

Financial Services (Collective Investment Schemes)
**FINANCIAL SERVICES (EXPERIENCED INVESTOR FUNDS)
REGULATIONS 2012**

2005-48
Revoked
Subsidiary
2012/056

Subsidiary Legislation made under s. 52.

**FINANCIAL SERVICES (EXPERIENCED INVESTOR
FUNDS) REGULATIONS 2012**

Revoked by LN. 2018/226 as from 23.10.2018¹

(LN. 2012/056)

Commencement **12.4.2012**

Amending enactments	Relevant current provisions	Commencement date
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In exercise of the powers conferred upon him by section 52 of the Financial Services (Collective Investment Schemes) Act, 2005 the Minister responsible for financial services has made the following regulations—

PART I
PRELIMINARY

Title.

1. These Regulations may be cited as the Financial Services (Experienced Investor Funds) Regulations 2012.

Interpretation.

2. In these Regulations—

“the Act” means the Financial Services (Collective Investment Schemes) Act 2011;

“administrator” means—

- (a) a Gibraltar administrator authorised by the Authority under the Act to hold a class V(c) licence; or
- (b) if not so authorised, an administrator—
 - (i) that is established in the European Economic Area or in a jurisdiction that is in the opinion of the Authority regulated under and in accordance with a legislative and regulatory regime that provides at least equivalent protection to that of the legislative and regulatory regime in Gibraltar with respect to administration of funds; and
 - (ii) which the Authority, with the consent of the Minister, consents to be used as an administrator by an experienced investor fund whether in general or in respect of a specific fund.

An administrator that is not authorised under the Act shall appoint an agent for service in Gibraltar;

“collective investment scheme” shall be construed in accordance with the provisions of the Act;

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“controller”, with respect to an experienced investor fund, means the person or persons responsible for the management and control of the experienced investor fund under regulation 7;

“days” do not include Saturdays, Sundays and days appointed as public holidays under the Interpretation and General Clauses Act;

“Minister” means the minister with responsibility for financial services;

“professional adviser” means a person who is authorised or entitled in the European Economic Area, or in such other jurisdiction that is in the opinion of the Authority regulated under and in accordance with a legislative and regulatory regime that provides at least equivalent protection to that of the legislative and regulatory regime in Gibraltar, to provide investment advice by way of business in respect of collective investment schemes; and

“protected cell company” shall be construed in accordance with the provisions of the Protected Cell Companies Act 2001.

Meaning of an experienced investor.

3.(1) An “experienced investor” is a person or body who, at the time of the investment falls into one of the following categories—

- (a) a person or partnership whose ordinary business or professional activity includes, or it is reasonable to expect that it includes, acquiring, underwriting, managing, holding or disposing of investments, whether as principal or agent, or the giving of advice concerning investments;
- (b) a body corporate which has net assets in excess of €1,000,000 or which is part of a group which has net assets in excess of €1,000,000;
- (c) an unincorporated association which has net assets in excess of €1,000,000;
- (d) the trustee of a trust where the aggregate value of the cash and investments which form part of the trust’s assets is in excess of €1,000,000;
- (e) an individual whose net worth, or joint net worth with that person’s spouse, is greater than €1,000,000, excluding that person’s principal place of residence;

- (f) a participant who has a current aggregate of €100,000 invested in one or more experienced investor funds;
- (g) a participant who invests a minimum of €50,000 in an experienced investor fund and who has been advised by a professional adviser to invest in the fund and the fund's administrator has received confirmation of such advice;
- (h) a participant who is a professional client, as defined under the Financial Services (Markets In Financial Instruments) Act 2006; or
- (i) a participant in a fund that has re-domiciled to Gibraltar where the Authority has permitted the inclusion of such participant either in respect of a specific fund or generally in respect of funds or a category of funds from a certain jurisdiction.

(2) The Authority may, with the prior approval of the Minister, in respect of a particular fund to which these Regulations apply, approve other categories or descriptions of experienced investor where it considers that it is reasonable to expect that persons within that category or description at the time of the investment are sufficiently experienced to understand the risks associated with an investment in that fund.

PART II
PROVISIONS APPLICABLE TO ALL EXPERIENCED INVESTOR FUNDS

Establishment and authorisation of an experienced investor fund.

