STATEMENT OF NEED AND IMPACT OF THE DETERMINATION RELATING TO FOREIGN COLLECTIVE INVESTMENT SCHEMES SOLICITING INVESTMENTS IN THE REPUBLIC

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*** This version incorporates changes that were made to the original version of the "Statement supporting the draft Determination Relating to Foreign Collective Investment Schemes Soliciting Investments in the Republic" that was published on 29 August 2024**

FSCA

Financial Sector
Conduct Authority

1. PURPOSE OF THE STATEMENT

1.1 This Statement relates to the publication of the Financial Sector Conduct Authority (FSCA) CIS Notice 1 of 2026 – *Determination Relating to Foreign Collective Investment Schemes Soliciting Investments in the Republic* (the Determination). The FSCA intends to make the Determination in terms of section 65(1)(a) and (c) read with section 114(4)(b) of the Collective Investment Schemes Control Act, 2002 (Act No. 45 of 2002) (CISCA).

1.2 The Statement is published in accordance with section 98(1)(a) of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017) (FSR Act) and is intended to support and give context of the Determination. The Statement explain the need for and expected impact of the Determination.

2. STATEMENT OF NEED

2.1 In South Africa Collective Investment Schemes (CIS) are regulated and supervised under CISCA. CISCA, amongst others, distinguishes between local and foreign schemes. With respect to the latter, and as it pertains to soliciting investments within South Africa, sections 65 to 67 of CISCA further makes provision in terms of how the relevant applications to solicit CIS investments are to be made and conditions attached thereto, which the FSCA can determine in accordance with section 65(1)(c) of CISCA. In 2013, the erstwhile Financial Services Board (FSB) determined such conditions through the publication of Board Notice 257 of 2013 (BN 257). It is worth noting that previously the FSB provided guidance for categorization of both local and foreign CIS's under Guidance Note 2 and subsequently Guidance Note 2A to provide further guidance to the industry albeit with remaining challenges.

2.2 The shift from a predominantly rules-based approach of regulation to a principles-based approach, together with the fact that BN 257 is outdated, has necessitated the review of BN 257 and the publication of the Determination.

2.3 In addition, and more importantly, the Financial Services Tribunal's (Tribunal) decision in the matter of G*reenman Investments S.C.A., Sicav-Fis vs Financial Sector Conduct Authority* (Greenman)[1], which essentially dealt with the powers the FSCA has with respect to the assessment and approval of foreign CIS's when soliciting and or advertising for business in South Africa, highlighted various challenges with the existing BN 257.

2.4 The succinct facts in respect of the Greenman case is that at the end of 2020, the Authority declined their application for a foreign CIS to be categorised as a CIS in Qualified Hedge Funds on the basis that it did not comply with section 95(1)(b) of CISCA. Section 95(1)(b) determines that a manager may not sell or offer for sale any participatory interests and may not lend or advance any money from the fund. The reason for declining Greenman's application was that it was lending or advancing monies in contravention of section 95. Greenman applied for reconsideration of the decision in terms of section 230 of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017).

2.5 In May 2021, the Tribunal, held, amongst others, that a manager of a foreign CIS is not to be made subject to the limitations applied to a manager in terms of CISCA, where an application is made to the Authority for permission to solicit investments in South Africa, unless it is specified in legislation as being applicable to foreign schemes. Further, the Tribunal noted that the Authority's argument assumed that its regulations may be interpreted on the basis that they

[1] Case No.: A2/2021.

override the provisions of CISCA. The Tribunal found that paragraph 5(2) of BN 257 does not contemplate the Authority categorising a scheme and then selecting the sections of CISCA which it thinks should apply to that scheme. Put differently, the Authority does have the discretion to categorise foreign CIS's for the purpose of applying legislation that is not pre-stated as being applicable to foreign schemes, but such discretion is limited to a specific purpose, being to apply the provisions of CISCA.

2.6 As a result of all these developments, it was decided that BN 257 should be reviewed and updated to reflect international best practices which have developed in the preceding years and that the draft Determination be issued for public consultation.

3. CONSULTATION ON THE DETERMINATION

3.1 On 29 August 2024, the FSCA published the draft Determination Relating to Foreign Collective Investment Schemes Soliciting Investments in the Republic, for public consultation. The comment period was scheduled for and closed on 6 October 2024, with various comments received.

3.2 Subsequently, comments as received were considered and accordingly responded to by the FSCA (and necessary changes effected to the Determination).

3.3 Full details of the consultation process is set out in the Consultation Report pertaining to the Determination.

4. SUMMARY OF THE DETERMINATION

4.1 The Determination mainly set out principle-based requirements for the determination of conditions in terms of which a foreign collective investment schemes may advertise for and solicit investments in South Africa.

