is a class of participating securities of how many shares of that class are held by the shareholder in uncertificated form and certificated form respectively.

(4) In sub-paragraph (3)(d) above, “uncertificated form” and “certificated form” have the same meaning as in the Uncertificated Securities Regulations 1995.

7. The register of shareholders shall contain a monthly statement of the aggregate number of all the bearer shares in issue except for any bearer shares in issue which, at the time when the statement is made, are held by the designated person.

8.—(1) This paragraph applies where the aggregate number of shares referred to in paragraphs 5 to 7 above includes any shares to which attach rights expressed in two denominations.

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(32) S.I. 1995/3272.

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(2) In respect of each class of shares to which are attached rights expressed in two denominations, the number of shares of that class held by any person referred to in paragraph 5 or 6 above, or the number of bearer shares of that class referred to in paragraph 7 above, shall be taken to be the total of—

$$N + \frac{n}{p}$$

(3) In sub-paragraph (2) above—

- (a) N is the relevant number of larger denomination shares of that class;
- (b) n is the relevant number of smaller denomination shares of that class; and
- (c) p is the number of smaller denomination shares of that class that are equivalent to one larger denomination share of that class.

(4) Nothing in these Regulations shall be taken as preventing the total arrived at under sub-paragraph (2) above being expressed on the register as a single entry representing the result derived from the formula set out in that sub-paragraph.

### **Location**

9. The register of shareholders of a company shall be kept at its head office, except that—
- (a) if the work of making it up is done at another office of the company, it may be kept there; and
  - (b) if the company arranges with some other person for the making up of the register to be undertaken on its behalf by that other person, it may be kept at the office of the other person at which the work is being done.

### **Index**

- 10.—(1) Every company shall keep an index of the names of the holders of its registered shares.
- (2) The index shall contain, in respect of each shareholder, a sufficient indication to enable the account of that shareholder in the register to be readily found.
- (3) The index shall be at all times kept at the same place as the register of shareholders.
- (4) Not later than 14 days after the date on which any alteration is made to the register of shareholders, the company shall make any necessary alteration in the index.

### **Inspection**

- 11.—(1) Subject to regulation 44 above and to SIB regulations, the register of shareholders and the index of names shall be open to the inspection of any shareholder (including any holder of bearer shares) without charge.
- (2) Any shareholder may require a copy of the entries on the register relating to him and the company shall cause any copy so required by a person to be sent to him free of charge.
- (3) If an inspection required under this paragraph is refused, or if a copy so required is not sent, the court may by order compel an immediate inspection of the register and index, or direct that the copy required be sent to the person requiring it.

### **Agent's default**

- 12.—(1) Sub-paragraphs (2) and (4) below apply where, in accordance with paragraph 9(b) above, the register of shareholders is kept at the office of some person other than the company and by reason of any default of his—

- (a) the company fails to comply with any of the requirements of paragraph 10 or 11 above; or
- (b) the company fails to comply with any of the requirements of regulation 65(2) above.

(2) In a case to which this sub-paragraph applies, the person at whose office the register of shareholders is kept is guilty of an offence if he knowingly or recklessly authorises or permits the default in question.

(3) A person guilty of an offence under sub-paragraph (2) above is liable in respect of each default on summary conviction to a fine not exceeding level 1 on the standard scale.

(4) The power of the court under paragraph 11(3) above extends to the making of orders directed to the person at whose office the register of shareholders is kept and to any officer or employee of his.

## SCHEDULE 5

Regulation 46

### SHARE TRANSFERS

#### General

1. The instrument of incorporation of a company may contain provision as to share transfers in respect of any matter for which provision is not made in these Regulations or SIB regulations.
2. Where any shares are transferred to the company, the company shall cancel those shares.
3. In the case of a company which is a participating issuer, nothing in this Schedule shall apply—
  - (a) to any transfer of a share in the company which is an uncertificated unit of a security; or
  - (b) in any of the circumstances set out in sub-paragraph (b) or (c) of regulation 27(2) of the Uncertificated Securities Regulations 1995(33) (conversion of securities into uncertificated form).

#### Transfer of registered shares

4.—(1) Where a transfer of shares is made by the person (if any) who is designated in the company's instrument of incorporation for the purposes of this paragraph, the company may not register the transfer unless such evidence as the company may require to prove that the transfer has taken place has been delivered to the company.

- (2) Where for any reason a person ceases to be designated for the purposes of this paragraph—
  - (a) any shares held by that person which are not disposed of on or before his ceasing to be so designated shall be deemed to be the subject of a new transfer to him which takes effect immediately after he ceases to be so designated; and
  - (b) the company shall make such adjustments to the register as are necessary to reflect his change of circumstances.

5.—(1) Except in the case of any transfer of shares referred to in paragraph 4 above, the company may not register any transfer unless the transfer documents relating to that transfer have been delivered to the company.

(2) No share certificate shall be required to be delivered by virtue of sub-paragraph (1) above in any case where shares are transferred by a nominee of a recognised investment exchange who is designated for the purposes of regulation 41(6) above in the rules of the investment exchange in question.

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(33) S.I. 1995/3272.

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(3) In these Regulations “transfer documents”, in relation to any transfer of registered shares, means—

- (a) a stock transfer within the meaning of the Stock Transfer Act 1963<sup>(34)</sup> which complies with the requirements of that Act as to the execution and contents of a stock transfer or such other instrument of transfer as is authorised by, and completed and executed in accordance with any requirements in, the company’s instrument of incorporation;
- (b) except in a case falling within paragraph (3) or (4) of regulation 41 above, a share certificate relating to the shares in question;
- (c) in a case falling within paragraph (3) of that regulation above, such other evidence of title to those shares as is required by the instrument of incorporation of the company; and
- (d) such other evidence (if any) as the company may require to prove the right of the transferor to transfer the shares in question.

