



**NOTICE REGARDING THE PUBLICATION OF THE DRAFT DETERMINATION
RELATING TO FOREIGN COLLECTIVE SCHEMES SOLICITING INVESTMENTS IN THE
REPUBLIC**

COLLECTIVE INVESTMENT SCHEMES CONTROL ACT, 2002

The Financial Sector Conduct Authority (Authority) hereby invites submissions on the draft Determination relating to Foreign Collective Schemes Soliciting Investments in the Republic as set out in the Schedule, to be made under section 65(1)(a) and (c) of the Collective Investment Schemes Control Act, 2002 (Act No. 45 of 2002).

The draft Determination, together with the statement supporting the draft Determination, is available on the website of the Authority at <https://www.fsca.co.za>.

Submissions on the draft Determination must, on the submission template available on the website of the Authority, be submitted in writing on or before **11 October 2024** to the Authority at FSCA.RFDStandards@fsca.co.za.

**UNATHI KAMLANA
COMMISSIONER
FINANCIAL SECTOR CONDUCT AUTHORITY**

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SCHEDULE

CHAPTER 1

Definitions, purpose and determinations

1. Definitions

In this Schedule, **“the Act”** means the Collective Investment Schemes Control Act, 2002 (Act No. 45 of 2002) and any word or expression to which a meaning is assigned in the Act shall have that meaning, and unless the context otherwise indicates –

“applicant” means a manager or operator of a foreign collective investment scheme applying for approval in terms of section 65 of the Act;

“commodities exchange traded funds” means an exchange traded fund invested in physical commodities, such as agricultural goods, natural resources and precious metals;

“Companies Act” means the Companies Act, 2008 (Act No. 71 of 2008);

“hedge fund” means a hedge fund as defined in the Declaration of Hedge Fund Business as a Collective Investment Scheme under section 63 of the Act and published in *Government Gazette* Number 38503 on 25 February 2015;

“index-based derivatives” means a derivative instrument as defined in the Financial Markets Act, 2012 (Act No. 19 of 2012) whose value depends on or is derived from one or more underlying index;

“market gearing” refers to the ratio of a company’s debt relative to its equity;

“operator” means any person or entity that is authorised by a foreign regulator to administer a foreign scheme;

“foreign regulator” means a regulatory body that has a primary responsibility for the regulation and supervision of collective investment schemes in a foreign jurisdiction;

“foreign scheme” means a collective investment scheme authorised to conduct business in a foreign country and includes any portfolio of such scheme

“REITS” has the meaning assigned to that term in Board Notice 42 of 2014; and

“representative office” means a financial institution that is a company incorporated or registered in terms of the Companies Act, and which represents a foreign scheme.

2. Determinations

- (1) The Authority hereby determines, in accordance with section 65(1)(a) of the Act, the format of an application for approval in terms of section 65(1) of the Act, as set out in Chapter 2.
- (2) The Authority hereby determines, in accordance with section 65(1)(c) of the Act, the conditions that a foreign scheme must comply with for purposes of being approved under section 65(1), as set out in Chapter 3.

CHAPTER 2

Format of application for approval of a foreign scheme under section 65(1) of the Act

3. Format of application for approval of a foreign scheme

- (1) An application for approval in terms of section 65 of the Act must be in writing and, to the extent applicable, include –
 - (a) the full name of the foreign scheme and portfolio;
 - (b) the full name and address of the applicant;
 - (c) the full name and address of the foreign regulator to which the applicant and foreign scheme is subject in the applicant's country of registration;
 - (d) the full name and address of the trustee or body that provides the fiduciary oversight to the foreign scheme;
 - (e) the full name and address of the custodian of the foreign scheme;
 - (f) a detailed explanation of the manner in which the applicant will solicit investments in the foreign scheme from members of the public in the Republic;
 - (g) a description of legal and operational structure of the foreign scheme;
 - (h) where a representative office has been established, details of the representative office of the scheme;
 - (i) where a representative agreement has been concluded, details of the manager with which the applicant has entered into the representative agreement, and a copy of the representative agreement
 - (j) written confirmation from the applicable foreign regulator verifying that the scheme -
 - (i) has been approved and authorised in accordance with the legislation of the domicile of registration of the foreign scheme;
 - (ii) is subject to supervision by the foreign regulator in the relevant jurisdiction;
 - (iii) is by applicable law permitted to solicit investment in the respective jurisdiction and outside its domicile of registration; and
 - (iv) the applicant is fit and proper and in good standing with such foreign regulator;
 - (k) a certified copy of the approval or registration of the foreign scheme;
 - (l) a certified copy of the fund rules and instruments of incorporation of the scheme and portfolio(s);
 - (m) the prospectus and any amendments to the prospectus including clear disclosure of all risks pertaining to the foreign scheme or portfolio and the nature of the foreign scheme or portfolio, which must be provided to all investors;
 - (n) the latest annual financial report or equivalent report and any subsequent half yearly report of the foreign scheme;
 - (o) a copy of any other document affecting the rights of investors in the foreign scheme;
 - (p) confirmation by the auditor of the representative office that the representative office complies with the requirement in respect of paid-up share capital and reserves set out in paragraph 5(2); and
 - (q) any other further information as the Authority may require.

