

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

27th September, 2006

Securities Unit

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Dear _____,

Re: Upcoming New Companies Act (Investment Companies with Variable Share Capital) Regulations, 2006 to repeal current Companies Act (Investment Companies with Variable Share Capital) Regulations, 1996 as amended.

We are pleased to enclose the draft Companies Act (Investment Companies with Variable Share Capital) Regulations, 2006 together with an Explanatory Note outlining the principal amendments to these Regulations for your information. These Regulations will shortly be published in the Government Gazette.

As indicated in the enclosed Explanatory Note, the current Companies Act (Investment Companies with Variable Share Capital) Regulations, 1996 have been updated to cater for certain industry developments and more importantly, to streamline the provisions applicable to Schemes which have not established any sub-funds with those applicable to Schemes with sub-funds.

Please feel free to contact Mr. James Farrugia should you have any queries or require any clarifications regarding the above.

Your sincerely,

Cristina Parlato Trigona
Director

Encls.

Explanatory Note

September 2006

Upcoming **New Companies Act (Investment Companies with Variable Share Capital) Regulations, 2006** to repeal current **Companies Act (Investment Companies with Variable Share Capital) Regulations, 1996** as amended.

A. *Current Position*

The current Companies Act (Investment Companies with Variable Share Capital) Regulations [L.N. 102 of 1996 as amended] (hereafter referred to as “the **current SICAV Regulations**”) provide that:

- a SICAV is an investment company with variable share capital duly licensed in terms of article 4 of the Investment Services Act, 1994;
- a SICAV may be constituted as a multi-class or umbrella company where its share capital is or is capable of being divided into different classes of shares and where each class of shares represents a distinct sub-fund of the SICAV;
- each class of shares issued by a multi class or umbrella company constituting a sub-fund may be designated in a different currency;
- a SICAV may issue fractional shares up to at least three decimal places;
- a SICAV may appoint a Corporate Company Secretary;
- a SICAV may appoint a licensed manager as its sole corporate Director;
- an umbrella or multi-class company (i.e. a SICAV with sub-funds) may in its memorandum and articles of association elect to have the assets and liabilities of each sub-fund treated as a patrimony separate from the assets and liabilities of each other sub-fund in the SICAV.

B. *Principal Changes*

1. Wider Scope

- a. The **current SICAV Regulations** capture exclusively SICAVs which have been duly licensed by the MFSA in terms of article 4 of the Investment Services Act. Accordingly, the provisions of the SICAV Regulations do not apply to recognized private SICAVs or to SICAVs which are exempt from the requirement to hold a CIS Licence in terms of the Investment Services Act (Exemption) Regulations, 1995 as amended.
- b. The **new SICAV Regulations** define SICAVs as investment companies with variable share capital licensed, recognized, exempted or otherwise regulated in terms of the Investment Services Act. This amendment extends the scope of the definition of SICAVs.

2. **Clearer distinction between SICAVs with sub-funds and SICAVs without sub-funds**

- a. The **current SICAV Regulations** refer to SICAVs which have established sub-funds, as multi class or umbrella companies. However these Regulations do not regulate SICAVs which have issued one or more classes of shares, which class or classes of shares do not constitute one or more sub-funds (i.e. SICAVs without sub-funds).
- b. Under the **new SICAV Regulations**:
 - a. SICAVs which have established sub-funds are referred to as “*multi fund companies*” or “*umbrella companies*”; and
 - b. SICAVs which have not established sub-funds are referred to as “*multi class companies*”.
- c. The term “*multi class companies*” will no longer capture SICAVs which have established sub-funds, but will refer to SICAVs which have issued one or more classes of shares, which class or classes of shares **do not** constitute one or more sub-funds.

3. **Provision for Classes representing a Sub-Fund denominated in different currencies**

- a. Under the **current SICAV Regulations**, the term “Sub-Fund” means **one** class of shares to which are allocated assets and liabilities distinct from other assets and liabilities allocated to other sub-funds. These regulations further provide that a class of shares may only be denominated in one currency. In the case of umbrella companies, each class of shares representing a sub-fund may be denominated in a different currency.

