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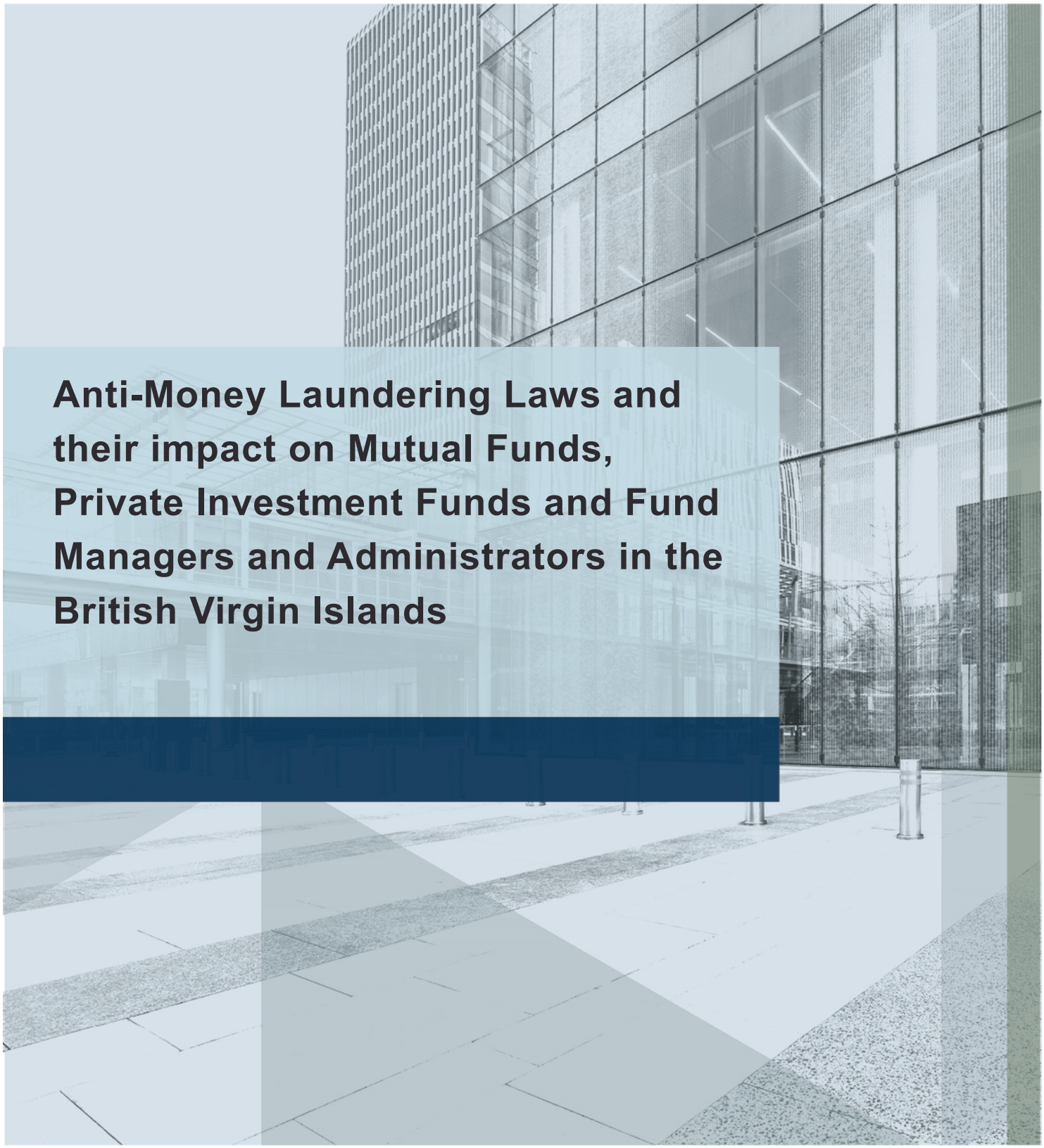

# Anti-Money Laundering Laws and their impact on Mutual Funds, Private Investment Funds and Fund Managers and Administrators in the British Virgin Islands

# Preface

This publication has been prepared for the assistance of those who are considering the law of the British Virgin Islands ("BVI") as it pertains to anti-money laundering measures and how such laws may impact on BVI mutual funds, private investment funds and fund administrators and managers. It deals in broad terms with the requirements of BVI law. It is not intended to be exhaustive but merely to provide brief details and information which we hope will be of use to our clients. We recommend that our clients and prospective clients seek legal advice on BVI law in respect of any specific scenarios, matters or concerns.

Copies of the relevant legislation, regulations and guidelines are available from the Firm on request.

