
EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Open-Ended Investment Companies Regulations 2001 (S.I. 2001/1228) (“the Principal Regulations”) to make provision as to the assets of sub-funds of umbrella companies.

Regulation 3(3) inserts new regulations 11A and 11B into the Principal Regulations. Regulation 11A(1) provides that, where an open-ended investment company is established as an umbrella company, the assets of each sub-fund shall belong exclusively to that sub-fund. Regulation 11A(2) provides that any liability incurred by or attributable to a sub-fund shall be discharged solely out of the assets of that sub-fund. Regulation 11A(4) provides for an exception to the general position set out in paragraphs (1) and (2) of regulation 11A: assets received or liabilities incurred by an umbrella company on behalf of its sub-funds or in order to enable the operation of those sub-funds and which are not attributable to any particular sub-fund may be allocated between the sub-funds in a manner which the umbrella company considers is fair to shareholders.

Regulation 11A(3) provides that any provision in any document that is inconsistent with paragraphs (1) and (2) of regulation 11A shall be void and that any attempt to apply assets in contravention of the provisions of these paragraphs shall also be void.

Regulation 11A(5) and (6) provide respectively that the property of a sub-fund is subject to orders of the court as if the sub-fund were a separate legal person, despite the sub-fund not being a separate legal person, and that an umbrella company may sue and be sued in respect of a sub-fund and may exercise the same rights of set-off in respect of a sub-fund that apply in respect of companies.

Regulation 11B provides that an umbrella company may invest in or dispose of shares in another sub-fund of the same umbrella company, notwithstanding any law which prohibits or restricts a company from acquiring its own shares.

Regulation 3(5) inserts a new regulation 33C into the Principal Regulations. Regulation 33C makes additional modifications to Part 5 of the Insolvency Act 1986 (c.45) so that a sub-fund may be wound up as if it were an unregistered company, in accordance with the provisions of regulations 31 to 33 of the Principal Regulations.

Regulation 3(6) inserts a new sub-paragraph into paragraph 2 of Schedule 2 to the Principal Regulations requiring that an umbrella company’s instrument of incorporation contain a statement that the assets of each sub-fund belong exclusively to that sub-fund and cannot be used to discharge liabilities incurred by another sub-fund within the umbrella company or the umbrella company itself.

Regulations 4 to 10 makes certain transitional provisions. Regulations 5 to 10 make specific transitional provisions for micro-businesses whereas regulation 4 makes provision for pre-existing umbrella companies which are not micro-businesses. Regulation 4(3) gives such umbrella companies a two-year compliance period from the date these Regulations come into force and regulation 4(4) permits them to apply to the Financial Services Authority to extend that period for a further year. During the compliance period the umbrella companies cannot enter into any agreement or contract which is inconsistent with the provisions of regulation 11A(1) and (2) of the Principal Regulations unless the agreement or contract is subject to a master agreement which was in force prior to the date these Regulations came into force. By the end of the compliance period, the umbrella companies must have altered their instrument of incorporation to contain the statement detailed in the paragraph above. Regulation 33C does not apply to umbrella companies during their compliance periods.

Regulation 4(1) contains a general prohibition on the entry into any agreement or contract which is inconsistent with the provisions of regulation 11A(1) and (2) after the date these Regulations come into force but this prohibition does not apply to micro-businesses during their compliance period. Regulations 5 to 10 give effect to the Government's micro-business moratorium policy, based on the announcement in the Plan for Growth, published on 23 March 2011 and adapted to umbrella companies. Regulation 6 provides that micro-businesses have a three-year compliance period from the date that these Regulations come into force. Micro-businesses will have to alter their instrument of incorporation to effect compliance with paragraph 2(ba) of Schedule 2 to the Principal Regulations by the end of the compliance period, after which the provisions of regulations 11A and 33C will apply to them.

Regulation 7 provides the definition of a micro-business, which hinges on the number of its employees. Regulation 8 provides how the number of employees is to be calculated and provides a definition of full-time equivalent employee solely for the purposes of these regulations. Regulation 9 provides that where a separate business employs people solely for the purpose of the first business, the first business must count those other employees for the purpose of determining whether it is a micro-business. Regulation 10 makes clear that micro-businesses may opt to comply with the provisions of regulation 11A(1) and (2) and alter their instrument of incorporation at any time before the end of their compliance period.

A full impact assessment of the effect that this instrument will have on the costs of business and the voluntary sector is available on HM Treasury's website (www.hm-treasury.gov.uk) or from the Financial Regulation and Markets Group, HM Treasury, 1 Horse Guards Road, London SW1A 2HQ and is published with the Explanatory Memorandum alongside the instrument on www.legislation.gov.uk.