[A Sub-Fund is **one** class of shares in the umbrella SICAV. Moreover, a class of shares in the SICAV may only be denominated in one currency. Thus, a Sub-Fund may only be “denominated” in one currency/ have one reference currency]

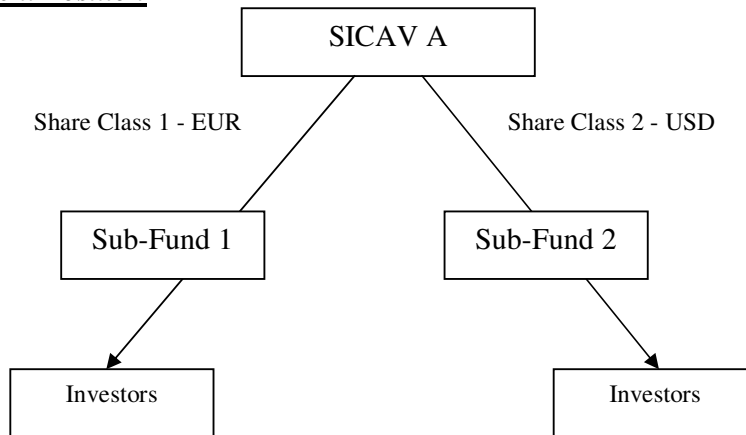
- b. The **new SICAV Regulations** address this matter by providing that **one or more** classes of shares of a SICAV established as a multi-fund or umbrella company may constitute a sub-fund of the SICAV with each class of shares being denominated exclusively in one currency. The classes of shares constituting a sub-fund must have the same investment objectives, policies and restrictions and must be exposed to the same portfolio of assets and liabilities.
- c. A sub-fund may thus be made up of one or more classes of shares – with each class of shares denominated in one currency – and effectively the sub-fund may be “denominated” in more than one currency/ have more than one reference currency.

Example

- d. *Scenario:* SICAV A (established as an umbrella company) has issued two classes of Shares, Class 1 (denominated in EUR) and Class 2 (denominated in USD).

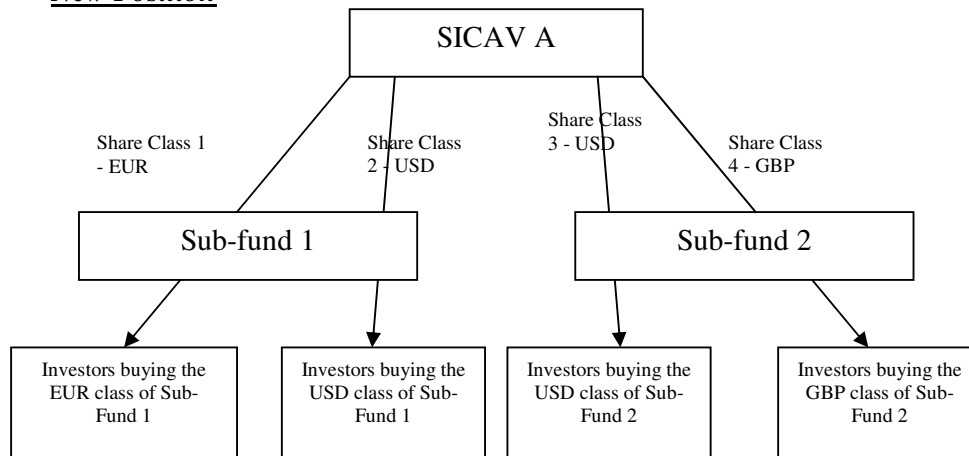
- e. The **current SICAV Regulations** provide that each class of shares in an umbrella company must constitute a distinct sub-fund of the SICAV. Thus effectively the Class 1 and Class 2 shares will constitute distinct sub-funds of the SICAV. Each sub-fund will have one currency of reference i.e. EUR in the case of Sub-Fund 1 and USD in the case of Sub-Fund 2 as follows:

Present Position



- f. In terms of the **new SICAV Regulations**, SICAV A may issue Share Class 1, Share Class 2, Share Class 3 and Share Class 4 with Share Class 1 and 2 constituting Sub-Fund 1 and Share Class 3 and 4 constituting Sub-Fund 2. This is not possible under the **current SICAV Regulations** where only one class of shares may constitute a sub-fund of the SICAV. Thus, Share Class 1 and 2 constituting Sub-Fund 1 and Share Class 3 and 4 constituting Sub-Fund 2 may be denominated in a different currency as follows:

New Position



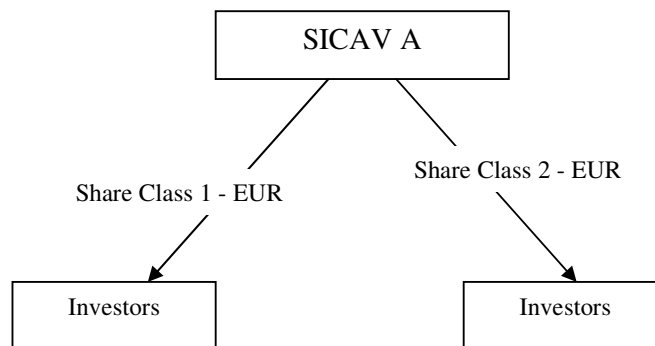
4. **Classes which do not represent a Sub-Fund denominated in different currencies**

- a. Presently, SICAVs which are not established as umbrella companies are required to adhere to the requirements of Article 186 of the Companies Act, which provides that the classes of shares issued by a company (including a SICAV) must be denominated in one currency. Thus, whenever a SICAV issues more than one class of shares (which classes do not constitute distinct sub-funds of the SICAV), such classes of shares must be denominated in the same currency.
- b. The **new SICAV Regulations** exempt SICAVs from the requirements of Article 186 and provide that SICAVs established as multi class companies (in terms of the revised Regulations – i.e. without sub-funds) may issue classes of shares denominated in different currencies provided that a class of shares may only be denominated in one currency.

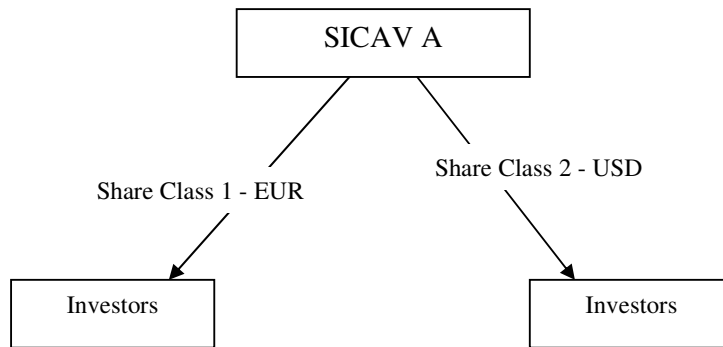
Example

- c. *Scenario 1:* SICAV A (established as a multi class company) has issued two classes of Shares, Class 1 (denominated in EUR) and Class 2 (denominated in EUR). *Scenario 2:* SICAV A (established as a multi class company) has issued two classes of Shares, Class 1 (denominated in EUR) and Class 2 (denominated in USD) as follows:

Scenario 1: Acceptable in terms of the present requirements



Scenario 2: Not acceptable in terms of the present requirements



- d. Under the present requirements, Scenario 1 is acceptable, however Scenario 2 is not acceptable (as all classes of shares issued by a SICAV with no sub-funds must be denominated in the same currency). Both Scenarios would be acceptable under the **new SICAV Regulations**.

5. Fund Manager as the Sole Corporate Director

- a. The **current SICAV Regulations** provide that a SICAV may appoint as its sole Director a licensed manager.
- b. This option no longer features in the **new SICAV Regulations**. As a matter of policy in view of corporate governance considerations, the MFSA will no longer allow SICAVs to appoint their Manager as the sole corporate Director.
- c. SICAVs which at present have a licensed Manager as sole Director will be required to appoint at least an additional Director to the satisfaction of the MFSA, within a period of six months from the coming into force of the **new SICAV Regulations**. The MFSA will be contacting such SICAVs in this regard.