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## 1. INTRODUCTION

The primary anti-money laundering legislation in BVI is the Proceeds of Criminal Conduct Act (the "PCCA"). Growing out of the "forty plus nine" recommendations formulated by the Financial Action Task Force ("FATF"), the PCCA had the objective of developing and improving the BVI's legal systems and mechanisms to counter the laundering of drug trafficking money and other criminal proceeds. As the debate over the need to more effectively combat money laundering around the globe continued, the legislature of the BVI kept pace, updating its legislation as needed and fostering a compliance culture in the territory's financial services industry. In consultation with the FATF, the BVI Financial Services Commission (the "FSC") enacted significant amendments on February 5, 2009 in an effort to implement practical and effective measures for BVI mutual funds, fund managers and administrators and private investment funds and other BVI entities and professionals to satisfy their respective AML obligations. These and other ongoing amendments serve to make the BVI's anti-money laundering legislative regime a model for other jurisdictions.

## 2. MUTUAL FUNDS AND PRIVATE INVESTMENT FUNDS LEGISLATION

The activities of mutual funds are regulated by the Securities and Investment Business Act and the regulations promulgated thereunder. This legislation requires that entities proposing to carry out mutual fund or private investment fund activities be licensed by the FSC. Entities so licensed fall under the regulatory oversight of the FSC, as do those entities falling under the Banks and Trust Companies Act, the Company Management Act and the Insurance Act, and must comply with detailed regulations and standards that reflect industry best practice. In certain respects, these obligations overlap with and reinforce the jurisdiction's generally applicable anti-money laundering measures.

## 3. ANTI-MONEY LAUNDERING LAWS AND REGULATIONS OF GENERAL APPLICATION

Specific legislation has been enacted in BVI which, taken together as a package, forms a comprehensive anti-money laundering and anti-terrorist financing regime. The primary legislation, as mentioned above, is the PCCA, under which there are the Anti-Money Laundering Regulations and the Anti-Money Laundering and Terrorist Financing Code of Practice. In addition, the FSC has published certain guidance notes and advisories which are of practical use in establishing and maintaining suitable anti-money laundering mechanisms applicable to the fund industry. Finally, there are a number of laws, treaties and orders which supplement the primary anti-money laundering legislation, particularly with respect to enforcement and international co-operation. Each is discussed in turn below.

### 3.1. Proceeds of Criminal Conduct Act

The PCCA, as originally enacted, created the core money laundering offences. It also contained provisions for the making and enforcement of confiscation orders and established certain investigatory and co-operative powers to enhance enforcement efforts. By way of legislative amendment, the Joint Anti-Money Laundering Co-ordinating Committee (recently renamed as the National Anti-Money Laundering and Terrorist Financing Coordinating Council) (the "Committee") was established. The Committee is made up of representatives from the financial and legal sectors, the government, and law enforcement. The primary function of the Committee was to develop and issue guidelines for detecting

and dealing with money laundering activities, and in the intervening years the Committee has been instrumental in ensuring that the BVI's anti-money laundering legislative regime remains on par with the highest of international standards. As a reflection of those efforts, in 2008 the legislature enacted the Proceeds of Criminal Conduct (Amendment) Act, 2008, which significantly amended virtually every section of the primary legislation. The current iteration of the PCCA is broader and more comprehensive than the original, and strives to reflect the approach advocated by the FATF and other international agencies concerned with the prevention and detection of money laundering.

(a) The Money Laundering Offences

Under the PCCA, five primary money laundering offences are defined as: (i) acquisition, possession or use of proceeds of criminal conduct; (ii) assisting another to retain the benefit of criminal conduct; (iii) concealing or transferring proceeds of criminal conduct; (iv) tipping off; and (v) failing to disclose a suspicion.

(b) Defences

For each of the foregoing offences, statutory defences have been crafted to protect those who obtained information about money laundering in privileged circumstances. It is also a defence in those cases where it is another person's benefit in question that one intended to report the activity but had not yet done so with reasonable excuse.

(c) Enforcement

The PCCA contains extensive and comprehensive provisions with respect to investigations into alleged money laundering, as well as provisions pertaining to the seizure, detention, forfeiture and confiscation of the proceeds of criminal conduct.

### 3.2. The Anti-Money Laundering Regulations

The Anti-Money Laundering Regulations, 2008 (the "Regulations") are promulgated under the PCCA and apply to regulated persons. "Regulated person" is defined as a person who is licensed or registered to carry on "relevant business" and includes mutual funds and their managers and administrators and private investment funds. Relevant businesses are briefly described as follows:

(a) banking or trust business;

(b) insurance business;

(c) company management business;

(d) investment business or business as a mutual fund or a private investment fund;

(e) trust or company service providers carrying on certain activities relating to the formation or administration of legal persons;

(f) remittance service providers;

(g) financing or money services business;

(h) advising on capital structure, industrial strategy, advice and services related to mergers and the purchase of undertakings, money broking, safekeeping and administration of securities and lending or financial leasing and other related investment advice activities;

(i) providing legal, notarial or accounting services relating to the buying and selling of real estate, the managing of client money, securities or other assets, the management of bank, savings or securities accounts, the organisation of contributions for the creation, operation or management of companies, and the creation, operation and management of legal persons or arrangements or the buying and selling of business entities;

(j) acting as a real estate agent;

(k) dealing in certain precious metals when such transaction involves accepting a cash payment of $15,000 or more;

(l) casino operations when a transaction involves accepting a cash payment of $3,000 or more.