6. In the case of any transfer of shares which meets the requirements of paragraph 4 or 5 above, the company shall—

- (a) register the transfer; and
- (b) where the name of the transferee is not already entered on the register, enter that name on the register.

7.—(1) A company may, before the end of the period of 21 days commencing with the date of receipt of the transfer documents relating to any transfer of shares, refuse to register the transfer if—

- (a) there exists a minimum requirement as to the number or value of shares that must be held by any shareholder of the company and the transfer would result in either the transferor or transferee holding less than the required minimum; or
- (b) the transfer would result in a contravention of any provision of the company’s instrument of incorporation or would produce a result inconsistent with any provision of the company’s prospectus.

(2) A company shall give the transferee written notice of any refusal to register a transfer of shares.

(3) Nothing in these Regulations shall require a company to register a transfer or give notice to any person of a refusal to register a transfer where registering the transfer or giving the notice would result in a contravention of any provision of law (including any law that is for the time being in force in a country or territory outside the United Kingdom).

8.—(1) Where, in respect of any transfer of shares, the company certifies that it has received the transfer documents referred to in paragraph 5(3)(b) or (c) above (as the case may be), that certification shall be taken as a representation by the company to any person acting on the faith of the certification that there has been produced to the company such evidence as on its face shows a prima facie title to the shares in the transferor named in the instrument of transfer.

(2) For the purposes of sub-paragraph (1) above, a certification is made by a company if the instrument of transfer—

- (a) bears the words “certificate lodged”(or words to the like effect); and
- (b) is signed by a person acting under authority (whether express or implied) given by the company to issue and sign such certifications.

(3) A certification under sub-paragraph (1) above shall not be taken as a representation that the transferor has any title to the shares in question.

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(34) 1963 c. 18.

(4) Where a person acts on the faith of a false certification by a company which is made negligently or fraudulently, the company shall be liable to pay to that person any damages sustained by him.

### **Transfer of bearer shares**

**9.** A transfer of title to any bearer share in a company is effected by the transfer from one person to another of the instrument mentioned in regulation 42 above which relates to that share.

**10.** Where the holder of bearer shares proposes to transfer to another person a number of shares which is less than the number specified in the instrument relating to those shares, he may only do so if he surrenders the instrument to the company and obtains a new instrument specifying the number of shares to be transferred.

### **Miscellaneous**

**11.** Nothing in the preceding provisions of this Schedule shall prejudice any power of the company to register as shareholder any person to whom the right to any shares in the company has been transmitted by operation of law.

**12.** A transfer of registered shares that are held by a deceased person at the time of his death which is made by his personal representative is as valid as if the personal representative had been the holder of the shares at the time of the execution of the instrument of transfer.

**13.** On the death of any one of the joint holders of any shares, the survivor or survivors shall be the only persons recognised by the company as having any title to or any interest in those shares.

## SCHEDULE 6

Regulation 63

### AUDITORS

#### **Eligibility**

**1.** No person is eligible for appointment as auditor of an investment company with variable capital unless he is also eligible under section 25 of the Companies Act 1989<sup>(35)</sup> (eligibility for appointment as company auditor) for appointment as a company auditor.

**2.—(1)** A person is ineligible for appointment as auditor of an investment company with variable capital if he is—

- (a) an officer or employee of the company; or
- (b) a partner or employee of such a person, or a partnership of which such a person is a partner.

(2) For the purposes of sub-paragraph (1) above, an auditor of a company shall not be regarded as an officer or employee of the company.

(3) The power of the Secretary of State to make regulations under section 27 of the Companies Act 1989 (ineligibility on ground of lack of independence) in relation to the appointment of company auditors shall be exercisable in relation to the appointment of auditors of investment companies with variable capital—

- (a) for like purposes; and
- (b) subject to the same conditions.

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(35) 1989 c. 40.

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(4) Any reference in this paragraph to an officer of an investment company with variable capital shall include a reference to a shadow director of such a company.

**3.—(1)** No person shall act as auditor of a company if he is ineligible for appointment to the office.

(2) If during his term of office an auditor of a company becomes ineligible for appointment to the office, he shall thereupon vacate office and shall forthwith give notice in writing to the company concerned that he has vacated it by reason of ineligibility.

(3) A person who acts as auditor of a company in contravention of sub-paragraph (1) above or fails to give notice of vacating his office as required by sub-paragraph (2) above is guilty of an offence and liable—

(a) on conviction on indictment, to a fine;

(b) on summary conviction, to a fine not exceeding the statutory maximum.

(4) In the case of continued contravention he is liable on a second or subsequent summary conviction (instead of the fine mentioned in sub-paragraph (3)(b) above) to a fine not exceeding £100 in respect of each day on which the contravention is continued.

(5) In proceedings against a person for an offence under this paragraph it is a defence for him to show that he did not know and had no reason to believe that he was, or had become, ineligible for appointment.

## **Appointment**

**4.—(1)** Every company shall appoint an auditor or auditors in accordance with this paragraph.

(2) A company shall, at each general meeting at which the company's annual report is laid, appoint an auditor or auditors to hold office from the conclusion of that meeting until the conclusion of the next general meeting at which an annual report is laid.

(3) The first auditors of a company may be appointed by the directors of the company at any time before the first general meeting of the company at which an annual report is laid; and auditors so appointed shall hold office until the conclusion of that meeting.

(4) Where no appointment is made under sub-paragraph (3) above, the first auditors of any company may be appointed by the company in general meeting.

(5) No rules made under section 107 of the 1986 Act (appointment etc of auditors) shall apply in relation to investment companies with variable capital.

**5.** If, in any case, no auditors are appointed as required in paragraph 4 above, SIB may appoint a person to fill the vacancy.