6. Accounts of SICAVs which have not established sub-funds

- a. Presently the classes of shares issued by a SICAV which has not been established as an umbrella company (i.e. it has not established sub-funds) must be denominated in the same currency. Accordingly, the accounts of such SICAVs must in terms of Article 187(1) of the Companies Act be drawn up in the currency of denomination of the share classes.
- b. SICAVs which have been set up as multi class companies (as defined in the **new SICAV Regulations**) may issue classes of shares denominated in different currencies provided that a class of shares may only be denominated in one currency.
- c. The **new SICAV Regulations** exempt SICAVs from the requirements of Article 187(1). Regulation 6 of the **new SICAV Regulations** further provides that

SICAVs set up as multi class companies (i.e. without sub-funds) which have their share capital denominated in different currencies, are required to draw up their annual accounts in any one of such currencies.

7. **Multi Fund Companies may issue one or more classes which do not constitute sub-funds**

- a. Under the **current SICAV Regulations**, all classes of shares issued by an umbrella company constitute distinct sub-funds of the SICAV, with a class of shares constituting a sub-fund of the SICAV.
- b. Regulation 7 of the **new SICAV Regulations** provides that the initial share capital of a SICAV may not be organized in one or more sub-funds. The term “initial share capital” refers to the initial shares issued by the SICAV for the purposes of setting up the Scheme – i.e. before shares are offered to prospective investors. Thereafter, all new classes of shares issued by the SICAV will constitute one or more sub-funds.

Example

- c. *Scenario:* SICAV A (established as an umbrella or multi fund company) has issued in terms of its memorandum of association two classes of shares - Class 1 (denominated in EUR) and Class 2 (denominated in GBP). The promoters of the SICAV may elect to provide in the memorandum of association of the SICAV that the Class 1 and Class 2 shares do not constitute a sub-fund of the SICAV. Any new share classes created subsequent to the registration of the SICAV will constitute one or more sub-funds of the SICAV.

8. **Applications in Specie**

- a. The **current SICAV Regulations** are silent on this matter. Article 73 of the Companies Act provides that when a Company (including SICAVs) receives a consideration for the issuance of shares in a form other than cash:
 - such consideration may only consist of assets capable of economic assessment and which not include future personal services and in general any undertaking to perform work or supply services;
 - the full consideration must be transferred within five years from the date of the decision to issue the shares;
 - the Company is required to obtain an independent expert’s report (expert being in turn defined as an auditor whether or not assisted by a specialist valuer) in order to ensure that the value of the consideration is at least equal to the nominal value (including any share premium) of shares to be issued by the Company
 - the expert’s report must include the disclosures set out in Article 73(5); and
 - the report must be delivered to the Registrar of Companies for registration before the shares are issued.

- b. The **new SICAV Regulations** address this matter by including specific amendments to Article 73 when applicable to SICAVs. These Regulations provide that:
- i. in the case of Retail Funds, the provisions of Article 73 apply in full with the exception of sub-articles 2, 3, 5 and 6 which have been slightly modified to accommodate the specific features of SICAVs. Sub-articles 2 and 3 as amended provide that the non cash consideration shall be transferred to the SICAV either before the SICAV is authorised to commence business (in the case of a shares issued on original subscription – sub-article 2), or before the shares are issued in favour of the investor/s (in the case of a new issue of shares – sub-article 3). In terms of the revised sub-article 5 the non cash consideration shall be at least equal to the net asset value of the shares to be issued for it. Sub-article 6 has been amended to clearly provide that where the expert report has not been delivered to the Registrar for registration before a new issue of shares, the issue shall be considered null and void.
 - ii. in the case of Professional Investor Funds (PIFs), the provisions of Article 73 apply in full with the following exceptions:
 - a. the report referred to in sub-article 4 must be drawn up in accordance with Guidelines issued by the MFSA;
 - b. sub-articles 5 and 6 have been entirely disapplied.
- c. The Guidelines – applicable exclusively to PIFs – that the MFSA intends drawing up will provide that:
- i. the Offering Memorandum/ Prospectus of the PIF must clearly disclose the procedure to be followed by a prospective investor contemplating an application in specie;
 - ii. the valuer’s report may be drawn up by the PIF’s own appointed Administrator or Manager ordinarily responsible for valuing the PIF’s assets. Such report shall include:
 - a description of each of the assets comprising the consideration;
 - the value of each asset and a description of the method of valuation used;
 - a confirmation that the value of the consideration is at least equal to the net asset value of the shares to be issued in return for such consideration;
 - iii. the valuation report must be held in Malta at the registered office of the PIF and must be available to MFSA for inspection during compliance visits; and
 - iv. shares in the PIF should only be issued (in favour of the investor) once the assets referred to in the report have been transferred in favour of the PIF to the satisfaction of the Custodian or Prime Broker or (where no