4.(1) A fund may be established as an experienced investor fund if at the time of resolution to be established as such the following criteria are satisfied—

- (a) it is a collective investment scheme; and
- (b) it is established—
 - (i) as a company formed or re-domiciled under the Companies Act; or
 - (ii) as a unit trust established under and governed by Gibraltar law, the trust deed of which stipulates that the

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trust is subject to the jurisdiction of the Supreme Court of Gibraltar; or

- (iii) as a protected cell company; or
- (iv) as a limited partnership under the Limited Partnership Act; or
- (v) in any other form recognised under the law of Gibraltar that may be approved by the Authority, either generally or with respect to a particular fund; or
- (vi) as a legal entity established in a European Economic Area State in a form recognised under the law of Gibraltar that may be approved by the Authority; and

(c) it complies with the requirements for experienced investor funds prescribed in these Regulations.

(2) No person shall be accepted as a participant of the fund, unless the fund is deemed to be authorised in accordance with these regulations.

(3) The administrator of the fund shall either—

- (a) not later than 10 days before the establishment of the fund as such; or
- (b) within 10 days of the establishment of the fund as such,

file with the Authority—

- (i) a written notification registering the fund as an experienced investor fund in the approved form accompanied by the prescribed fee;
- (ii) a copy of the offering documents;
- (iii) an opinion of a lawyer of at least 5 years professional standing and who is also a Barrister or Solicitor of the Supreme Court of Gibraltar and who is independent of the administrator, that the experienced investor fund complies with the relevant provisions of the principal Act and these Regulations with respect to experienced investor funds and their establishment, including the

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criteria for an experienced investor fund specified in sub-regulation (1); and

(iv) such other documents as the Authority may require.

(4) Where the Authority receives notification under sub-regulation (3)(a) it may, no later than 10 days of receipt of the notification, do one or more of the following—

- (a) issue a written notice to the applicant requiring such further information, documents and explanations as it may require;
- (b) issue a written notice to the applicant requiring such changes as it considers necessary to comply with the relevant provisions of the Act and these Regulations;
- (c) issue a written notice to the applicant confirming that the experienced investor fund is deemed to be authorised.

(5) If after 10 days of receipt of a notification under sub-regulation (3)(a), the Authority does not issue any notice to the applicant, the fund shall be deemed to be authorised.

(6) If the Authority issues a written notice under subregulation (4)(a) or (b) the fund shall not be deemed to be authorised until such time as the Authority—

- (a) is satisfied by the further information, documents and explanations supplied to it in respect of a written notice issued under subregulation (4)(a);
- (b) is satisfied that any changes required further to a written notice issued under subregulation (4)(b) have been made; and
- (c) has issued a written notice to the applicant confirming that the experienced investor fund is deemed to be authorised.

(7) Where sub-regulation (3)(b) has been complied with the fund shall be deemed authorised by the Authority to commence its investment activities.

(8) A fund that is deemed to be authorised shall cease to be authorised if such authorisation is revoked by the Authority under section 44 of the Act.

Acceptance of participants.

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5.(1) No person shall be accepted as a participant of an experienced investor fund unless he has provided written confirmation–

- (a) that he is an experienced investor within the meaning specified in these Regulations; and
- (b) that he has received and accepted the investment warning required by these Regulations to be contained in the offer document.

(2) Subject to sub-regulation (3), the controller, administrator or trustee of an experienced investor fund is not required to verify the factual accuracy of a confirmation provided by a participant or potential participant under sub-regulation (1).

(3) A controller, administrator or trustee of an experienced investor fund commits an offence if he permits a person to become, or acquiesces in a person becoming, a participant in an experienced investor fund–

- (a) where he knows that the person is not an experienced investor within the meaning specified in these Regulations; or
- (b) where he knows or has reasonable grounds for believing that the person has not provided both the written confirmation specified in sub-regulation (1)(a) and the written confirmation specified in sub-regulation (1)(b).

(4) Sub-regulation (1) shall not apply to those participants in an experienced investor fund re-domiciled to Gibraltar as per regulation 3(1)(i) provided that–

- (a) a first notice has been provided to all participants in such fund no less than 30 days before the proposed re-domiciliation;
- (b) a second notice is provided to all participants in such fund no less than 20 days before the proposed re-domiciliation and no less than 5 days after the date of the first notice.

(5) A notice under sub-regulation (4) shall be in writing and shall inform the participants that they will be deemed experienced investors within the meaning specified in these Regulations and deemed to have accepted the investment warning set out in sub-regulation (1)(b).

General provisions with respect to experienced investor funds.

6.(1) An experienced investor fund shall have an administrator. The administrator shall be a different person than the depositary of the fund.

(2) The controller of the fund shall notify the Authority immediately upon knowing that the fund has ceased to comply with the requirements for experienced investor funds under the Act or these Regulations.

(3) Where an experienced investor fund has been deemed to be authorised and subsequently it does not comply with the provisions of these Regulations, the Authority may allow a fund a specified period of time beyond that specified in these Regulations in which to comply with the provisions of these Regulations.

