

SCHEDULE 17 CONDITIONS TO BE SATISFIED FOR APPLICATION OF SEGREGATED LIABILITY TO SUB-FUNDS OF INVESTMENT  
COMPANY TRADING BEFORE 30 June 2005

Section 1405 .

Conditions for segregated liability to apply to sub-funds

1. (1) Section 1405 (1) shall not apply to an umbrella fund which was authorised and commenced trading (as that latter expression is to be read in accordance with this Schedule) before 30 June 2005 unless—

(a) the members of the umbrella fund shall have resolved by special resolution that the provisions of section 1405 (1) should apply to that umbrella fund; and

(b) the special resolution has taken effect in accordance with paragraph 2.

(2) For the purposes of this Schedule, an umbrella fund shall be deemed to have commenced to trade before 30 June 2005 if—

(a) shares, other than the subscriber shares issued for the purposes of incorporation of the umbrella fund, were issued in any sub-fund of that umbrella fund before 30 June 2005 and one or more of those shares remained in issue on that date; or

(b) the umbrella fund, or any person acting on its behalf, entered into an agreement with a third party before 30 June 2005, which remained in force on that date and pursuant to which the assets of any sub-fund may be applied in satisfaction of any liability incurred on behalf of or attributable to any other sub-fund of the same umbrella fund.

Taking effect of special resolution referred to in paragraph 1

2. (1) If no application to the court is made pursuant to paragraph 5, a special resolution passed pursuant to paragraph 1(1) shall take effect on the date on which such resolution is passed or the 31st day after the date of service of notice on creditors issued pursuant to paragraph 3(1)(b), whichever is the later.

(2) If an application is, or applications are, made to the court pursuant to paragraph 5, a special resolution pursuant to paragraph 1(1) shall not take effect until—

(a) in the event that all applications made are withdrawn, the day on which such resolution is passed or the day next following the withdrawal of the last outstanding application, whichever is the later, subject to this day being no earlier than the 31st day after the date of service of notice on creditors issued pursuant to paragraph 3(1)(b); and

(b) in the event that all applications made are not withdrawn, whichever of the following is the later,

that is to say, the later of the day on which such resolution is passed, and:

(i) where an order is granted by the court pursuant to paragraph 5 or on appeal pursuant to paragraph 6, the date specified in that order or, if no such date is specified, the day next following the date on which the period for which the order is specified to remain in force expires or, as appropriate, following the day on which it otherwise ceases to be in force; or

(ii) where no appeal against any decision of the court is lodged pursuant to paragraph 6, the day next following the date on which the period for such an appeal in relation to the last such determination of the court shall have elapsed; or

(iii) where an appeal is lodged against any decision of the court pursuant to paragraph 6, the day next following the date on which the last outstanding such appeal is disposed of or withdrawn,

unless a court has otherwise ordered under paragraph 5 or 6.

Certain requirements concerning notice of meeting to consider special resolution

3. (1) Any notice of a meeting at which a special resolution of the type referred to in paragraph 1(1) is intended to be proposed—

(a) shall be accompanied by audited financial statements for the umbrella fund which—

(i) include a statement of the assets and liabilities of each sub-fund of the umbrella fund; and

(ii) are prepared as at a date which is not more than 4 months before the date on which the notice convening the meeting is served,

and such a statement is referred to subsequently in this paragraph and paragraph 4 as a “statement of assets and liabilities”;

(b) shall be given to all creditors of the umbrella fund, accompanied by a copy of the statement of assets and liabilities, in accordance with the provisions of paragraph 4; and

(c) shall be delivered to the Registrar, accompanied by the statement of assets and liabilities, no later than the third day after the date on which the notice is first sent to members of the umbrella fund.

(2) If the means provided under section 193 (unanimous written resolutions) are proposed to be used to pass the special resolution, the following provisions have effect—

(a) notice in writing of the proposed use of those means for that purpose shall be served on all members of the umbrella fund (and such notice shall not be valid if less than 30 days elapse between the date of service of it and the date of the signing of the resolution by the last member to sign);

(b) each of the requirements under subparagraph (1) with respect to the notice of a meeting shall apply

to the notice in writing under clause (a); and

(c) references in subparagraph (1) to the notice of a meeting shall be read as references to the notice in writing under clause (a),

and references elsewhere in this Schedule to the notice of a meeting shall be read accordingly.

