

## INVESTMENT TRUST SAVINGS SCHEMES AND PUBLIC OFFERS

The AITC was recently approached by a fund management organisation which had received legal advice which raised questions as to whether a financial promotion in relation to an Investment Trust Savings Scheme (ITSS) might constitute a public offer under FSMA 2000, thereby requiring the production of a prospectus.

The AITC's initial view was that an ITSS does not amount to a public offer. However, having discussed this matter with the AITC's Technical Committee, it was clear that the relevant legislation, recently amended as a result of the Prospectus Directive, is not as unambiguous as had previously been the case. The AITC therefore met with the FSA to discuss these issues in relation to a 'typical' ITSS. This paper sets out the background to these issues and the AITC's conclusions.

*The comments in this paper are intended to be general in nature. Some of the issues raised can only be finally determined by reference to the facts applying to individual ITSSs on a case-by-case basis. Providers of ITSSs who are in any doubt over the application of the prospectus rules should take professional advice before relying on anything contained in this paper.*

### Background

In essence, an ITSS is a 'wrapper' scheme through which investors can buy, hold and then sell shares in investment trusts on a low-cost basis. The scheme itself, being an FSA regulated service, must be provided by a person authorised by the FSA. So, the scheme will normally be provided by the investment trust fund manager (or a regulated subsidiary) or (in the case of self-managed trusts) by a regulated subsidiary of the investment trust.

It should be noted that the term ITSS simply refers to the mechanism and service by which shares can be bought, held and sold. It can therefore form part of some other form of savings product, often with tax privileges. So, an ITSS could be used as part of an ISA, personal pension scheme, Child Trust Fund etc. In many respects, an ITSS is equivalent to the equity ISAs or share dealing services offered by, say, banks. The difference is that an ITSS will typically restrict the range of investment trust shares that can be bought to the shares of investment trusts which are managed by the same investment trust manager.

When a person takes out an ITSS, the terms of the scheme will normally provide that shares will be purchased on the first dealing day after instructions have been received and monies have cleared. Vice versa, the provider of the ITSS might receive instructions for shares held through the ITSS to be sold and the proceeds to be returned to the investor. An ITSS will normally provide no advice in connection with these transactions, which are conducted on an execution-only basis. The price that the investor will eventually pay and receive for the shares will be subject to

prevailing market conditions (and will therefore not be known by either the ITSS provider or investor).

**When the customer's funds have been received, the provider of the ITSS will then arrange for the purchase/sale of the required shares. Where such purchases are made via the secondary market, it is understood that this will not amount to a public offer by the ITSS provider.**

**Where an ITSS provider, alternatively, acquires the shares to satisfy the customer order from the trust itself, either as the result of a new issue of shares by the trust (or a sale of treasury shares), it is similarly understood that this would not amount to a public offer by the ITSS provider. However, it is important to note that the issue or sale of shares by the trust in such circumstances may amount to a public offer by the trust itself (unless, for example, the trust is able to rely one of the specific exemptions that exist within the regulations – e.g. section 86 FSMA 2000 but taking account also of the considerations which apply when securities are placed through an intermediary).**

### **Regulatory analysis**

The key regulatory provision is the definition of a public offer in s102B FSMA which is set out as follows:

*“For the purposes of this Part there is an offer of transferable securities to the public if there is a communication to any person which presents sufficient information on:*

- (a) the transferable securities to be offered; and*
- (b) the terms on which they are offered,*

*to enable an investor to decide to buy or subscribe for the securities in question.”*

The AITC believes that an ITSS is different in substance to a public offer such as an IPO. Factors that differentiate an ITSS are:

- in substance, when an ITSS is taken out by a customer, the customer is entering into an agreement which provides them with access to a dealing service rather than accepting an offer for shares.
- at the time the ITSS is taken out by a customer, the person from whom the shares will eventually be bought (i.e. market maker or investment trust) is unknown and therefore this person cannot be aware that any such arrangements exist.

- at the time the ITSS is taken out, and instructions for the purchase of shares have been received, the price that will be paid is unknown and subject to market forces.
- an ITSS does not require the permission of the investment trust(s) to be set up and some ITSSs will include shares of trusts managed by other managers. As shares for the ITSS can, and normally will, be bought on the open market, the ITSS does not require any permission from the investment trusts concerned.
- on taking out the ITSS, there is no contractual arrangement between the market maker/investment trust and the ITSS provider which can compel the market maker/investment trust to provide the shares to satisfy the customer's order. The ITSS provider is therefore not an agent of a market maker/investment trust for the purpose of making an offer – rather the ITSS provider is an agent of the customer which uses the customer's funds to makes offers to the market maker/investment trust.
- at no time during the process does the ITSS provider own the shares that are eventually delivered to the customer. Beneficial ownership of the shares is transferred from the market maker/investment trust to the customer via a nominee arrangement.

**Therefore, because the ITSS is neither offering shares that it owns on its own account, or acting as an agent of another party offering shares, but simply providing a service through which shares can be bought and sold, the AITC does not consider that a financial promotion in connection with an ITSS is a public offer which requires the production of a prospectus.**

## **Conclusion**

Having discussed the above issues with the FSA, the AITC can confirm its view that the typical ITSS as described above does not amount to a public offer requiring the publication of a prospectus. However, it should be stressed, especially in light of the analysis provided in the paragraphs in bold on page 2 of this note, that each ITSS provider, and trust whose shares are available within them, must consider these issues on a case-by-case basis to determine if the publication of a prospectus is required and by whom and if so, what action may need to be taken.

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