Management and control of an experienced investor fund.

7.(1) If an experienced investor fund is established as a company formed or re-domiciled under the Companies Act or as a protected cell company, it shall have at least two Gibraltar ordinarily resident directors qualified to act as the director of an experienced investor fund.

(2) For the purposes of sub-regulations (1), (3) and (4), a person is qualified to act as the director of an experienced investor fund that is a company or a protected cell company if he is approved by the Authority—

- (a) to act as the director of experienced investor funds generally; or
- (b) to act as the director of the particular experienced investor fund.

(3) If an experienced investor fund is established as a limited partnership, the general partner shall be or shall be ultimately controlled by a corporate entity with two directors who are qualified to act as the directors of an experienced investor fund.

(4) If an experienced investor fund is established as a unit trust—

- (a) with more than one trustee, at least two trustees shall be persons ordinarily resident in Gibraltar and authorised by the Authority to act as the trustee of an experienced investor fund;
- (b) with a corporate trustee, at least 2 directors of which shall be persons ordinarily resident in Gibraltar and authorised by the Authority to act as the director of an experienced investor fund.

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(5) If an experienced investor fund takes a form other than that specified above, the controller of the person or entity having ultimate responsibility for the management and control of the experienced investor fund shall include at least two persons who are authorised for the purpose by the Authority.

(6) Subject to sub-regulation (7), the controller of an experienced investor fund shall not delegate the management and control of the experienced investor fund to any other person without the prior permission of the Authority (either generally by guidance or specifically).

(7) Nothing in sub-regulation (6) shall prevent the controller from delegating functions to an administrator, investment manager, investment advisor or depositary whether ordinarily resident and authorised in Gibraltar or in another jurisdiction, provided that, where such administrator, investment manager, investment advisor or depositary is intending to exercise his functions in another jurisdiction he—

- (a) is authorised or otherwise legally entitled to provide such service in the state or territory in which he is providing such service; and
- (b) the intention to delegate is disclosed in the offer document issued pursuant to Part III.

Depositary arrangements for experienced investor funds.

8.(1) Subject to the provisions of these Regulations, an experienced investor fund shall have a depositary.

(2) An experienced investor fund is not required to have a depositary where—

- (a) the experienced investor fund is a closed fund; or
- (b) the Authority makes a determination to that effect.

(3) The Authority may, if it considers it appropriate, direct an experienced investor fund to appoint a new depositary in the place of the depositary appointed.

(4) The principal duty of the depositary of an experienced investor fund is to keep the assets that are under its control safe and accounted for and to undertake such other duties as required of it by the experienced investor fund's offer document.

Audit requirements.

9.(1) Subject to sub-regulation (2), an experienced investor fund shall have an annual audit of its financial statements–

- (a) performed by an auditor approved under the Financial Services (Auditors) Act 2009,
- (b) conducted in accordance with internationally recognised audit and accounting standards.

(2) The financial statement period shall not be longer than 12 months unless it is the first financial statement or a change to the period is necessary in which case the period shall not be longer than 18 months.

(3) The audited financial statements shall be kept at the administrator’s Gibraltar office, or at the office of the administrator’s Gibraltar agent for service, and filed with the Authority in the form containing such information, and in such manner, as may be specified by the Authority, within 6 months of the financial statement period end, or such other time as determined by the Authority.

Name of experienced investor fund.

10.(1) The name of an experienced investor fund shall not–

- (a) be misleading or otherwise objectionable whether as to the objectives of the experienced investor fund or otherwise,
- (b) use the word “Gibraltar” or any word the use of which is restricted under section 17 of the Companies Act.

(2) Where the Authority considers, on reasonable grounds, that the name of an experienced investor fund is contrary to sub-regulation (1), it may by written notice direct the experienced investor fund to change its name on or before a date specified in the notice, which shall be not less than 15 days after the date of the notice.

(3) If the name of an experienced investor fund to which notice has been given under sub-regulation (2) is not changed on or before the date specified in the notice, the Authority may take such enforcement action under the Act against the experienced investor fund and against any controller or administrator of the experienced investor fund who caused or acquiesced in the failure to comply with the notice as the Authority may deem appropriate.

Changes in information provided to Authority.

11. The controller shall ensure that all material changes to information provided to the Authority in connection with an experienced investor fund is notified to the Authority within 20 days of the change taking place.

Returns to the Authority.

12. The controller shall, with respect to each experienced investor fund for which he so acts, file with the Authority an annual return in the form, and containing such information and in such manner, as may be specified by the Authority.

Penalties.