Custodian or Prime Broker has been appointed), to the satisfaction of the Manager or Administrator).

C. *Transitional Provisions*

- a. The current Prospectus and Memorandum & Articles of Association of licensed/ recognized SICAVs may need to be updated to reflect the changes referred to above. Any reference in these documents to the current SICAV Regulations should be updated to refer to the new SICAV Regulations once these are published.
- b. Those SICAVs which have established sub-funds and whose Prospectus or Memorandum & Articles of Association refers to the SICAV being set up as a “multi class company” will be required to – within a period of one year from the coming into force of the **new SICAV Regulations** – update these documents to refer to the SICAV being set-up as an “umbrella or multi fund company”. Similarly, those SICAVs which have not established any sub-funds and whose Prospectus or Memorandum & Articles of Association refers to the SICAV being set up as a “single class company” or “single fund company” will be required to update these documents to refer to the SICAV being set-up as a “multi class company” within a period of one year from the coming into force of the **new SICAV Regulations**. The MFSA will be contacting the above mentioned SICAVs in this regard.

**COMPANIES ACT
(CAP. 386)**

**Companies Act (Investment Companies with Variable
Share Capital) Regulations, 2006**

IN exercise of the powers conferred by sub-article (10) of article 84 of the Companies Act, the Prime Minister and Minister of Finance, acting on the advice of the Malta Financial Services Authority, has made the following regulations:

Citation. **1.** The title of these regulations is the Companies Act (Investment Companies with Variable Share Capital) Regulations, 2006.

Interpretation. **2.** In these regulations, unless the context otherwise requires:

“the Act” means the Companies Act;

“base currency” means the currency in which a class of shares is denominated;

Cap. 370 “the Competent Authority” means the Competent Authority under the Investment Services Act;

“currency” means, in addition to the Maltese lira, any convertible currency in terms of article 186 of the Act;

“fractional share” means a fraction of a whole share in any class of shares issued by a SICAV ;

“multi class company” means a SICAV falling within the terms of regulation 5;

“multi fund company” means a SICAV falling within the terms of regulation 7 and such a SICAV may also be referred to as an umbrella company;

“SICAV” means an investment company with variable share capital licensed, recognised, exempted or otherwise regulated in terms of the Investment Services Act.

Fractional shares. **3.** (1) A SICAV may, if so authorised by its memorandum of association, issue fractional shares up to such number of decimal places, not being less than three, as shall be specified in the memorandum of association, and under such terms and conditions as

may be stipulated therein.

(2) Fractional shares shall be automatically consolidated into a whole share of the same class when the fractional shares held by one shareholder become equal to a whole share.

(3) A fractional share shall carry no voting rights in general meetings of the company.

Company Secretary.

4. Notwithstanding anything contained in the definition of company secretary in article 2, and in sub-article (3) of article 138 of the Act, a SICAV shall, with the written approval of the Competent Authority, appoint to the office of company secretary, any person who may be either an individual or otherwise.

Multi class company.

5. (1) A SICAV may be constituted as a multi class company, if in terms of its memorandum of association, its share capital is, or is capable of being, divided into different classes of shares not constituting any distinct sub-fund.

