

## Alert

### Foreign Investment Funds Managed or Promoted In or From Within Bermuda Subject to New Registration Requirements

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**Recent amendments to Bermuda’s Investment Funds Act now require certain investment funds, organized in jurisdictions outside of Bermuda, to be designated and register as “Overseas Investment Funds” with the Bermuda Monetary Authority. These new registration requirements potentially apply to all “in scope” investment funds including, but not limited to, closed-ended and private equity vehicles.**

The Investment Funds Amendment Act 2019 (the “Amendment Act”), which amends the Investment Funds Act 2006 (the “Act”) came into force on 1 January 2020, and provides for a new system of registration in Bermuda for foreign (i.e. non Bermuda organized) investment funds, where such funds are managed, marketed, promoted and/or sold “in and from within” Bermuda (collectively “Fund Promotion”). Previously, Fund Promotion undertaken by non-Bermuda organized investment funds was not subject to regulation pursuant to the provisions of the Act. Commencing on 1 January 2020, no foreign investment fund which is in scope of the Act may be managed or carry on promotion in or from within Bermuda, unless designated and registered as an “Overseas Investment Fund” by the Bermuda Monetary Authority (BMA) pursuant to the terms of the Act.

The Amendment Act contains a transitional provision for those foreign investment funds (FIFs) which: (i) now meet the new definition of an “Overseas Investment Fund”; and (ii) were engaged in Fund Promotion prior to 1 January 2020 (each a “Grandfathered Fund”). Each Grandfathered Fund has been granted a period ending on 30 June 2020 (the “Grandfather Period”) to comply with the terms of the Act and to become registered. Grandfathered Funds may continue to undertake Fund Promotion during the Grandfather Period provided the registration of such Grandfathered Fund is affected on or before 30 June 2020.

It is important to note that: (i) FIFs that become in scope of the Act after the Commencement Date and which have not been grandfathered are required to complete their registration immediately and prior to any Fund Promotion being undertaken; and (ii) the new registration requirements are fund-specific. There is no sheltering for an investment fund which may be a member of a wider group of investment funds, some of which may already be duly registered.

#### What entities does this apply to?

As part of the legislative amendments, the definition of what constitutes an “investment fund” has been broadened for the purposes of the Act. An investment fund is now defined as:

*“any arrangements with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangements to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income”.*

Additionally, the arrangements must be such that (i) investors do not have day-to-day control over the management of the assets of the fund; (i) the assets of the fund, and its profits and losses represent a pooling of investors’ contributions; and/or (b) the property is managed as a whole by or on behalf of the operator of the fund.

Where an investment fund incorporated or established in a jurisdiction outside of Bermuda, meets the above noted definition and is also managed or carries on promotion in or from within Bermuda, it must be designated and register as an Overseas Investment Fund with the BMA.

## Management and Promotion

The Act does not include a definition of what constitutes “management” of a fund, but the generally accepted industry understanding is that an entity manages an investment fund if it is responsible for its investment strategy, manages its portfolio trading and investment activities and otherwise supervises and monitors the fund’s investment program and risk parameters. Consideration and analysis should be undertaken when determining if a specific fund is in fact managed from Bermuda.

“Promotion” is defined in the Amendment Act as:

- (a) advertising;
- (b) issuing an offering document, application form or proposal form and stating the method of issue;
- (c) circulating or making available promotional material, including describing the general nature of the material and the persons to whom, and the manner in which, it is to be circulated or made available.

It is important to note that these amendments to the Act only apply to fund promotion and management carried out either directly or indirectly in or from within Bermuda and where, in the case of promotional activities, the foreign investment fund or related parties are initiating the promotion (as opposed to a client reverse solicitation).

## Registration requirements and process

An FIF qualifies for registration as an Overseas Investment Fund if:

- (a) it is an overseas investment fund;
- (b) it complies with the applicable rules and requirements of the overseas regulatory authority in the country or territory in which it is incorporated or established; and
- (c) it complies with all requirements of the Act and any condition which may be imposed on it by the BMA.

The Act permits the BMA to impose such conditions on the registration of the Overseas Investment Fund as the BMA may determine appropriate, and to delete, vary and modify those conditions.

Pursuant to the terms of the Act, registration as an overseas investment fund will require the operator of the fund to:

- (a) notify the BMA, through its online registration system “ERICA”, of the fund’s existence and operations;
- (b) provide the BMA with a copy of the fund’s offering document and details of any regulatory approval given by, or notification given to, the overseas regulatory authority in the country or territory in which the fund is incorporated or established; and
- (c) pay an application fee of US\$900. The annual fee thereafter is US\$1,200.

Upon the BMA being satisfied that the fund meets the requirements of the Act, it will designate it an “overseas investment fund”.

## On-going requirements

Once an Overseas Investment Fund is designated and registered as such by the BMA, it is required, on an annual basis on or before 30 June each year, to submit a certificate of compliance to the BMA. The certificate of compliance must include the following:

- (a) a statement that the fund continues to satisfy the requirements of the Act and has at all times during its prior fiscal year been in compliance with the applicable rules and requirements of its overseas regulatory authority;
- (b) details of any material changes made to its offering document during the period;
- (c) a statement that it has at all times during the proceeding period been in compliance with the requirements of the Act as applicable to overseas investment funds.

The BMA may determine to cancel an overseas investment fund’s designation and registration in the event of the fund breaching a provision of the Act. Additionally, an Overseas Investment Fund may voluntarily, at any time, apply to have its designation and registration cancelled. The BMA may reject any request for cancellation in the event it determines that it is in the public interest to investigate any matter prior to permitting the designation to be cancelled.

## **We are here to help**

The regulatory treatment of foreign funds in Bermuda has changed dramatically and we are here to help. Please feel free to reach out to your usual Conyers contacts with questions on the process and whether it applies to your or your client's foreign investment fund.

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