13.(1) Late filing of the financial statements set out in regulation 9 and the annual return as set out in regulation 12 shall render the fund liable to penalty fees provided that the Authority may, in its absolute discretion, waive such penalty fee. Penalty fees so due shall be paid to the Financial Services Commission;

(2) Penalty fees due under sub-regulation (1) shall be a debt due to the Financial Services Commission and may be recovered by the Financial Services Commission as a civil debt in any court of competent jurisdiction.

(3) The penalty fees due under this regulation shall be set at level 2 on the standard scale for each complete week and part of a week during which the failure continues.

Application to cease to be authorised as an experienced investor fund.

14.(1) A fund authorised as an experienced investor fund, may at any time thereafter apply to the Authority for consent for the fund to cease to be so authorised.

(2) An application made under sub-regulation (1) shall be accompanied by such undertakings and documents as the Authority may require.

(3) Where the Authority is satisfied that the experienced investor fund will no longer be promoted and will not accept further subscriptions under its offering document, the Authority shall issue a notice to the applicant confirming that the experienced investor fund is no longer authorised as an experienced investor fund.

**PART III
OFFER DOCUMENT**

Offer document.

15.(1) Every experienced investor fund shall issue to each potential participant an offer document that complies with the provisions of these Regulations.

(2) Any person who promotes an experienced investor fund or its offer document in breach of regulation 3 or 4, commits an offence and shall be liable on summary conviction to a fine at level 5 on the standard scale.

(3) Without limiting sub-regulation (2), a person promotes an experienced investor fund if he communicates, or causes to be communicated, an invitation or inducement to any other person, or advises or procures any other person, to participate in, or to offer to participate in, an experienced investor fund.

(4) Information provided to potential participants to negotiate the terms of investment shall not be deemed promotion, so long as the status of the experienced investor fund at that time is made clear to each potential participant and if changes are subsequently made to the information provided the potential participants are informed of the fact that such changes have been made.

Information to be included in an offer document.

16.(1) The offer document of an experienced investor fund shall–

- (a) contain such information as would reasonably be required and expected by participants, and potential participants, and their professional advisers for the purposes of making an informed judgment about the merits of participating in the experienced investor fund and the extent of the risks of participating in the experienced investor fund; and
- (b) shall be approved by the controller .

(2) Without limiting sub-regulation (1)(a), the offer document of an experienced investor fund shall contain the following information–

- (a) an explanation of the structure of the experienced investor fund, including brief particulars of the constituting documents

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of the experienced investor fund and details of how to obtain complete copies of the constituting documents;

- (b) the full name and address of—
 - (i) the persons who manage and control the experienced investor fund (including their relationship to the experienced investor fund),
 - (ii) the administrator of the experienced investor fund,
 - (iii) the depositary or trustee of the experienced investor fund,
 - (iv) the investment manager of the experienced investor fund, if any, and
 - (v) any other person or persons performing any function in relation to the experienced investor fund;
- (c) in the case of a fund established as a company, details of its registered office, the place and date of its incorporation and details of its share capital;
- (d) details of the manner in which each of the persons specified in sub-regulation (2)(b) may be appointed and replaced;
- (e) the name and address of—
 - (i) the auditor of the experienced investor fund, and
 - (ii) the legal adviser to the experienced investor fund;
- (f) any conflicts of interest that may exist in relation to the experienced investor fund;
- (g) the investment objective and investment strategies to be employed by the experienced investor fund, including the experienced investor fund's approach to borrowing and gearing, and any investment or borrowing restrictions applicable to the experienced investor fund;
- (h) the manner in which changes likely to have a material effect on participants may be made to the experienced investor fund and notified to the participants;

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- (i) the basis upon which dealing in the experienced investor fund is to take place, if applicable;
- (j) in the case of a closed-ended experienced investor fund, the basis upon which any subsequent offerings in the experienced investor fund may be made, and the manner, if any, in which the units in the experienced investor fund are to be cancelled and redeemed;
- (k) the basis upon which the value of the experienced investor fund is to be calculated and the basis upon which the value of units in the experienced investor fund is to be determined;
- (l) the manner in which units in the experienced investor fund are to be created, issued and paid for and, in the case of an open-ended fund, cancelled and redeemed;
- (m) the manner in which meetings of unit-holders are to be convened and managed generally and the manner in which voting by unit-holders is to be conducted;
- (n) the fees, charges and expenses payable from the property of the experienced investor fund;
- (o) the address at which the most recent audited financial statements of the experienced investor fund may be inspected;
- (p) the address, where the register of unit-holders can be inspected;
- (q) the manner in which any voting rights in underlying assets held by the experienced investor fund will be exercised;
- (r) the arrangements for the safe custody of the assets of the experienced investor fund, including disclosure, if applicable, of prime broker arrangements;
- (s) in the case of an umbrella fund or a protected cell company, as the case may be, details of the “ring-fencing” of assets within sub-funds, or, if there is no such arrangement, a statement to the effect that “in the event of the experienced investor fund being unable to meet liabilities attributable to any particular sub-fund out of the assets attributable to such sub-fund, the excess liabilities may be met out of the assets attributable to the