**6.—(1)** The directors of a company, or the company in general meeting, may fill a casual vacancy in the office of auditor.

(2) While such a vacancy continues, any surviving or continuing auditor or auditors may continue to act.

**7.—(1)** Sub-paragraphs (2) to (5) below apply to the appointment as auditor of a company of a partnership constituted under the law of England and Wales or Northern Ireland, or under the law of any other country or territory in which a partnership is not a legal person; and sub-paragraphs (3) to (5) below apply to the appointment as such an auditor of a partnership constituted under the law of Scotland, or under the law of any other country or territory in which a partnership is a legal person.

(2) The appointment is, unless the contrary intention appears, an appointment of the partnership as such and not of the partners.



- (3) Where the partnership ceases, the appointment shall be treated as extending to—
- (a) any partnership which succeeds to the practice of that partnership and is eligible for the appointment; and
  - (b) any person who succeeds to that practice having previously carried it on in partnership and is eligible for the appointment.

(4) For this purpose a partnership shall be regarded as succeeding to the practice of another partnership only if the members of the successor partnership are substantially the same as those of the former partnership; and a partnership or other person shall be regarded as succeeding to the practice of a partnership only if it or he succeeds to the whole or substantially the whole of the business of the former partnership.

(5) Where the partnership ceases and no person succeeds to the appointment under sub-paragraph (3) above, the appointment may with the consent of the company be treated as extending to a partnership or other person eligible for the appointment who succeeds to the business of the former partnership or to such part of it as is agreed by the company shall be treated as comprising the appointment.

## **Rights**

**8.—**(1) The auditors of a company shall have a right of access at all times to the company's books, accounts and vouchers and are entitled to require from the company's officers such information and explanations as they think necessary for the performance of their duties as auditors.

(2) An officer of a company commits an offence if he knowingly or recklessly makes to the company's auditors a statement (whether written or oral) which—

- (a) conveys or purports to convey any information or explanations which the auditors require, or are entitled to require, as auditors of the company; and
- (b) is misleading, false or deceptive in a material particular.

(3) A person guilty of an offence under sub-paragraph (2) above is liable—

- (a) on conviction on indictment, to imprisonment not exceeding a term of two years or to a fine or to both;
- (b) on summary conviction, to imprisonment not exceeding a term of three months or to a fine not exceeding the statutory maximum or to both.

(4) This paragraph applies to a shadow director of an investment company with variable capital as it applies to an officer of such a company.

**9.—**(1) The auditors of a company are entitled—

- (a) to receive all such notices of, and other communications relating to, any general meeting of the company as a shareholder of the company is entitled to receive;
- (b) to attend any general meeting of the company; and
- (c) to be heard at any general meeting which they attend on any part of the business of the meeting which concerns them as auditors.

(2) The right to attend and be heard at a meeting is exercisable in the case of a body corporate or partnership by an individual authorised by it in writing to act as its representative at the meeting.

## **Remuneration**

**10.—**(1) The remuneration of auditors of a company who are appointed by the company in general meeting shall be fixed by the company in general meeting or in such manner as the company in general meeting may determine.

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(2) The remuneration of auditors who are appointed by the directors or SIB shall, as the case may be, be fixed by the directors or SIB (and shall be payable by the company even where it is fixed by SIB).

**11.**—(1) Subject to sub-paragraph (2) below, the power of the Secretary of State to make regulations under section 390B of the 1985 Act<sup>(36)</sup> (remuneration of auditors and their associates for non-audit work) in relation to company auditors shall be exercisable in relation to auditors of investment companies with variable capital—

- (a) for like purposes; and
- (b) subject to the same conditions.

(2) For the purposes of the exercise of the power to make regulations under section 390B of the 1985 Act, as extended by sub-paragraph (1) above, the reference in section 390B(3) to a note to a company's accounts shall be taken to be a reference to the annual report of an investment company with variable capital.

### **Removal**

**12.**—(1) A company may by resolution remove an auditor from office notwithstanding anything in any agreement between it and him.

(2) Where a resolution removing an auditor is passed at a general meeting of a company, the company shall not later than 14 days after the holding of the meeting notify SIB of the passing of the resolution.

(3) Nothing in this paragraph shall be taken as depriving a person removed under it of compensation or damages payable to him in respect of the termination of his appointment as auditor or of any appointment terminating with that as auditor.

### **Rights on removal or non-reappointment**

**13.**—(1) A resolution at a general meeting of a company—

- (a) removing an auditor before the expiration of his period of office; or
- (b) appointing as auditor a person other than the retiring auditor;

is not effective unless notice of the intention to move it has been given to the investment company with variable capital at least 28 days before the meeting at which it is moved.

(2) On receipt of notice of such an intended resolution, the company shall forthwith send a copy to the person proposed to be removed or, as the case may be, to the person proposed to be appointed and to the retiring auditor.

(3) The auditor proposed to be removed or, as the case may be, the retiring auditor may make with respect to the intended resolution representations in writing to the company (not exceeding a reasonable length) and request their notification to the shareholders of the company.

(4) The company shall (unless the representations are received by the company too late for it to do so)—

- (a) in any notice of the resolution given to the shareholders of the company, state the fact of the representations having been made;
- (b) send a copy of the representations to each of the shareholders whose name appears on the register of shareholders (other than the person who is designated in the company's instrument of incorporation for the purposes of paragraph 4 of Schedule 5 to these Regulations) and to whom notice of the meeting is or has been sent;

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(36) Section 390B was inserted into the 1985 Act by section 121 of the Companies Act 1989 (c. 40).

(c) take such steps as SIB regulations may require for the purpose of bringing the fact that the representations have been made to the attention of the holders of any bearer shares; and

(d) at the request of any holder of bearer shares, provide a copy of the representations.