(2) A multi class company may, with the written approval of the Competent Authority, issue a new class or classes of shares. Such class or classes of shares shall not constitute a distinct sub-fund or sub-funds of the company.

(3) Each class of shares in a multi class company may be denominated in a different currency provided that a class of shares may be denominated only in one currency.

(4) A multi class company may not elect for the segregation of any of its assets and liabilities.

Accounts of multi class companies.

6. (1) A multi class company having its share capital denominated in different currencies shall draw up its annual accounts in any one of such currencies.

(2) The provisions of sub-regulation (1) shall *mutatis mutandis* apply to the drawing up of any other reports or financial statements which may be required under the Act or by the Competent Authority.

(3) For the purposes of sub-regulations (1) and (2), the conversion from the base currency of a class of shares into the currency in which the annual accounts of the multi class company are to be drawn up shall be in accordance with generally accepted accounting principles.

Multi fund companies. 7. (1) A SICAV may be constituted as a multi fund company, where in terms of its memorandum of association, its share capital is, or is capable of being divided into different classes of shares where one class or a group of classes of shares constitute a distinct sub-fund of the company:

Provided that the initial share capital may or may not be organized in one or more sub-funds in terms of this regulation.

(2) A multi fund company may, with the written approval of the Competent Authority, create and issue a new class or classes of shares which may constitute a new sub-fund or be comprised in an existing sub-fund or sub-funds of the company.

(3) A class or classes of shares constituting a sub-fund in a multi fund company may be denominated in a different currency provided that a class of shares may be denominated only in one currency.

(4) For the purposes of this regulation, a “sub-fund” means the distinct class or classes of shares constituting that sub-fund in a multi fund company to which are allocated assets and liabilities distinct from other assets and liabilities allocated to other sub-funds in the same company.

Accounts of multi fund companies. 8. (1) A multi fund company having its share capital denominated in different currencies shall draw up its annual accounts in any one of such currencies.

(2) The directors of a multi fund company shall maintain proper accounting records of the assets and liabilities of each sub-fund in the base currency of any class of shares constituting that sub-fund.

(3) The provisions of sub-regulation (1) shall *mutatis mutandis* apply to the drawing up of any other reports or financial statements which may be required under the Act or by the Competent Authority.

(4) For the purposes of sub-regulations (1) and (3), the conversion from the base currency of a class of shares into the currency in which the annual accounts of the multi fund company are to be drawn up shall be in accordance with generally accepted accounting principles.

Segregation of assets and liabilities of multi fund companies.

9. (1) A multi fund company may in its memorandum of association elect to have the assets and liabilities of each sub-fund comprised in that company treated for all intents and purposes of law as a patrimony separate from the assets and liabilities of each other sub-fund of such company. Where a multi fund company makes the election aforementioned the assets and liabilities of each sub-fund of that multi fund company shall, for all intents and purposes of law be deemed to constitute a patrimony separate from the assets and liabilities of each other sub-fund of such a company.

(2) (a) Save for such proportion of the liabilities of a multi fund company which by virtue of the memorandum of association of the company or by virtue of the terms of issue of the shares constituting a sub-fund are, or are to be attributable to, one or more sub-funds in the proportion established therein, the liabilities incurred in respect of each sub-fund shall be paid out of the assets forming part of its patrimony and the creditors in respect thereof shall have no claim or right of action against the other assets of the company, and the following rules shall apply:

- (a) proceedings in relation to the company shall respect the legal status of each sub-fund as a patrimony separate from the assets and liabilities of each other sub-fund of the company in terms of this regulation;
- (b) proceedings under the Act shall apply *mutatis mutandis* to the sub-fund as though it were a distinct legal entity and with such modifications as are necessary to accommodate the fact that the sub-fund is not a company; and any proceedings in relation to one sub-fund shall not have any effect on the assets of any other sub-fund of the company or of the company itself; and
- (c) for the avoidance of doubt, where a sub-fund which comprises a separate patrimony in terms of this regulation is being wound up, the liquidator of such sub-fund shall carry out his functions in accordance with the provisions of the Act; and accordingly all the powers of the directors and company secretary in respect solely of that sub-fund shall cease.