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other sub-funds” and an explanation of the manner in which such liabilities may be apportioned; and

- (t) a statement to the effect that “further information in relation to the regulatory treatment of experienced investor funds in Gibraltar may be obtained from the Gibraltar Financial Services Commission”.

(3) Offer documents issued or amended on or after the coming into force of these Regulations shall contain the following information–

- (a) details of the relevant authorisations to act of each of the persons in sub-regulation (2)(b);
- (b) the process for notification and remedy of breach of any investment or borrowing restrictions applicable to the experienced investor fund;
- (c) the manner in which errors in valuation likely to have a material effect on participants will be dealt with and notified to the participants;
- (d) the name and address of the fund’s agent for service (if any);
- (e) disclosure of who manages the investment activity of the fund;
- (f) details of the directors’ experience and qualifications; and
- (g) details of any intention to delegate functions in accordance with regulation 7(7).

(4) Every offer document shall contain a statement to the following effect–

“The [directors of the company/trustee/person responsible for the management and control in any other form approved for the purpose by the Authority as permitted by regulation 7] have/has taken all reasonable care to ensure that the facts stated in this document are true and accurate in all material respects, and that there are no other facts the omission of which would make misleading any statement in the document, whether of facts or of opinion. The [directors/ trustee/person responsible for the management and control in any other form approved for the purpose by the Authority as permitted by regulation 7] accept responsibility accordingly.”

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(5) Nothing in any of the constituting documents of an experienced investor fund may exclude the jurisdiction of the courts of Gibraltar with respect to an action concerning the experienced investor fund.

(6) In the event that an offer document is issued in a language other than English—

- (a) a statement should be included in both the original offer document and the translation stating which version will take precedence in the event of a dispute; and
- (b) a copy of an English language version of the document shall be lodged with the Authority.

Investment warning.

17. The offer document of every experienced investor fund must contain the following investment warning in a prominent position□

“This [fund] has been established in Gibraltar as an experienced investor fund. It is suitable only for those who fall within the definition of “experienced investor” contained in the Financial Services (Experienced Investor Funds) Regulations, 2012.

Requirements which may be deemed necessary for the protection of retail or non-experienced investors, do not apply to experienced investor funds. By acknowledging this statement you are expressly agreeing that you fall within the definition of an “experienced investor” and accept the reduced requirements accordingly.

You are wholly responsible for ensuring that all aspects of [this fund] are acceptable to you. Investment in experienced investor funds may involve special risks that could lead to a loss of all or a substantial portion of such investment. Unless you fully understand and accept the nature of [this fund] and the potential risks inherent in [this fund] you should not invest in [this fund]”.

Offences.

18.(1) The following shall constitute an offence—

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- (a) for a controller, administrator, depositary or trustee of an experienced investor fund not to inform the Authority immediately upon knowing or having reasonable grounds for believing that the experienced investor fund has ceased to comply with the requirements for experienced investor funds within the meaning of regulation 4(1);
- (b) for a controller, administrator, depositary or trustee of an experienced investor fund to accept as a participant of an experienced investor fund any person contrary to the provisions of regulation 5;
- (c) for a person to assume the functions of an authorised administrator contrary to the provisions of regulation 2 or 6;
- (d) for a controller, administrator, depositary or trustee of an experienced investor fund not to inform the Authority immediately upon knowing or having reasonable grounds for believing that any requirement of regulation 8, 10, 11, 12, 13 or Part III is not complied with.

(2) A person found guilty of an offence contrary to sub-regulation (1) shall on summary conviction be liable to a fine at level 5 on the standard scale.

(3) A person found guilty of a second or subsequent offence contrary to sub-regulation (1) shall on summary conviction be liable to a fine at twice level 5 on the standard scale.

Revocation and transitional provisions.

19.(1) The Financial Services (Experienced Investor Funds) Regulations, 2005 are revoked and replaced by these regulations in their entirety.

(2) Experienced investor funds established and deemed authorised under the Financial Services (Experienced Investor Funds) Regulations, 2005 shall continue to be deemed authorised under these regulations and shall have 90 days or such longer time as the Authority may determine, from the enactment of these Regulations to ensure their compliance herewith.