

Chapter 6

Operating duties and responsibilities

6.9 Independence, names and UCITS business restrictions

Application

6.9.1 **R** This section applies to an *authorised fund manager*, a *depository*, an *ICVC* and any other *directors* of an *ICVC*.

6.9.1A **G** Articles 20 to 24 of the *UCITS level 2 regulation* set out detailed provisions that must be read by the *authorised fund manager* and the *depository* of a *UCITS scheme* alongside ■ COLL 6.9.2G to ■ COLL 6.9.5G.

Independence of depositories and scheme operators

- 6.9.2** **G**
- (1) Regulation 15(8)(f) of the *OEIC Regulations* (Requirements for authorisation) requires independence between the *depository*, the *ICVC* and the *ICVC's directors*, as does section 243(4) of the *Act* (Authorisation orders) for the *trustee* and *manager* of an *AUT*, and section 261D(4) of the *Act* (Authorisation orders) for the *depository* and *authorised fund manager* of an *ACS*. ■ COLL 6.9.3 G to ■ COLL 6.9.5 G give the *FCA's* view of the meaning of independence of these relationships. An *ICVC*, its *directors* and *depository* or a *manager* and a *trustee* of an *AUT* or an *authorised fund manager* and *depository* of an *ACS* are referred to as "relevant parties" in this *guidance*.
 - (2) There are at least three possible kinds of links between the relevant parties:
 - (a) *directors* in common;
 - (b) cross-shareholdings; and
 - (c) contractual commitments.
 - (3) If any of these links exist between the relevant parties, the *FCA* will have regard to ■ COLL 6.9.3 G to ■ COLL 6.9.5 G in determining whether there is independence.

Independence: influence by directors

- 6.9.3** **G**
- (1) Independence is likely to be lost if, by means of executive power, either relevant party could control the action of the other.
 - (2) The board of one relevant party should not be able to exercise effective control of the board of another relevant party. Arrangements which might indicate this situation include quorum

provisions and reservations of decision-making capacity of certain directors.

- (3) For an *AUT* or *ACS*, the *FCA* would interpret the concept of *directors* in common to include any *directors* of associates of one relevant party who are simultaneously *directors* of the other relevant party.
- (4) For an *ICVC*, independence would not be met if:
 - (a) a *director* of the *ICVC* or any *associate* of the *director* is a *director*, an employee, or both of the *depository*; or
 - (b) a *director* of an *ICVC*:
 - (i) has a direct or indirect shareholding for investment purposes of more than 0.5% of the votes at a general meeting or a meeting of holders of the class of *share* concerned of the *depository* of that *ICVC*; or
 - (ii) has any other relationship with the *depository* which might reasonably be expected to give rise to a potential conflict of interest.

Independence: influence by shareholding

6.9.4

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Independence is likely to be lost if either of the relevant parties could control the actions of the other by means of shareholders' votes. The *FCA* considers this would happen if any shareholding by one relevant party and their respective *associates* in the other exceeds 15% of the voting *share* capital, either in a single *share* class or several *share* classes. The *FCA* would be willing, however, to look at cross-shareholdings exceeding 15% on a case-by-case basis to consider if there were exceptional grounds for concluding that independence was safeguarded by other means.

Independence: contractual commitments

6.9.5

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The *FCA* would encourage relevant parties to consult it in advance about its view on the consequences of any intended contractual commitment or relationship which could affect independence, whether directly or indirectly.

Undesirable or misleading names

6.9.6

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- (1) Regulation 15(9) of the *OEIC Regulations*, and sections 243(8) and 261D(10) of the *Act* require that an *authorised fund's* name must not be undesirable or misleading. This section contains *guidance* on some specific matters the *FCA* will consider in determining whether the name of an *authorised fund* is undesirable or misleading. It is in addition to the requirements of regulation 19 of the *OEIC Regulations* (Prohibition on certain names).
- (2) The *FCA* will take into account whether the name of the *scheme*:
 - (a) is substantially similar to the name of another *authorised fund*;
 - (b) implies that the *authorised fund* has merits which are not, or might not be, justified;
 - (c) implies that the *authorised fund manager* has particular qualities, which may not be justified;

- (d) is inconsistent with the *authorised fund's* investment objectives or policy;
 - (e) implies that the *authorised fund* is not an *authorised fund* (for example, describing the *authorised fund* as a "plan" or "account" are unlikely to be acceptable); and
 - (f) might mislead investors into thinking that *persons* other than the *authorised fund manager* are responsible for the *authorised fund*.
- (3) The *FCA* is unlikely to approve a name of an *authorised fund* that includes the word "guaranteed" unless:
- (a) the guarantee is given by:
 - (i) an *authorised person*;
 - (ii) a *person* authorised by a *Home State regulator*; or
 - (iii) a *person* subject to prudential supervision in accordance with criteria defined by *EU* law or prudential rules at least as stringent as those laid down by *EU* law;

