



**IN THE MATTER of the Administration of the Investment Funds Act, 2003  
and the Investment Funds Regulations, 2003**

**AND**

**IN THE MATTER of Proceedings under Part XVII of  
the Securities Industry Regulations, 2000  
and Section 54 of the Investment Funds Act, 2003.**

**BETWEEN**

**THE EXECUTIVE DIRECTOR OF  
THE SECURITIES COMMISSION OF THE BAHAMAS**

**Plaintiff**

**AND**

**ACCUVEST FUND SERVICES LIMITED  
AND  
SOUTH AMERICAN INVESTMENT FUND LIMITED**

**Defendants**

**Matter No. SCB/HP/1/2010**

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**HEARING PANEL FINAL DECISION**

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Hearing Panel: Sterling Quant, Chairman;  
John Archer; and  
Deborah Bastian.

Hearing: Monday 27<sup>st</sup> January, 2011.

2 The Hearing Panel (the Panel) held a hearing at the offices of the Securities Commission of  
the Bahamas (the Commission) concerning allegations against Accuvest Fund Services  
4 Limited (Accuvest), and a fund it administers, South American Investment Fund Limited (the  
Fund). This decision concerns the Panel's findings relative to both defendants and the  
pertinent facts are as follows:

2 **FACTS**

4 Accuvest was licensed as a Restricted Investment Fund Administrator (RIFA) as of January  
6 15, 2003 pursuant to s. 34 of the Investment Funds Act, 2003 (the Act). The Fund was  
8 previously administered by another administrator prior to that administrator's resignation on  
10 June 21, 2006. The Fund advised the Commission via letter dated June 14, 2006 that  
12 Accuvest would be its new administrator.

14 As of September 11, 2007 the Commission's files showed Accuvest had no funds under its  
16 administration. As a RIFA, Accuvest must submit any fund it will be administering to the  
18 Commission for licensing. Accuvest submitted an application to the Commission prior to  
20 September 2007 to license the Fund. However, the Commission never issued a license  
22 because the documents required to complete the application were not all received until nearly  
24 two (2) years later.

16 Accuvest is obligated under the Act to submit its audited financials to the Commission within  
18 four (4) months of the financial year-end, and where this is not feasible application may be  
20 made to the Commission for an extension of the time period for submitting them. Accuvest  
22 is also obligated under the Act to use reasonable means to ensure that any fund it administers  
24 is complying with the provisions of the Act.

20 The Commission conducted a routine inspection of Accuvest from September 11 – 28, 2007  
22 and found a number of breaches concerning Accuvest and the Fund. The Executive Director  
24 filed a Formal Complaint (the Complaint) containing the breaches which are outlined in  
greater detail below.

26 **BREACHES AND SUBMISSIONS**

28 As a result of the inspection findings and the events that followed, the Executive Director  
30 filed a Formal Complaint containing the following breaches of the Act and the Investment  
Funds Regulations, 2003 (the Regulations):

32 **Accuvest**

34 **BREACH 1**

36 Section 42(2) of the Act which states: "an investment fund administrator shall  
38 submit its financial statements in respect of the financial year of the administrator to  
the Commission within four months of the end of that financial year or within such  
extension of that period as the Commission may reasonably allow."

40 **BREACH 2**

42 Section 26 of the Act which states: "The administrator of an investment fund  
shall use reasonable efforts to ensure that the investment fund does not carry on or  
attempt to carry on business as an investment fund contrary to provisions of this Act."

44

BREACH 3

2 Regulation 17(1)(g) of the Regulations, which states: “An investment fund  
administrator shall– ...

4 (g) Take all reasonable steps to ensure that operators are meeting their  
obligations and are complying with the Act and these Regulations.”

6  
8 BREACH 4

8 Regulation 53 of the Regulations, which states: “The annual declaration made  
by an investment fund administrator pursuant to section 36(4) of the Act shall be in  
10 Form B in Schedule 11 and shall be submitted to the Commission at the time of  
payment of the prescribed annual fee for the administrator.”

12  
14 As regards Breach 1, the Executive Director alleged that Accuvest failed to submit its audited  
financial statements for the years 2005 through 2007, inclusive. Breaches 2 and 3 concern  
16 Accuvest’s failure to ensure the Fund operated in accord with the Act. Concerning Breach 4,  
the Executive Director alleges that Accuvest failed to file its statutory annual declaration for  
18 the year 2006.