Notice to creditors of meeting to consider special resolution under paragraph 1(1)

4. (1) The requirement in subparagraph (1)(a) of paragraph 3 to give all creditors of the umbrella fund notice of the meeting referred to in that paragraph shall be regarded as having been complied with if—

(a) a notice in writing, accompanied by the statement of assets and liabilities, is sent to each relevant creditor of a sub-fund; and

(b) a notice is published in at least one national newspaper, stating that the umbrella fund intends to avail itself of section 1405 (1) and that an application may be made in accordance with paragraph 5 for an order pursuant to that paragraph.

(2) For the purpose of this paragraph, a relevant creditor of a sub-fund is any creditor for whom provision was made, in accordance with the articles of association, in the net asset value of the sub-fund calculated—

(a) in the case of a sub-fund in respect of which the net asset value is not calculated on a daily basis, as at the last valuation point for that sub-fund before the date of service of the notice pursuant to paragraph 3(1)(b); and

(b) in the case of a sub-fund in respect of which the net asset value is calculated on a daily basis, as at the second last valuation point for that sub-fund.

Application to court opposing special resolution under paragraph 1(1)

5. (1) An application may be made to the court in accordance with this paragraph for an order preventing any resolution passed, or proposed to be passed, pursuant to subparagraph (1) of paragraph 1 from taking effect in relation to any umbrella fund referred to in that paragraph.

(2) An order under this paragraph may be granted only if the court considers that it would be just and equitable to do so.

(3) Each order granted pursuant to this paragraph shall specify the period in respect of which the order shall remain in force and, without prejudice to the powers of the court to specify such period, may specify that the order shall cease to be in force on the date on which the applicant ceases to be a creditor of the umbrella fund or the date on which the applicant consents to the application of section 1405 (1) to that umbrella fund, whichever is the later.

(4) An application under this paragraph may only be made by a relevant creditor or relevant creditors constituting not less than 1 per cent in number of the creditors of any sub-fund, or the debts owed to whom account for not less than 1 per cent in value of the debts owed by any sub-fund, in each case as provided for in the net asset value of that sub-fund referred to in paragraph 4.

(5) Any application pursuant to this paragraph shall be made by a relevant creditor within 28 days after the date of service of the notice referred to in paragraph 3(1) (b), and may be made on behalf of the creditors entitled to make the application by one or more of their number as they may appoint in writing for such purpose.

(6) Notice of an application to the court for the purposes of this paragraph shall be sent by the relevant creditor or relevant creditors to the umbrella fund and to the Central Bank within 2 days after the date on which the application is made, and the umbrella fund and the Central Bank shall each be entitled to appear and be heard on an application made pursuant to this paragraph.

(7) In considering whether it is just and equitable to make an order pursuant to this paragraph, the court shall have regard to the following matters:

(a) the terms of any agreement or arrangement between the creditor or creditors and the umbrella fund or its delegates;

(b) the course of dealings between the creditor or creditors and the umbrella fund or its delegates;

(c) the conduct of the umbrella fund or its delegates towards the creditor or creditors;

(d) the extent to which the umbrella fund or its delegates represented to the creditor or creditors that the umbrella fund would have recourse to the assets of any other sub-fund to discharge the liabilities owed to the creditor or creditors;

(e) the extent to which it was reasonable for the relevant creditor or relevant creditors to expect to have recourse to the assets of any other sub-fund;

(f) any other matters which the court shall deem relevant.

Appeal from decision of court under paragraph 5

6. (1) Any creditor who has made an application pursuant to paragraph 5, or the umbrella fund in respect of which the application is made, may appeal to the Supreme Court against any decision of the court in respect of that application.

(2) Notice of any such appeal shall be lodged within 5 days after the date on which the order is perfected by the court.

(3) Notice of any appeal lodged by the umbrella fund shall be sent to the Central Bank and to the relevant creditor or relevant creditors who made the application pursuant to paragraph 5 within 2 days after

the date on which the appeal is made.

(4) Notice of any appeal by the party which made the application pursuant to paragraph 5 shall be sent to the Central Bank and to the umbrella fund within 2 days after the date on which the appeal is made.