(5) If a copy of any such representations is not sent out as required because they were received too late or because of the company's default or if, for either of those reasons, any steps required by sub-paragraph (4)(c) or (d) above are not taken, the auditor may (without prejudice to his right to be heard orally) require that the representations be read out at the meeting.

(6) Copies of the representations need not be sent out, the steps required by sub-paragraph (4)(c) or (d) above need not be taken and the representations need not be read out at the meeting if, on the application of the company or any other person claiming to be aggrieved, the court is satisfied that the rights conferred by this paragraph are being abused to secure needless publicity for defamatory matter; and the court may order the costs of the company on such an application to be paid in whole or in part by the auditor, notwithstanding that he is not a party to the application.

**14.—**(1) An auditor who has been removed from office has, notwithstanding his removal, the rights conferred by paragraph 9 above in relation to any general meeting of the company at which his term of office would otherwise have expired or at which it is proposed to fill the vacancy caused by his removal.

(2) Any reference in paragraph 9 above to business concerning the auditors as auditors shall be construed in relation to an auditor who has been removed from office as a reference to business concerning him as former auditor.

### **Resignation**

**15.—**(1) An auditor of a company may resign his office by depositing a notice in writing to that effect at the company's head office.

(2) Such a notice is not effective unless it is accompanied by the statement required by paragraph 18 below.

(3) An effective notice of resignation operates to bring the auditor's term of office to an end as of the date on which the notice is deposited or on such later date as may be specified in it.

(4) The company shall not later than 14 days after the deposit of a notice of resignation send a copy of the notice to SIB.

**16.—**(1) This paragraph applies where a notice of resignation of an auditor is accompanied by a statement of circumstances which he considers ought to be brought to the attention of the shareholders or creditors of the company.

(2) An auditor may deposit with the notice a signed requisition that a general meeting of the company be convened forthwith for the purpose of receiving and considering such explanation of the circumstances connected with his resignation as he may wish to place before the meeting.

(3) The company shall, not later than 21 days after the date of the deposit of a requisition under this paragraph, proceed to convene a meeting for a day not more than 28 days after the date on which the notice convening the meeting is given.

(4) The auditor may request the company to circulate to the shareholders of the company whose name appears on the register of shareholders (other than the person who is designated in the company's instrument of incorporation for the purposes of paragraph 4 of Schedule 5 to these Regulations)—

(a) before the meeting convened on his requisition; or

(b) before any general meeting at which his term of office would otherwise have expired or at which it is proposed to fill the vacancy caused by his resignation;

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a statement in writing (not exceeding a reasonable length) of the circumstances connected with his resignation.

- (5) The company shall (unless the statement is received by it too late for it to do so)—
- (a) in any notice or advertisement of the meeting given or made to shareholders of the company, state the fact of the statement having been made;
  - (b) send a copy of the statement to every shareholder of the company to whom notice of the meeting is or has been sent; and
  - (c) at the request of any holder of bearer shares, provide a copy of the statement.

(6) If a copy of the statement is not sent out or provided as required because it was received too late or because of the company's default the auditor may (without prejudice to his right to be heard orally) require that the statement be read out at the meeting.

(7) Copies of a statement need not be sent out or provided and the statement need not be read out at the meeting if, on the application of the company or any other person claiming to be aggrieved, the court is satisfied that the rights conferred by this paragraph are being abused to secure needless publicity for defamatory matter; and the court may order the costs of the company on such an application to be paid in whole or in part by the auditor, notwithstanding that he is not a party to the application.

**17.—(1)** An auditor who has resigned has, notwithstanding his removal, the rights conferred by paragraph 9 above in relation to any such general meeting of the company as is mentioned in paragraph 16(4)(a) or (b) above.

(2) The reference in paragraph 9 above to business concerning the auditors as auditors shall be construed in relation to an auditor who has resigned as a reference to business concerning him as former auditor.

#### **Statement by auditor ceasing to hold office**

**18.—(1)** Where an auditor ceases for any reason to hold office, he shall deposit at the head office of the company a statement of any circumstances connected with his ceasing to hold office which he considers should be brought to the attention of the shareholders or creditors of the company or, if he considers that there are no such circumstances, a statement that there are none.

- (2) The statement shall be deposited—
- (a) in the case of resignation, along with the notice of resignation;
  - (b) in the case of failure to seek re-appointment, not less than 14 days before the end of the time allowed for next appointing auditors; and
  - (c) in any other case, not later than the end of the period of 14 days beginning with the date on which he ceases to hold office.

(3) If the statement is of circumstances which the auditor considers should be brought to the attention of the shareholders or creditors of the company, the company shall not later than 14 days after the deposit of the statement either—

- (a) send a copy of the statement to each of the shareholders whose name appears on the register of shareholders (other than the person who is designated in the company's instrument of incorporation for the purposes of paragraph 4 of Schedule 5 to these Regulations) and take such steps as SIB regulations may require for the purpose of bringing the fact that the statement has been made to the attention of the holders of any bearer shares; or
- (b) apply to the court;

and, where an application is made under paragraph (b) above, the company shall notify the auditor.

(4) Unless the auditor receives notice of an application to the court before the end of the period of 21 days beginning with the day on which he deposited the statement, he shall not later than seven days after the end of that period send a copy of the statement to each of the registrar of companies and SIB.

(5) If the court is satisfied that the auditor is using the statement to secure needless publicity for defamatory matter—

- (a) it shall direct that copies of the statement need not be sent out and that the steps required by SIB regulations need not be taken; and
- (b) it may further order the company's costs on the application to be paid in whole or in part by the auditor notwithstanding that he is not a party to the application;

and the company shall not later than 14 days after the court's decision take such steps in relation to a statement setting out the effect of the order as are required by sub-paragraph (3)(a) above in relation to the statement deposited under sub-paragraph (1) above.