20 In support of his allegations the Executive Director exhibited from the Commission’s files  
various pieces of correspondence between the Commission and Accuvest which showed that  
22 Accuvest became the Fund’s administrator following the resignation of its former  
administrator. The Executive Director submitted that the correspondence evidenced activity  
24 relative to administration of a fund (pg. 17, lines 21-25 of transcript). By way of example,  
the Executive Director made particular reference to the correspondence between the  
26 Commission and Accuvest, on its own behalf and on behalf of the Fund (pg. 16, line 14 to pg.  
17, line 4 of transcript). He indicated that Accuvest’s efforts to license the fund spanned two  
28 (2) years with the application for licensing being made one (1) year after notifying the  
Commission of the change in administrator (pg. 17, lines 11-20 of transcript). The Executive  
30 Director further submitted that consequently the defendants did not use reasonable efforts or  
take reasonable steps to ensure the fund carried on business in compliance with the Act and  
32 Regulations (pg. 18, line 22 to pg. 19, line 11 of transcript).

34 The defendants referred the Panel to its Answer to the Complaint wherein they submitted  
either a qualified admission or a denial of the breaches. The defendants explained that they  
36 did not file audited financial statements because they had not yet started operating and  
administering funds during the periods covered by the Complaint (pg. 8, lines 4 – 8 of  
38 transcript). The defendants stated that Accuvest was in the process of re-registering the Fund  
following its transfer and the licensing process “albeit protracted” was a slow effort to get the  
40 Fund compliant (pg. 9, lines 19 – 23 and pg. 10, lines 12 – 19 of transcript). In the meantime,  
the relationship between Accuvest and the Fund was not negatively impacted by the alleged  
42 failings (pg. 34, lines 5-21 of transcript).

44 Further, the defendants also submitted that the Panel should have regard to special  
circumstances prevailing around the time of these breaches. They indicated that these special

circumstances incapacitated certain of their operators, a result of which was the breaches referred to. These circumstances were said to be a significant contributor to the alleged failings in the complaint (pg. 23, line 14 – pg. 25, line 14 of transcript).

## **The Fund**

### **BREACH 1**

SAIF was unlicensed yet operational and therefore breached Section 3 of the Investment Funds Act, 2003 which states: “An investment fund shall not carry on or attempt to carry on business unless -

- (a) It is licensed as -
  - (i.) A professional fund;
  - (ii.) A SMART fund; or
  - (iii.) A standard fund; or
- (b) It is registered as a recognised foreign fund.”

### **BREACH 2**

Alternatively, SAIF is in breach of Section 5(1) of the Act which states: “Notwithstanding section 3, a SMART fund shall not carry on or attempt to carry on business unless -

- (a) It complies with any written rule of the Commission establishing the parameters or requirements in respect of the category, class or type of investment fund; and
- (b) The prescribed fees have been paid in respect of the investment fund.”

### **BREACH 3**

While operating as a SMART fund model SFM003 as outlined above, SAIF is in breach of Regulation 52 of the Regulations, which states: “The annual declaration made by an investment fund under section 27(1)(a) of the Act shall be in Form A in Schedule 11 and shall be submitted to the Commission at the time of payment of the prescribed annual license or registration fee.”

The Executive Director alleged in Breach 1 that the Fund was operating while being unlicensed, or alternatively that it was carrying on business as a SMART fund contrary to the Act. The Panel noted that Breach 2 was cited as an alternative to Breach 1. Breach 3 concerned the Fund’s failure to file its statutory annual declaration for the year 2008.

The submissions of both parties concerning the Fund were either similar to or made during their submissions concerning Accuvest. This is understandable given the relationship between the two defendants, inclusive of the operators for both Accuvest and the Fund being one and the same (pg. 3, Breach 3 of defendant’s Answer). The Executive Director again directed the Panel to the exhibited correspondence earlier referred to.

In addition to referencing their aforementioned Answer, the defendants submitted that the Fund was in the process of re-registering as a SMART fund once the transfer to Accuvest was announced. The time between the change in administration and the licensing of the Fund

2 albeit protracted was still a slow effort to bring the Fund into compliant status. The  
3 defendants indicated that a major reason for this protracted time-period was the  
4 aforementioned special circumstances (pg. 9, line 13 to pg. 10, line 4 of transcript).

5  
6 The defendants also indicated that the breaches are curable and have for the most part already  
7 been remedied as they changed their operations to avoid repetition of the difficulties  
8 experienced thus far (pg. 26, lines 10 – 14 and pg. 27, lines 10 - 15 of transcript).

## 10 **RULING**

11 The Panel, having deliberated on the above matter following the hearing of same, rules as  
12 follows:

### 14 **Accuvest**

15 The Panel has found Accuvest guilty of the breaches in the Complaint based on the evidence  
16 presented, including the correspondence exhibited by the Executive Director which  
17 evidenced their operations. From the evidence presented, Accuvest was operational and  
18 failed to submit its audited annual financial statements for 2005 through 2007, inclusive.  
19 They also failed to submit the statutory annual declaration for 2006.

