Draft Regulations laid before Parliament under section 429(2) of the Financial Services and Markets Act 2000, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2011 No.

FINANCIAL SERVICES AND MARKETS

The Open-Ended Investment Companies (Amendment) Regulations 2011

Made - - - - 2011

Coming into force in accordance with regulation 1

A draft of these Regulations has been approved by a resolution of each House of Parliament pursuant to section 429(2) of the Financial Services and Markets Act 2000(**1**);

The Treasury make the following Regulations in exercise of the powers conferred on them by sections 262 and 428(3) of that Act:

Citation and commencement

1. These Regulations may be cited as the Open-Ended Investment Companies (Amendment) Regulations 2011 and come into force on the day after the day on which they are made.

Interpretation

2. In these Regulations—

"authorised corporate director" is the director referred to in regulation 15(6) of the Principal Regulations;

"contract of employment" means a contract of service, whether express or implied, and (if it is express) whether oral or in writing;

"employee" means an individual who has entered into or works under a contract of employment;

"existing umbrella company" means an umbrella company in respect of which an authorisation order has been made prior to the date these Regulations come into force;

"master agreement" means contractually agreed standard terms and conditions which form part, but not the whole, of the terms of one or more transactions or contracts between the parties to the agreement;

(**1**) 2000 c. 8.

"micro-business" has the meaning given in regulation 7;

"the Principal Regulations" means the Open-Ended Investment Companies Regulations 2001(**2**).

Amendment of the Principal Regulations

3.—(1) The Principal Regulations are amended as follows.

(2) In regulation 2(1) (interpretation) after the definition of "smaller denomination share" insert—

""sub-fund" means a separate part of the property of an umbrella company that is pooled separately;"

(3) After regulation 10(**3**) (the Authority's procedures) insert—

"Umbrella companies

Segregated liability of sub-funds

11A.—(1) In the case of an umbrella company, the assets of a sub-fund belong exclusively to that sub-fund and shall not be used to discharge the liabilities of or claims against the umbrella company or any other person or body, or any other sub-fund, and shall not be available for any such purpose whether such liability or claim was incurred before, on or after the date this regulation first applies to such umbrella company.

(2) Any liability incurred on behalf of or attributable to any sub-fund of an umbrella company shall be discharged solely out of the assets of that sub-fund.

(3) Any provision, whether contained in an instrument of incorporation, agreement, contract or otherwise, shall be void to the extent that it is inconsistent with paragraph (1) or (2) and any application of, or agreement to apply, assets in contravention of either such paragraph shall be void.

(4) An umbrella company may allocate any assets or liabilities which —

(a) it receives or incurs on behalf of its sub-funds or in order to enable the operation of the sub-funds; and

(b) are not attributable to any particular sub-fund,

between its sub-funds in a manner which it considers is fair to shareholders.

(5) A sub-fund of an umbrella company is not a legal person separate from that umbrella company but the property of a sub-fund is subject to orders of the court as it would have been had the sub-fund been a separate legal person.

(6) Without prejudice to paragraphs (1) and (2) and save as provided in regulation 33C(7), an umbrella company may sue and be sued in respect of a particular sub-fund and may exercise the same rights of set-off in relation to that sub-fund as apply in respect of companies.

Cross sub-fund investment

11B. Notwithstanding section 658 of the Companies Act 2006(**4**) and any rule of law which prohibits or restricts a company from acquiring its own shares, an umbrella company may, for the account of any of its sub-funds, and in accordance with FSA rules, acquire by subscription

(**2**) S.I. 2001/1228, to which there are amendments not relevant to these Regulations.
(**3**) Regulation 11 was revoked by S.I. 2010/22.
(**4**) 2006 c. 46.

or transfer for consideration, shares of any class or classes, however described, representing other sub-funds of the same umbrella company.".

(4) In regulation 21(1)(d) (the Authority's approval for certain changes in respect of a company) after "company" insert "or a sub-fund of that company".

(5) After regulation 33B (merger or division of a master UCITS) insert—

"**Winding up of sub-funds**

33C.—(1) Save as provided in paragraphs (2) and (3), a sub-fund may be wound up as if it were an open-ended investment company in accordance with the provisions of regulations 31 to 33 provided that the appointment of the liquidator or any provisional liquidator and the powers and duties of the liquidator or any provisional liquidator shall be confined to the sub-fund which is being wound up and its affairs, business and property.

(2) Notwithstanding paragraph (1), sections 226 to 228 of the 1986 Act shall not apply where a sub-fund is wound up in accordance with the provisions of this regulation.