(6) If the court is not so satisfied, the company shall not later than 14 days after the court's decision send to each of the shareholders a copy of the auditor's statement and notify the auditor of the court's decision.

(7) The auditor shall not later than seven days after receiving such a notice send a copy of the statement to each of the registrar of companies and SIB.

(8) Where a notice of appeal is filed not later than 14 days after the court's decision, any reference to that decision in sub-paragraphs (5) and (6) above shall be construed as a reference to the final determination or withdrawal of that appeal, as the case may be.

**19.—**(1) If a person ceasing to hold office as auditor fails to comply with paragraph 18 above, he is guilty of an offence and liable—

- (a) on conviction on indictment, to a fine;
- (b) on summary conviction, to a fine not exceeding the statutory maximum.

(2) In proceedings for an offence under sub-paragraph (1) above, it is a defence for the person charged to show that he took all reasonable steps and exercised all due diligence to avoid the commission of the offence.

## SCHEDULE 7

Regulation 64

### MERGERS AND DIVISIONS

**1.** This Schedule applies to any reconstruction or amalgamation involving an investment company with variable capital which takes the form of a scheme described in paragraph 4 below.

**2.** An investment company with variable capital may apply to the court under section 425 of the 1985 Act<sup>(37)</sup> (power of company to compromise with creditors or members) for an order sanctioning a scheme falling within any of paragraphs (a) to (c) of paragraph 4(1) below where—

- (a) the scheme in question involves a compromise or arrangement with its shareholders or creditors or any class of its shareholders or creditors; and
- (b) the consideration for the transfer or each of the transfers envisaged by the scheme is to be—
  - (i) shares in the transferee company receivable by shareholders of the transferor company; or

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<sup>(37)</sup> Section 425 was amended by section 109(i) of, and paragraph 11 of Schedule 6 to, the Insolvency Act 1985 (c. 65).

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- (ii) where there is more than one transferor company and any one or more of them is a public company, shares in the transferee company receivable by shareholders or members of the transferor companies (as the case may be);

in each case with or without any cash payment to shareholders.

**3.** A public company may apply to the court under section 425 of the 1985 Act for an order sanctioning a scheme falling within any of paragraph (b) or (c) of paragraph 4(1) below where—

- (a) the scheme in question involves a compromise or arrangement with its members or creditors or any class of its members or creditors; and
- (b) the consideration for the transfer or each of the transfers envisaged by the scheme is to be—
  - (i) shares in the transferee company receivable by members of the transferor company; or
  - (ii) where there is more than one transferor company and any one or more of them is an investment company with variable capital, shares in the transferee company receivable by members or shareholders of the transferor companies (as the case may be);

in each case with or without any cash payment to shareholders.

**4.—(1)** The schemes falling within this paragraph are—

- (a) any scheme under which the undertaking, property and liabilities of an investment company with variable capital are to be transferred to another such company, other than one formed for the purpose of, or in connection with, the scheme;
- (b) any scheme under which the undertaking, property and liabilities of two or more bodies corporate, each of which is either—
  - (i) an investment company with variable capital; or
  - (ii) a public company;
 are to be transferred to an investment company with variable capital formed for the purpose of, or in connection with, the scheme;
- (c) any scheme under which the undertaking, property and liabilities of an investment company with variable capital or a public company are to be divided among and transferred to two or more investment companies with variable capital whether or not formed for the purpose of, or in connection with, the scheme.

(2) Nothing in this Schedule shall be taken as enabling the court to sanction a scheme under which the whole or any part of the undertaking, property or liabilities of an investment company with variable capital may be transferred to any person other than an investment company with variable capital.

**5.** For the purposes of this Schedule, sections 425 to 427 of the 1985 Act shall, subject to paragraph 6 below, have effect in respect of any application made by virtue of paragraph 2 or 3 above as they have effect in respect of applications falling within section 427A(1) of that Act (that is to say, subject to the provisions of section 427A of, and Schedule 15B to, that Act (mergers and divisions of public companies))(38).

**6.—(1)** All the provisions of the 1985 Act referred to in paragraph 5 above shall have effect with such modifications as are necessary or appropriate for the purposes of this Schedule.

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(38) Section 427A of, and Schedule 15B to, the 1985 Act were inserted by the Companies (Mergers and Divisions) Regulations 1987 (S.I. 1987/1991).

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(2) In particular, any reference in those provisions to a Case 1 Scheme, a Case 2 Scheme or a Case 3 Scheme shall be taken to be a reference to a scheme falling within paragraph (a), (b) or (c) of paragraph 4(1) above.

(3) Without prejudice to the generality of sub-paragraph (1) above, the following references in those provisions shall, unless the context otherwise requires, have effect as indicated below, that is to say—

- (a) any reference to a scheme shall be taken to be a reference to a scheme falling within any of paragraphs (a) to (c) of paragraph 4(1) above;
- (b) any reference to a company shall be taken to be a reference to an investment company with variable capital;
- (c) any reference to members shall be taken to be a reference to shareholders of an investment company with variable capital;
- (d) any reference to the registered office of a company shall be taken to be a reference to the head office of an investment company with variable capital;
- (e) any reference to the memorandum and articles of a company shall be taken to be a reference to the instrument of incorporation of an investment company with variable capital;
- (f) any reference to a report under section 103 of the 1985 Act shall be taken to be a reference to any report with respect to the valuation of any non-cash consideration given for shares in an investment company with variable capital which may be required by SIB regulations;
- (g) any reference to annual accounts shall be taken to be a reference to the accounts contained in the annual report of an investment company with variable capital;
- (h) any reference to a directors' report, in relation to a company's annual accounts, shall be taken to be a reference to any report of the directors of an investment company with variable capital that is contained in the company's annual report;
  - (i) any reference to the requirements of the 1985 Act as to balance sheets forming part of a company's annual accounts shall be taken to be a reference to any requirements arising by virtue of SIB regulations as to balance sheets drawn up for the purposes of the accounts contained in the annual report of an investment company with variable capital;
- (j) any reference to paid up capital shall be taken to be a reference to the share capital of an investment company with variable capital.