CHAPTER 3

Conditions for approval under section 65(1) of the Act

4. General conditions

- (1) An applicant and foreign scheme must be authorised and supervised by a foreign regulator which has a regulatory framework equivalent to the regulatory framework established under the Act.
- (2) The foreign scheme in which the applicant intends to solicit investments in the Republic must be -
 - (a) available for investment by members of the public in its domicile of registration; and
 - (b) promoted in the Republic to the same type of investors under the same or substantially similar requirements and conditions relating to the type of investors as in its domicile of registration.
- (3) The applicant may only solicit investments for the foreign scheme from members of the public in the Republic in relation to portfolios of the foreign scheme that the Authority has approved for solicitation purposes.
- (4) The applicant must satisfy the Authority on an ongoing basis that –
 - (a) the operator will organise and control the foreign scheme in a responsible manner;
 - (b) solicitation of investments in the foreign scheme will not be contrary to the interests of investors, potential investors, the financial sector or the public interest;
 - (b) the foreign scheme is sufficiently liquid to meet investor redemptions fully at its earliest redemption period;
 - (c) the foreign scheme does redemptions at regular intervals;
 - (d) the foreign scheme does not permit investment in an instrument that compels the acceptance of physical delivery of a commodity and the foreign scheme particulars or prospectus prohibits it from accepting physical delivery;
 - (e) the assets of investors are properly protected by application of the principle of segregation and identification;
 - (e) the foreign scheme does not lend out investor's funds;
 - (f) the investments that a foreign scheme proposes to offer for sale in the Republic have a risk profile which is not significantly higher when compared to the risk profile of similar investment in participatory interests offered for sale in the Republic by managers registered under the Act;
 - (g) the liquidity of the securities of the foreign scheme will not compromise the liquidity terms of the scheme; and
 - (h) the pooling structure of the foreign scheme is one which is allowable in the Republic under the Act.
- (5) Without limiting the generality of paragraph of 4(4)(b), in determining whether the solicitation of investments in the foreign scheme may be contrary to the interests of investors, potential investors, the financial sector or the public interest, the Authority will consider the manner and extent to which the following is used appropriately by the foreign scheme:
 - (a) investments in unlisted securities, commodities exchange traded funds and index-based derivatives and property securities and REITS, as permitted in the relevant foreign jurisdiction;
 - (b) diversification limits for transferable securities in actively managed funds and foreign schemes replicating an index, government and public securities, collective investment schemes, deposits and derivatives;
 - (c) concentration limits for foreign schemes, equities, debt or money market instruments;
 - (d) the purpose and market gearing for the use of derivatives, counter-party exposure to over-the-counter derivatives, counter-party exposure to transferable securities and overall counterparty exposure;

- (e) financial derivative instruments, where used for purposes other than hedging or efficient portfolio management such as -
 - (i) for investment purposes;
 - (ii) to follow an active investment strategy;
 - (iii) furtherance of the investment objective or strategy;
 - (iv) to actively manage the investment policy or objective;
 - (v) to obtain or manage exposure to the market or to specific asset classes (including the use of total return swaps and contracts for difference);
 - (f) an investment strategy which is associated with hedge funds including long/short, market neutral, fixed income arbitrage, option strategies or statistical arbitrage;
 - (g) hedge fund index funds; and
 - (h) complex debt instruments.
- (6) An operator¹ may not make a statement or disseminate information which the operator or the representative of the operator or ought reasonably to know is false, or misleading or is likely or intended to -
- (a) induce members of the public to purchase or deal with a participatory interest;
 - (b) conceal material information; or
 - (c) have the effect of inflating, depressing or maintaining the price of a participatory interest.
- (7) The applicant must avoid any conflict between the interests of the operator and the interests of an investor.
- (8) The applicant must maintain an open and co-operative relationship with the Authority and promptly inform the Authority about anything that might reasonably be expected to be disclosed to the Authority.
- (9) The applicant must comply with any additional conditions the Authority determines under section 65(1) of the Act as part of the applicant's application for approval, which conditions may be based on nature and type of category of the scheme, or portfolios under the scheme, and the target market of the scheme or portfolios.
- (10) If the applicant at any time amends the prospectus of any portfolio approved in accordance with subparagraph (9), the operator must cease soliciting investments in respect of that portfolio and may only proceed soliciting investments in respect of that portfolio if the Authority so confirms, subject to additional conditions determined by the Authority, if relevant.

5. Conditions in respect of representative office and representative agreement

- (1) The applicant must enter into a representative agreement with a -
 - (a) representative office established in the Republic; or
 - (b) manager registered under the Act.
- (2) If an applicant establishes a representative office as contemplated in subparagraph (1)(a), such representative office must maintain paid-up share capital and reserves of no less than R2 million.
- (3) The paid-up share capital and reserves contemplated in subparagraph (2) must be ring-fenced and may only be applied to the business and the purposes of the foreign scheme.