20  
21 The defendants indicated that special circumstances rendered one of their operators unable to  
22 perform his duties, a result of which was the breaches referred to. In making this submission  
23 however, Accuvest all but outright acknowledged the breaches referred to. The defendants  
24 referred to the special circumstances as being the main reason for the occurrence of the  
25 breaches. As indicated on this page at lines 5 - 7 above, the defendants also told the Panel  
26 what was done afterward to prevent a recurrence of these breaches. However, there was no  
27 indication as to what, if any, efforts were made at the time in question to prevent the  
28 commission of the breaches by Accuvest and the Fund. Generally, while the Panel accepts  
29 circumstances may result in hindrances or obstacles to any operation, reasonable efforts must  
30 be made to ensure that regulatory obligations are met in a timely manner.

31  
32 It is the Panel's view that Accuvest did not use reasonable efforts to ensure the Fund and its  
33 operators did not carry on business contrary to the Act. They also failed to meet their  
34 obligations and comply with the Act and Regulations.

### 36 **The Fund**

37 The Panel has also found the Fund guilty of the breaches in the Complaint based on the  
38 evidence presented. The Panel noted that once the former administrator resigned the Fund's  
39 license could no longer subsist. As a RIFA, Accuvest could not license the Fund and  
40 therefore was obliged to ensure that the required documentation was submitted to the  
41 Commission to license the Fund. The evidence presented by the Executive Director indicates  
42 that the Fund did not cease operations pending its submission of all of the documentation

2 required for it to be licensed. The Panel notes the Commission's repeated requests for the  
3 required documents, and that it took the defendants about two (2) years to submit those  
4 documents.

5 The Panel finds that the Fund was operating without a license and also failed to submit its  
6 annual declaration for the year 2008. As indicated at line 36 on page 4 above, the Executive  
7 Director presented an alternative offence. The Panel determined however that the Fund was  
8 operating without a license, and is therefore guilty of Breach 1 in the Complaint.

10 **SANCTIONS**

12 In making its decision, the Panel considered the prevailing circumstances such as these being  
13 first-time violations and whether the actions complained of are continuing. Emphasis has  
14 also been placed on, inter alia, whether the defendant engaged in the misconduct despite prior  
15 warnings from the regulator, the seriousness of the misconduct, evidence of whether the  
16 defendant addressed the failing(s) complained about and whether the defendant took full  
17 responsibility for the misconduct. We also take into consideration the defendants having  
18 since taken corrective action and incorporated procedures aimed at preventing a recurrence of  
19 such an incident.

20 The Panel considered that any sanctions that may be imposed ought to reflect the seriousness  
21 of the breaches. The Panel also considered the gravity of this matter given the nature of each  
22 of the breaches for which there was a finding of guilt.

23 The Executive Director sought a fine in the circumstances of this matter, but the defendants  
24 have asked the Panel to consider the imposition of a censure as opposed to a fine should it  
25 decide to impose sanctions. The defendants have asked that alternatively, any fine imposed  
26 be as lenient as possible given that the matters complained of have been remedied, as well as  
27 in light of the mentioned special circumstances.

28 The Panel notes that the defendants appear to be good registrants. The Panel also considered  
29 the defendants' special circumstances. However, as indicated at lines 29-30 on page 5 above  
30 reasonable efforts must still be made to ensure that regulatory obligations are met in a timely  
31 manner. As indicated above the Panel is of the view that any penalty must reflect the  
32 seriousness of the breach and ought also to have a deterrent effect. As such while the Panel  
33 may impose censure, these breaches do not warrant censure.

34 The Panel, having heard and considered the submissions of both the Executive Director and  
35 the defendants, finds that the breaches warrant the imposition of fines. Therefore, having  
36 also considered recent precedents we recommend that fines be imposed as follows:

42

**Accuvest:**

- 1) Section 42(2) – failure to file audited annual financial statements for 2005-2007 (3 years) **\$12,000** for each of the unfiled audited statements, totalling **\$36,000;**
- 2) Section 26 – failure to use reasonable efforts to ensure a fund carries on business in accord with the Act **\$7,500;**
- 3) Regulation 17(1)(g) – failure to take all reasonable steps to ensure that operators are meeting their obligations pursuant to securities legislation: **\$7,500; and**
- 4) Regulation 53 – failure to submit annual declarations for the year 2006: **\$2,500.**

**The total for Accuvest’s breaches is - \$53,500**

**The Fund:**

- 1) Section 3 - carrying on business as an unlicensed fund: **\$25,000; and**
- 2) Regulation 52 - Failure to submit declarations for the year 2008: **\$2,500.**


**The total for the Fund’s breaches is - \$27,500**

**The total penalty amount - \$53,500 + 27,500 = \$81,000**

The sanctions take effect from the date of this decision and the above penalty is to be paid within thirty (30) days after receipt of this decision.

This is the unanimous decision of the Panel.

Dated this 29<sup>th</sup> day of March, 2011

  
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Hearing Panel Chairman