## SCHEDULE 8

Regulation 75

### MINOR AND CONSEQUENTIAL AMENDMENTS

#### PART I

#### PRIMARY LEGISLATION

##### *Trustee Investments Act 1961 (c. 62)*

**1.** In Part III of Schedule 1 to the Trustee Investments Act 1961 (wider-range investments), after paragraph 2 there shall be inserted the following paragraph—

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“**2A.** In any shares in an investment company with variable capital within the meaning of the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996.”.

*Stock Transfer Act 1963 (c. 18)*

**2.** In section 1(4) of the Stock Transfer Act 1963 (registered securities to which section 1 applies), after paragraph (e) there shall be inserted the following paragraph—

“(f) shares issued by an investment company with variable capital within the meaning of the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996.”.

*Data Protection Act 1984 (c. 35)*

**3.** Section 30 of the Data Protection Act 1984 (exemption for regulation of financial services etc) shall have effect as if the reference in subsection (2) to any enactment included these Regulations.

*Companies Act 1985 (c. 6)*

**4.** In section 26 of the 1985 Act (prohibition on registration of certain names)—

(a) in subsection (1) after paragraph (b) there shall be inserted the following paragraph—

“(bb) which includes, at any place in the name, the expression “investment company with variable capital” or its Welsh equivalent (“cwmni buddsoddi â chyfalaf newidiol”);”;

(b) in subsection (3)(b) the word “and” after “(“anghyfyngedig”)” shall be omitted and at the end there shall be inserted

“and

“investment company with variable capital” or its Welsh equivalent (“cwmni buddsoddi â chyfalaf newidiol”);”.

**5.** In section 199(2A)(**39**) of the 1985 Act (interests to be disregarded in determining whether a person holds a material interest in shares), after paragraph (b) there shall be inserted the following paragraph—

“(bb) an interest belonging to an investment company with variable capital;”.

**6.** In section 209(1)(h) of the 1985 Act(**40**) (interests to be disregarded for purposes of obligation to disclose interests in shares) the word “or” at the end of sub-paragraph (i) shall be omitted and, after sub-paragraph (ii), there shall be inserted

“or

(iii) by virtue of his being a depositary, within the meaning of the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996, of an investment company with variable capital.”.

**7.** In section 220(1) of the 1985 Act(**41**) (definitions for Part VI of the Act), after the definition of “designated agency” there shall be inserted the following definition—

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(39) Subsection (2A) of section 199 of the 1985 Act was inserted by the Disclosure of Interests in Shares (Amendment) Regulations 1993 (S.I. 1993/1819).

(40) Section 209 of the 1985 Act was substituted by the Disclosure of Interests in Shares (Amendment) Regulations 1993 (S.I. 1993/1819).

(41) Subsection (1) of section 220 of the 1985 Act was substituted by the Disclosure of Interests in Shares (Amendment) Regulations 1993 (S.I. 1993/1819).



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““investment company with variable capital” has the same meaning as in the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996;”.

8. In section 716(2) of the 1985 Act(42) (exemptions from prohibition on formation of any company, association or partnership with more than 20 members), after paragraph (d) there shall be inserted the following paragraph—

“(e) of an investment company with variable capital within the meaning of the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996.”.

9. In section 718(2) of the 1985 Act (exemptions from application of Act to unregistered companies), after paragraph (c) there shall be inserted the following paragraph—

“(d) any investment company with variable capital within the meaning of the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996.”.

#### *Company Directors Disqualification Act 1986 (c. 46)*

10. In Schedule 1 to the Company Directors Disqualification Act 1986(43) (matters for determining unfitness of directors), after paragraph 5 there shall be inserted the following paragraph—

“5A. In the application of this Part of this Schedule in relation to any person who is a director of an investment company with variable capital, any reference to a provision of the Companies Act shall be taken to be a reference to the corresponding provision of the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996 or of any regulations made under regulation 6 of those Regulations (SIB regulations).”.

#### *Financial Services Act 1986 (c. 60)*

11. After section 24 of the 1986 Act (operators and trustees of recognised schemes) there shall be inserted the following section—

#### *“Investment companies with variable capital*

##### **Investment companies with variable capital**

24A. An investment company with variable capital is an authorised person as respects—

- (a) investment business which consists in operating the collective investment scheme constituted by the company; and
- (b) any investment business which is carried on by the company in connection with or for the purposes of operating that scheme.”.

12. In section 47A(4) of the 1986 Act(44) (disciplinary action which may be taken in respect of failure to comply with statements of principle) the word “or” at the end of paragraph (c) shall be omitted and after paragraph (d) there shall be inserted

“or

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(42) Paragraph (d) of section 716(2) of the 1985 Act was inserted by section 145 of, and paragraph 15 of Schedule 19 to, the Companies Act 1989 (c. 40).

(43) Paragraph 5 of Schedule 1 was substituted by section 23 of, and paragraph 35 of Schedule 10 to, the Companies Act 1989 (c. 40).

(44) Section 47A was inserted into the 1986 Act by section 192 of the Companies Act 1989 (c. 40).

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- (e) the giving of a direction under regulation 18 of the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996 (directions) or the making of an application for an order under regulation 20 of those Regulations (application to court to remove director or depository);”.