(3) The provisions of Part 5 of the 1986 Act with respect to staying, sisting or restraining actions and proceedings against a company at any time after the presentation of a petition for winding up and before the making of a winding-up order extend, in the case of a sub-fund, where the application to stay, sist or restrain is presented by a creditor, to actions and proceedings against the umbrella company of that sub-fund, or any of the other sub-funds of that umbrella company, in respect of a liability of that sub-fund.

(4) Notwithstanding regulation 11A(5), a sub-fund shall be treated as if it were a separate legal person for the purposes of winding up.

(5) For the purposes of paragraph (1), in regulations 31 to 33—

(a) a reference to an open-ended investment company is taken to be a reference to a sub-fund; and

(b) a reference to a company, save in relation to the term "unregistered company", is taken to be a reference to a sub-fund.

(6) For the purposes of paragraph (1), in the provisions of the 1986 Act to which reference is made in regulations 31 to 33—

(a) references to an unregistered company and to a company are taken to be references to a sub-fund;

(b) a reference to creditors is taken to be a reference to the creditors of a sub-fund; and

(c) a reference to members is taken to be a reference to the holders of the shares in a sub-fund.

(7) Subject to paragraph (8), regulation 11A(6) shall not apply after the appointment of a liquidator or a provisional liquidator.

(8) Where an order has been made for the winding-up of a sub-fund, no action or proceedings shall be commenced or proceeded with against the umbrella company or the sub-fund in respect of any liability of the sub-fund, except by leave of the court and subject to such terms as the court may impose.".

(6) In paragraph 2 of Schedule 2 (instrument of incorporation) after sub-paragraph (b) insert—

"(ba) in the case of an umbrella company, the assets of a sub-fund belong exclusively to that sub-fund and shall not be used to discharge the liabilities of or claims against the umbrella company or any other person or body, or any other sub-fund, and shall not be available for any such purpose;".

Transitional provisions

4.—(1) Save as provided in paragraph (5) and regulation 5, an umbrella company shall not enter into any agreement or contract after the date on which these Regulations come into force which is inconsistent with paragraphs (1) and (2) of regulation 11A of the Principal Regulations, and paragraph (3) of regulation 11A shall apply to any such agreement or contract.

(2) An existing umbrella company shall give written notice to the Authority that it proposes to alter its instrument of incorporation before the end of its compliance period to effect compliance with paragraph 2(ba) of Schedule 2 to the Principal Regulations.

(3) Save as provided in regulation 6, the compliance period is the period of 2 years beginning with the date on which these Regulations come into force.

(4) For the purposes of paragraph (3) and save in relation to micro-businesses, upon receipt of a written request by an existing umbrella company made within the compliance period but prior to the expiry of a period of 23 months from the date on which these Regulations come into force, the Authority may, having regard to its regulatory objectives, extend the compliance period in relation to that umbrella company for a further period not exceeding one year beginning with the date on which the compliance period calculated in accordance with paragraph (3) ends.

(5) Notwithstanding paragraph (1), an existing umbrella company may, during its compliance period, continue to enter into transactions or contracts subject to a master agreement provided that such master agreement was in force prior to the date on which these Regulations come into force.

(6) Regulation 33C of the Principal Regulations shall not apply to an existing umbrella company during its compliance period.

(7) Regulations 11A and 33C of the Principal Regulations shall apply to an existing umbrella company which has given written notice to the Authority of the proposed alteration to its instrument of incorporation under paragraph (2) of this regulation from the date on which effect may be given to the proposal under regulation 21(3) of the Principal Regulations.

(8) Regulations 21 and 22 of the Principal Regulations apply to any proposed alteration to an instrument of incorporation under paragraph (2) of this regulation with the exception of paragraph (2) of regulation 21.

(9) Any notice given under paragraph (2) shall be accompanied by a notification in such form as the Authority may direct that the umbrella company does not have any agreements or contracts with a third party the provisions of which are inconsistent with paragraph (1) or (2) of regulation 11A of the Principal Regulations.

(10) Paragraph 5(1) of Schedule 2 to the Principal Regulations shall not apply to any alteration to an instrument of incorporation made in accordance with paragraph (2) of this regulation.

(11) An umbrella company which contravenes any provision of this regulation is to be treated for the purposes of Part 5 of the Principal Regulations as having contravened a provision of those Regulations.

Further transitional provisions for micro-businesses

5. Save as provided in regulation 10, regulations 11A and 33C of and paragraph 2(ba) of Schedule 2 to the Principal Regulations shall not apply in relation to a micro-business during the compliance period.

The compliance period for micro-businesses

6.—(1) The compliance period for micro-businesses is the period of 3 years beginning with the date on which these Regulations come into force.