¹ Including its representative office as referred to in paragraph 6(1) and 6(2).

- (4) The operator must ensure that the auditor of its representative office annually certifies to the Authority, no later than three months after the financial year-end of the representative office, that the operator has complied with subparagraph (2).
- (5) A representative agreement referred to in subparagraph (1) must contain –
 - (a) an undertaking by the operator that it will comply with the provisions of section 65 of the Act and this Determination;
 - (b) an undertaking by the representative office or local manager, as relevant, to use its reasonable endeavours to ensure compliance by the operator with the provisions of section 65 and this Determination;
 - (c) an undertaking by the representative office or local manager, as relevant, to compensate the investor for any loss suffered which is attributable directly to non-compliance by the operator with the provisions of section 65 or this Determination, provided the investor has no other recourse or legal remedy against the operator;
 - (d) an undertaking by the operator to compensate the representative office or local manager, as the case may be, for any compensation the representative office or local manager provided in accordance with item (c);
 - (e) a provision stating that if the representative agreement is cancelled, the –
 - (i) representative office or local manager, as the case may be, will timeously notify the Authority, in writing, of the cancellation; and
 - (ii) operator will immediately cease the solicitation of investment in the scheme concerned;
 - (f) a provision stating that if the representative agreement is amended, the representative office or local manager, as the case may be, will notify the Authority, in writing, within 14 days of the amendment taking place and include details of the amendment in the notification; and
 - (f) a provision stating that if the representative office is discontinued, the –
 - (i) person designated for the purposes of section 33(3) of the Companies Act will timeously notify the Authority in writing of such discontinuation; and
 - (ii) operator will immediately cease the solicitation of investment in the scheme concerned.

6. Conditions relating to name changes

- (1) The applicant may not, without the approval of the Authority, pending the lodging and disposal of an application in terms of section 65 or the change of the name of its business, include in or have part of the name of its business or in any description of its business any reference to a scheme approved under section 65. If not approved as a manager or operator, the applicant may not perform any act to lead the public to believe that it has been approved to solicit investments in the scheme from the members of the public in the Republic.

7. Conditions relating to prohibited investment and borrowing

- (1) The applicant may not utilise any of the following investment strategies or approaches, or invest in the following assets or instruments in respect of and on behalf of its foreign scheme:
 - (a) financial derivative instruments or structures/ strategies which are complex or of exotic compositions;
 - (b) net short positions or naked short selling;
 - (c) synthetic instruments including synthetic exchange- traded funds;
 - (d) structured products which include any of the above in paragraph 7(1)(a) - (c) and paragraph 4(5) (a) - (h); and

- (e) investment in other schemes that include any of the investment strategies or approaches, assets or instruments referred to in paragraph 7(1)(a) - (c) and paragraph 4(5) (a) - (h).
- (2) An operator may not for the account of a portfolio borrow money other than for the purposes and subject to the limits and conditions determined in the deed or prospectus.

8. Conditions relating to change of foreign scheme

- (1) If a foreign scheme changes, the operator must –
 - (a) notify the Authority in writing within 30 days of the change being effected; and
 - (b) apply for approval within three months of that change being effected, where such change relates to the requirements under paragraphs 4(1) to 4(3) and 5 of this Determination.

9. Conditions relating to suspension of redemption of participatory interests

The operator must immediately notify the Authority if it, at any time, suspends the repurchase of participatory interests, unless the suspension is a scheduled suspension of which investors are notified in the ordinary course of business.

10. Conditions relating to advertising, marketing and information disclosure

When soliciting investments from members of the public in the Republic, the operator must comply with the applicable advertising, marketing and information disclosure requirements in Board Notice 92 of 2014 and paragraph 27 of Board Notice 52 of 2015.

11. Conditions relating to submission of quarterly statistics

The operator, must within 30 days after the end of each calendar quarter, submit the assets under management on behalf of South African investors to the Authority in respect of the foreign scheme and each portfolio thereof, in the manner determined by the Authority on its website.

CHAPTER 4

Administrative matters

12. Transitional arrangements

- (1) An approval of a foreign scheme in terms of section 65 of the Act in force immediately before the commencement of this Determination remains in force for purposes of section 65 but may be withdrawn in accordance with section 67 of the Act.
- (2) An application for the approval in terms of section 65 submitted before the commencement of this Determination but which has not been finally determined will be considered by the Authority based on Board Notice 257 of 2013.

13. Short title, commencement, amendment and repeal

- (1) This Determination is called the Determination Relating to Foreign Collective Investment Schemes Soliciting Investments in the Republic, 2024 and comes into effect on the date of publication.

- (2) This Determination is subject to –
 - (a) amendment thereof, published by the Authority by notice on the website of the Authority; and
 - (b) withdrawal in a like manner.
- (3) Board Notice 257 of 2013, as published in *Government Gazette* Number 37123 of 13 December 2013, is hereby repealed.