**13.** In section 72 of the 1986 Act (winding up orders), at the end of subsection (5) (petition to wind up members of recognised self-regulating organisation) there shall be inserted the following subsection—

“(6) Subsection (5) above does not apply to the presentation of a petition under subsection (1) above for the winding up of an investment company with variable capital.”.

**14.** In section 76(1) of the 1986 Act (restrictions on promotion of collective investment schemes), after the words “authorised unit trust scheme” there shall be inserted the words “or an investment company with variable capital”.

**15.** In section 83(2) of the 1986 Act (activities in which manager of authorised unit trust scheme may engage)—

- (a) after paragraph (a) there shall be inserted—

“(aa) acting as a director of an investment company with variable capital;”;

- (b) in paragraph (b), after the words “mentioned in paragraph (a)” there shall be inserted the words “or (aa)”.

**16.** In section 87 of the 1986 Act (schemes authorised in designated countries or territories)—

- (a) at the beginning of subsection (2) there shall be inserted “Subject to subsection (2A) below;”, and

- (b) at the end of subsection (2) there shall be inserted the following subsection—

“(2A) Nothing in subsection (2) above shall require the comparison set out in that subsection to be made where—

- (a) the class of collective investment schemes to be specified in an order includes schemes having characteristics corresponding to those of an investment company with variable capital; and

- (b) having regard to the characteristics of such schemes, it appears more appropriate to consider whether investors in the United Kingdom are afforded protection at least equivalent to that provided for them by the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996;

and, to the extent that the requirements of paragraph (b) above are met, the relevant comparison shall be between the protection afforded to investors in the United Kingdom by the law under which collective investment schemes of the class to be specified in the order are authorised and supervised in the country or territory concerned and the protection provided for such investors by the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996.”.

**17.** In section 102 of the 1986 Act (register of authorised persons etc)—

- (a) in subsection (2), after paragraph (b) there shall be inserted the following paragraph—

“(bb) in the case of an investment company with variable capital which is an authorised person by virtue of section 24A above, the name of the company, the address of the company’s head office and the names and addresses of the directors and depository of the company;”;

- (b) in subsection (6), for the words “or (b)” there shall be substituted the words “, (b) or (bb)”.

18. In section 104(1) of the 1986 Act (power to call for information) after “24,” there shall be inserted “24A,”.

19. In section 108(1) of the 1986 Act (power to require second audit), after the words “by virtue of section” there shall be inserted “24A,”.

20. In section 205A of the 1986 Act(45) (supplementary provisions with respect to subordinate legislation)—

(a) in subsection (1) for “The following provisions” there shall be substituted “Subsections (2) to (4) below”; and

(b) after subsection (1) there shall be inserted the following subsection

“(1A) Subsections (2) to (4) below also apply to any power to make regulations by virtue of regulation 6 of the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996 in the event that that power becomes exercisable by the Treasury by virtue of an order under section 115 above.”.

21. In section 206(1) of the 1986 Act(46) (publication of information and advice), after paragraph (b) there shall be inserted the following paragraphs—

“(bb) the operation of the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996 and any regulations made by virtue of regulation 6 of those Regulations;

(cc) any matters relating to the functions to which regulation 73 of those Regulations relates;”.

22. In section 207(1) of the 1986 Act (interpretation) after the definition of “investment agreement” there shall be inserted the following definition—

““investment company with variable capital” and, in relation to such a company, “depository” have the same meaning as in the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996;”.

23. In Schedule 8 to the 1986 Act(47) (principles applicable to designated agency’s legislative provisions), at the end of paragraph 1(1) there shall be inserted the words “and the provisions of regulations made under regulation 6 of the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996”.

24. In paragraph 7 of Schedule 9 to the 1986 Act (designated agencies; status and exercise of transferred functions), after “this Act” there shall be inserted “or, as the case may be, the provision of the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996,”.

### **Pension Schemes Act 1993 (c. 48)**

25. In section 38(6) (permitted forms for appropriate schemes), after paragraph (c) there shall be inserted the following paragraph—

“(d) an investment company with variable capital within the meaning of the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996.”.

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(45) Section 205A of the 1986 Act was inserted by section 206(1) of, and paragraph 18 of Schedule 23 to, the Companies Act 1980; subsection (1) was amended by paragraph 8 of Schedule 4 to the Transfer of Functions (Financial Services) Order 1992 (S.I. 1992/1315).

(46) Section 206 of the 1986 Act was amended by section 206 of, and paragraph 19 of Schedule 23 to, the Companies Act 1989 (c. 40).

(47) Paragraph 1 was substituted by section 206(1) of, and paragraph 23 of Schedule 23 to, the Companies Act 1989.

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## PART II

### SUBORDINATE LEGISLATION

*The Data Protection (Regulation of Financial Services etc)  
(Subject Access Exemption) Order 1987 (S.I.1987/1905)*

**26.** Schedule 1 to the Data Protection (Regulation of Financial Services etc) (Subject Access Exemption) Order 1987(**48**) (functions designated for purposes of section 30 of Data Protection Act 1984) shall have effect as if at the end there were inserted the following entry—

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“Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996	Functions of the Securities and Investments Board under Regulations”
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*The Uncertificated Securities Regulations 1995 (S.I. 1995/3272)*

**27.** In regulation 3(1) of the Uncertificated Securities Regulations 1995 (interpretation) in the definition of “unit of security”, after the words “(for example a single share)” there shall be inserted “and, in the case of any share—

- (a) which is issued by an investment company with variable capital (within the meaning of the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996) which is a participating issuer; and
- (b) to which are attached rights expressed in two denominations;

it includes any smaller denomination share and any larger denomination share (within the meaning, in the case of each such share, of the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996).”