other than the *authorised fund manager* or the *depository*.
 - (b) the *authorised fund manager* can demonstrate that the guarantor has the authority and resources to honour the terms of the guarantee;
 - (c) the guarantee covers all *unitholders* within the *authorised fund* and is legally enforceable by each *Unitholder* who is intended to benefit from it or by a *person* acting on that *unitholder's* behalf;
 - (d) the guarantee relates to the total amount paid for a *unit* which includes any charge or other costs of buying or selling *units* in the *authorised fund*;
 - (e) the guarantee provides for payment at a specified date or dates and is unconditional although reasonable commercial exclusions such as force majeure may be included; and
 - (f) where the guarantee applies to different *classes* of *unit*, it is identical in its application to all *classes* except for the differences attributable to income already received or charges already suffered by the different *classes* of *unit*.
- (4) The name of an *authorised fund* may indicate a guaranteed capital return or income return or both but only if the total amount paid for a *unit* is guaranteed in accordance with (3).
- (5) The *FCA* is unlikely to approve a name of an *authorised fund* that includes words implying a degree of capital security (such as "capital protected" or anything with a similar meaning) unless the degree of capital security is apparent from the name and clearly stated in the *prospectus*, and:
- (a) the principles in (3) are satisfied except that, for the purposes of (3)(d), the guarantee may relate to an amount not materially less than the total amount paid for a *unit*; or
 - (b) the investment objective and investment policy for the *authorised fund* are such as to show a clear intention to provide a material degree of security in respect of the total amount paid for a *unit*.

(6) When determining whether (5) is complied with, the FCA will take into account whether the degree of capital security implied by the name fairly reflects the nature of the arrangements for providing that security. This assessment will take place on a case-by-case basis.

Undesirable or misleading names: umbrellas

6.9.7 **R** The authorised fund manager must ensure that the name of a sub-fund or of a class of unit is not undesirable or misleading.

Undesirable or misleading names: umbrellas - guidance

6.9.8 **G** When deciding whether COLL 6.9.7R is complied with, the FCA will take into account COLL 6.9.6G. COLL 6.9.7R applies generally and not just to the names that include the words "guaranteed" or "capital protected".

6.9.8A **R** [deleted]

Use of the term 'UCITS ETF'

- 6.9.8B **G**
- (1) ESMA has issued guidelines on the use of the term 'UCITS ETF'. A 'UCITS ETF' is a UCITS with at least one unit or share class which is traded throughout the day, on at least one regulated market or multilateral trading facility, with at least one market maker that takes action to ensure that the stock exchange value of its units or shares does not significantly vary from its net asset value and, where applicable, its indicative net asset value.
 - (2) A 'UCITS ETF' should use the identifier 'UCITS ETF' which identifies it as an exchange traded fund. This identifier should be used in its name, fund rules, instrument of incorporation, prospectus, key investor information document or marketing communications. The identifier 'UCITS ETF' should be used in all EU languages.
 - (3) A UCITS which is not a 'UCITS ETF' should not use the 'UCITS ETF' identifier, 'ETF' or 'exchange traded fund' in its name or in any of the documents or communications referred to in (2).

[Note: ESMA's Guidelines to competent authorities and UCITS management companies on ETFs and other UCITS issues (ESMA/2012/832)]

Restrictions of business for UCITS management companies

6.9.9 **R** A UCITS management company must not engage in any activities other than:

- (1) [deleted]
- (1A) managing a UCITS;
- (1B) managing an AIF;
- (1C) acting as a residual CIS operator;
- (2) activities for the purposes of or in connection with those in (1A), (1B) or (1C);

- (3) collective portfolio management, including without limitation:
 - (a) investment management;
 - (b) administration:
 - (i) legal and fund management accounting services;
 - (ii) *customer* enquiries;
 - (iii) valuation and pricing (including tax returns);
 - (iv) regulatory compliance monitoring;
 - (v) maintenance of unitholder register;
 - (vi) distribution of income;
 - (vii) unit issues and *redemptions*;
 - (viii) contract settlements (including certificate dispatch); and
 - (ix) record keeping; and
 - (c) marketing;
- (4) *managing investments* where the relevant portfolio includes one or more *financial instruments*;
- (5) investment advice concerning *financial instruments* where the firm has permission for the activity in (4); and
- (6) safeguarding and administration of *collective investment scheme units* where the *firm* has a *permission* for the activity in (4).

Connected activities: guidance

6.9.10

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- (1) Examples of the connected activities referred to in ■ COLL 6.9.9 R (2) include management of *group plans*, as long as they are dedicated to *investments* in *unit trust schemes*, *co-ownership schemes*, *limited partnership schemes* and *OEICs* for which the *firm* acts as an *authorised fund manager*.
- (2) The restrictions of business imposed by ■ COLL 6.9.9R reflect the position under Article 6 of the *UCITS Directive*. In accordance with recital (12) of the Directive the activities referred to at ■ COLL 6.9.9R (3) (a) to ■ COLL 6.9.9R (3) (c) may be performed on behalf of *EEA UCITS management companies*.

Notification to the FCA in its role as registrar of ICVCs

6.9.11

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An *ICVC* must notify the *FCA* within 14 *days* of the occurrence of any of the following:

- (1) any amendment to the *instrument of incorporation*;
- (2) any change in the address of the head office of the *ICVC*;
- (3) any change of *director*;
- (4) any change of *depository*;

- (5) in respect of any *director* or *depository*, any change in the information mentioned in regulation 12(1)(b) or (c) of the *OEIC Regulations* (Applications for authorisation);
- (6) any change of the auditor of the *ICVC*;
- (7) any order in respect of the *ICVC* made by virtue of regulation 70 of the *OEIC Regulations* (Mergers and divisions).