4.2 The Determination contains, *inter alia*, requirements and conditions relating to –

4.2.1 The prescribed format of an application for approval in terms of section 65(1) of CISCA; and

4.2.2 Conditions that a foreign scheme must comply with for purposes of being approved under section 65(1) of CISCA. The conditions include, amongst other things, that -

- a foreign scheme must be authorised and supervised by a foreign regulator which has a regulatory framework equivalent to the regulatory framework established under CISCA;
- the foreign scheme/operator will act responsibly and will be able to satisfy certain principles or general requirements, including that it will not lend out investor's funds, be sufficiently liquid, regularly do redemptions, have an appropriate pooling structure, and the like;
- the investment strategies and approaches utilised by the foreign scheme/operator is appropriate and not overly complex or risky;
- the operator does not make any statements or disseminates information which the operator or the representative of the operator reasonably knows to be false, misleading and the like. In addition, the operator must also comply with any prescribed requirements relating to advertising and disclosure that are applicable to CIS managers (e.g. Board Notice 92 of 2014);
- the foreign CIS/operator avoids any conflict between the interests of the foreign CIS/operator and the interests of an investor;

- the foreign CIS/operator enters into a representative agreement with a representative office established in the Republic or with a manager registered under CISCA. The representative agreement must provide for various matters, including that it must impose an obligation on the foreign CIS/operator to comply with section 65 of CISCA and the Determination and that it must include an undertaking by the representative office/local manager to take reasonable steps to ensure the foreign CIS/operator complies with section 65 of CISCA and the Determination;
- the foreign CIS/operator may not utilise certain investment strategies or approaches; and
- the foreign CIS/operator must immediately notify the FSCA if it suspends the repurchase of participatory interests, unless the suspension is a scheduled suspension of which investors are notified in the ordinary course of business.

5. STATEMENT OF IMPACT OF THE DETERMINATION

5.1 Through the consultation process, commentators indicated that the Determination will not have a materially adverse impact.

5.2 However, commentators highlighted two particular issues and contemplated that the first issue discussed below will result in an unreasonable consequence and the second issue creates uncertainty.

5.3 Issue 1: Commentators raised concerns with the outright prohibitions contained in paragraph 7(1) of the Determination and contended that the prohibitions are unreasonably restrictive and will result in certain funds being automatically and unjustifiable excluded from qualifying for approval. It was also contended that this approach is misaligned with international approaches. The FSCA acknowledged the concern and amended the Determination to address the concern as best as possible, whilst still ensuring optimal investor protection.

5.4 Issue 2: Commentators acknowledged that the FSCA intends to move to principle-based requirements and may exercise discretion on the manner and extent to which instruments are used in a foreign portfolio. However, commentators were of the view that the “public interest” criterion create significant uncertainty as to what the FSCA will regard as appropriate for the solicitation of investments in the foreign scheme to be in the interest of investors. Commentators contended that it is important that the FSCA issues guidance as to how the discretion will be exercised so that managers and trustees can exercise the discretion similar to the FSCA. The FSCA understand the potential impact created by the perceived uncertainty. However, public interest is a critical consideration, and it is not feasible to come up with all-encompassing criteria that will cater for all situations and clarify public interest. The FSCA will consider and apply this criterion based on the facts of the matter, its regulatory and supervisory insights, principles of fairness, and the like. Managers and trustees will have to exercise their judgement in a similar manner. The FSCA will in due course consider whether it is necessary to issue further guidance that informs the public interest criteria, but it is not possible to, at this stage, confirm that guidance will indeed be issued.

5.5 In conclusion, this Determination is representative of a process of updating an existing Board Notice 257 to better reflect international best practice and the supervisory experiences pertaining to applications by foreign collective investments schemes since its publication in 2013.

5.6 It is expected that the Determination, once implemented, will result in a stronger and more appropriate regulatory framework governing the advertisement and solicitation of foreign

collective investment schemes in South Africa, thereby resulting in better protection for financial customers.

5.7 The FSCA envisages that the cost implication (if any) of the Determination will not be significant, as the Determination is largely based on existing requirements contained in Board Notice 257 and the associated guidance notices.

6. STATEMENT OF INTENDED OPERATION OF THE DETERMINATION

6.1 The Determination is consistent with the objectives of the FSR Act and CISCA, especially the FSCA's mandate to protect financial customers by promoting fair treatment of financial customers by financial institutions.

6.2 The Determination applies to all foreign collective investment schemes which intends advertising for and soliciting investments in South Africa.

6.3 The Determination is intended to come into operation on the date of publication.

6.4 Following the implementation of the Determination, the Authority will assess and evaluate the effect of the Determination on a continuous basis as part of its regulatory and supervisory responsibilities.