(b) "Proceedings" in this regulation refers to any proceedings in terms of Title II of Part V and Part VI of the Act.

(3) When a SICAV is established as a multi fund company and elects to have the assets and liabilities of its sub-funds treated as

distinct patrimonies, the memorandum shall provide that the actual value of the paid up share capital of any sub-fund shall be at all times equal to the value of the assets of any kind of the particular sub-fund after the deduction of such sub-fund's liabilities and this in lieu of what is stated in sub-paragraph (i) of paragraph (c) of sub-article (2) of article 84 of the Act.

(4) The directors of a multi fund company shall hold or cause to be held such separate records, accounts, statements and other documents as may be necessary to evidence the liabilities and assets of each sub-fund as distinct and separate from the assets and liabilities of other sub-funds in the same company.

(5) These regulations shall have effect with respect to sub-funds of multi fund companies established before the coming into effect of these regulations, from the date of issue of the first shares in the class or classes constituting a sub-fund.

Applicability of
article 73 to SICAVS

10. (1) The provisions of article 73 of the Act shall apply to SICAVs, other than SICAVs licensed by the Competent Authority as Professional Investor Funds, subject to the following variations, conditions and modifications:

(a) sub-articles (1), (4) and (7) shall continue to apply thereto;

(b) sub-article (2) shall apply thereto and be read as if for the words therein "transferred to the company within five years from the date the company is authorized to commence business.", there were substituted the words "transferred to the company before the company is authorized to commence business.";

(c) sub-article (3) shall apply thereto and be read as if for the words therein "transferred within five years from the date of the decision to issue shares.", there were substituted the words "transferred to the company not later than the date of the issue of the shares." ;

(d) sub-article (5) shall apply thereto and be read as if for the words therein "correspond at least to the number and nominal value, and, where applicable, to the premium on the shares to be issued for them.", there were substituted the words "at least correspond to the net asset value of the shares to be issued for them."; and

(e) sub-article (6) shall apply and be read as if for the

words therein “and in default, the Registrar shall accordingly refuse to register the company or the return of the allotments of the shares so issued, and, in the latter case, the issue shall be considered null and void.”, there were substituted the words “and in default, the Registrar shall accordingly refuse to register the company and, in the case of a new issue, the issue shall be considered null and void.”.

(2) The provisions of article 73 of the Act shall apply to SICAVs licensed by the Competent Authority as Professional Investor Funds with the following variations, conditions and modifications:

(a) sub-articles (1),(2),(3) and (7) shall continue to apply thereto;

(b) sub-article (4) shall apply thereto and be read as if for the words “by one or more experts who are independent of the company and approved by the Registrar.”, these were substituted the words: “in accordance with Guidelines issued for that purpose by the Competent Authority from time to time.”; and

(c) sub-articles (5) and (6) shall not apply thereto provided that the “report” mentioned therein and in sub-article (4) that the “report” shall be drawn up in such manner and shall contain such particulars as may be required by Guidelines issued for that purpose by the Competent Authority.

Non-
applicability
of articles 186
and 187(1).
Guidelines.

11. The provisions of articles 186 and sub-article (1) of article 187 of the Act shall not apply to SICAVs constituted as multi fund or multi class companies.

12. For the better carrying out of the provisions of these regulations, the Competent Authority may issue guidelines in terms of paragraph (b) of sub-article (2) of article 6 of the Investment Services Act.

Transitional
arrangements.

13. The Competent Authority may issue guidelines in terms of paragraph (b) of sub-article (2) of article 6 of the Investment Services Act, to establish transitional arrangements in relation to SICAVs already set up prior to the coming into force of these regulations and in this regard to impose any relevant conditions and regulate any related documents, as it may deem appropriate.

Repeals L.N.
102 of 1996.

14. The Companies Act (Investment Companies with Variable Share Capital) Regulations, 1996, are hereby repealed.