**28.** In regulation 19 of those Regulations (entries on registers), after paragraph (8) there shall be inserted the following paragraph—

“(9) This regulation shall not apply to a participating issuer which is an investment company with variable capital (within the meaning of the Open-Ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996).”

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### EXPLANATORY NOTE

*(This note is not part of the Regulations)*

The Regulations make provision for the formation in Great Britain of a class of body corporate referred to in the Regulations as an investment company with variable capital. The Regulations also make provision for the authorisation of investment companies with variable capital and for their subsequent supervision.

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(48) There are amendments that are not relevant to these Regulations.

An investment company with variable capital formed under the Regulations will be a collective investment scheme within the meaning of section 75 of the Financial Services Act 1986 (c. 60) the object of which is investment in a limited class of investments (referred to in the Regulations as “transferable securities”). It will also be an open-ended investment company within the meaning of section 75(8) of that Act. In addition an investment company with variable capital will be an undertaking for collective investment in transferable securities to which Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (“the UCITS Directive”) applies. As such, it will be able to take advantage of the rights which that Directive confers in relation to the undertakings to which it applies to market their shares in other States of the European Economic Area. At present, the only undertakings formed in Great Britain which are able to take advantage of the rights conferred by the UCITS Directive are authorised unit trust schemes the object of which is investment in transferable securities.

Part I of the Regulations is general and contains definitions of certain of the terms used in the Regulations.

Part II of, and Schedules 1 to 3 to, the Regulations are concerned with the formation and the subsequent control and supervision of an investment company with variable capital. Regulations 3 and 4 and Schedule 1 concern the formation of a company and the registration of certain details relating to it with the registrar of companies. Regulation 5 and Schedule 2 are concerned with the custody of the company’s property and with the company’s depository who is the person to whom the property will be entrusted for safekeeping. Regulation 6 extends certain legislative powers under the Financial Services Act 1986 so as to be exercisable in relation to investment companies with variable capital. The powers are vested in the Securities and Investments Board (“SIB”). (Regulation 73 makes provision as to SIB’s functions under the Regulations.)

Regulations 7 to 12 of the Regulations contain provisions as to the authorisation by SIB of an investment company with variable capital. Schedule 3 contains provisions concerning the contents of a company’s instrument of incorporation.

An application for authorisation will be required and SIB must be satisfied that the company will, if formed and authorised, meet certain criteria (set out in regulation 10). There is provision for representations to be made against any refusal to authorise a company and there is also provision for a company to be issued with a certificate which is a necessary prerequisite to it being able to enjoy the rights conferred by the UCITS Directive. Regulations 13 and 14 contain provisions relating to the name which may be used by an investment company with variable capital and regulation 15 contains provisions requiring a company to seek prior approval from SIB for certain changes, including changes to the company’s instrument of incorporation. Regulations 16 to 20 confer powers on SIB to intervene in the affairs of a company once it has been authorised. The powers in question are powers to revoke authorisation, to give directions and to make applications to the court. Regulations 21 to 24 confer concurrent powers on the Secretary of State and SIB to appoint inspectors to investigate the affairs of an investment company with variable capital. Regulations 25 to 27 contain provisions as to the winding up and dissolution of an investment company with variable capital.

Part III of, and Schedules 4 to 7 to, the Regulations set out the corporate framework within which an investment company with variable capital will operate. This framework will be supplemented by regulations made by SIB under the provisions of regulation 6 of the Regulations. Regulations 28 to 30 contain provisions concerning the directors of an investment company with variable capital and the inspection of their service contracts. Regulation 31 makes provisions as to general meetings of the company and regulations 32 to 38 make provision as to the capacity of a company and the validity of certain transactions involving its directors. Regulations 39 to 46 contain provision about the nature of the shares that an investment company with variable capital may issue, about share certificates and (together with Schedule 5 to the Regulations) share transfers and about the maintenance, closure and rectification of a register of shareholders which an investment company with variable capital will be required to keep in accordance with Schedule 4. By virtue of regulation 42, an investment

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company with variable capital will be able to issue bearer shares. Regulations 47 to 59 contain various provisions that are relevant to the operation of an investment company with variable capital. The provisions in question are ones about the powers which a company enjoys incidental to the carrying on of its business (regulation 47), the details which must be included in its correspondence (regulations 48 and 49), the execution and authentication of documents (regulations 50 to 54), liability and exemptions from liability (regulations 55 to 57), fraudulent trading (regulation 58) and the powers which the company has to make provision for its employees on the cessation or transfer of its business (regulation 59). Regulations 60 to 63 and Schedule 6 make provision as to reports containing accounts which must be prepared by an investment company with variable capital, as to the audit of the reports and as to auditors. Regulation 64 of, and Schedule 7 to, the Regulations contain provisions concerning the merger and division of investment companies with variable capital.

Part IV of the Regulations contains miscellaneous provisions, including provisions about notifications to the registrar of companies, prosecutions and service of documents. Part IV (regulation 74) also contains provisions extending the powers that SIB has under the Financial Services Act 1986 to raise fees in relation to the authorisation and supervision of authorised unit trust schemes so as to be exercisable for like purposes in relation to the authorisation and supervision of investment companies with variable capital. In addition, Part IV of and Schedule 8 to the Regulations make various minor and consequential amendments to other enactments including an amendment which has the effect that an investment company with variable capital will be an authorised person under the Financial Services Act 1986 (paragraph 11 of Schedule 8) and an amendment which excludes such a company from the provisions of section 716 of the Companies Act 1985 (paragraph 8 of Schedule 8).

A compliance cost assessment relating to the Regulations has been prepared and a copy may be obtained from Mrs Janet Robbins, Financial Services, HM Treasury, Parliament Street, London, SW1P 3AG. Tel: 0171 270 5294. Fax: 0171 270 4694.