In conducting relevant business, a relevant person shall not form a business relationship or carry out a one-off transaction with or for another person unless they (a) maintain the following procedures in accordance with the Regulations: (i) maintain client identification procedures; (ii) keep "customer due diligence" and suspicious transaction records; (iii) establish internal reporting procedures for suspicious transactions; and (iv) have in place internal controls and communication procedures which are appropriate for the purposes of forestalling and preventing money laundering; (b) appoint a money laundering reporting officer and (c) maintain adequate training for staff on their obligations under the law with respect to money laundering. The Regulations describe in some detail the exact nature of these requirements and the form that the procedures should take.

The Regulations also require relevant persons to submit for the approval of the Financial Investigation Agency the identification procedures, record keeping procedures, internal reporting procedures and internal controls and communication procedures required above and the Financial Investigation Agency may keep, for its own use, copies of such documents.

Failure to comply with the requirements of the Regulations or any directive relating to money laundering issued thereunder is an offence and liable to criminal penalty and significant fines. It is a defence for a person to show that he took all reasonable steps and exercised due diligence to comply with the requirements of the Regulations.

### 3.3. The Anti-Money Laundering and Terrorist Financing Code of Practice

The Anti-Money Laundering and Terrorist Financing Code of Practice (the "Code") was originally promulgated in 2008, and subsequently amended and consolidated, by the FSC in the exercise of powers granted to it under the PCCA after consultation with the Committee. The Code is subsidiary legislation, and whilst written in the manner typically encountered with guidance notes, has the force of law and is enforceable against any person to whom it applies. It is the Code that provides the 'nuts and bolts' for relevant businesses such as mutual funds and their managers and administrators and private investment funds to follow in carrying out their mandate under the PCCA and the Regulations. It

addresses in great detail the requirements of the law as they pertain to internal systems and controls, and requires that relevant businesses provide to the FSC a copy of such internal policies for approval. The Code offers guidance and favours a 'risk based approach' to establishing internal policies, subject to certain specific requirements enumerated within it. In addition, the Code imposes a series of administrative offences, with related penalties, that flow from the failure to have in place adequate policies, internal systems and controls.

The Code impacts all BVI entities and professionals, including mutual funds, fund managers and administrators and private investment funds. Of particular relevance to funds is the practical recognition of industry practice with regard to who performs AML compliance functions and where such functions are carried out. Some of the more significant aspects of the Code are set out below:

(a) **A BVI entity may outsource AML functions**

Section 46 permits an entity or a professional to outsource functions under the Code. The FSC notes that legitimate reasons may arise for outsourcing the performance of a function, for instance, where an entity may not have the relevant expertise to carry out a necessary function, where the entity is part of a group or body corporate that is subject to and supervised for AML compliance to the standards of the FATF Recommendations or where the nature, resources and/or volume of business of the entity justifies outsourcing as a better viable mechanism for achieving the requirements of the Regulations. Outsourcing is permitted subject to conditions, in particular a requirement for a written agreement setting out how AML compliance is to be achieved.

The original requirement that the reporting officer must be from within the entity has been removed and the Code now expressly recognizes that an entity may not have employees in the BVI. In circumstances where the fund[1] does not have any staff employed in the BVI and the issuance or administration of subscriptions and redemptions is performed by a person who is regulated in a recognized jurisdiction, compliance by such person with the AML requirements of the recognized jurisdiction will be construed and accepted as compliance with the obligations set out in the Regulations and the Code.

(b) **Non-face to face business is no longer presumed to require enhanced customer due diligence**

In its original formulation, the Code required that full verification procedures be applied to all non-face to face business. The revised Code provides that such enhanced due diligence is not required where a regulated entity assesses an applicant for business or a customer to present a low risk or, where identity is verified by electronic or digital means, the entity is satisfied of the authenticity of the documentation being relied on.

[1] The FSC has interpreted this as being restricted to mutual funds and mutual fund administrators but not private investment funds.

(c) **Wire transfer test**

Section 26 of the Code permits wire transfer information to be used for verification of identity of low risk applicants for business where a subscription or redemption payment is effected through a wire transfer from a specific account in a financial institution that is regulated in a recognized jurisdiction and the account is operated in the name of the client.

(d) **Requirement for certified documentation**

In its original formulation, the Code required that all copies of documents presented by an applicant for business or a customer which are relied on by a regulated entity are properly certified. The revised Code provides that such certification is required only in relation to a copy of a document which the entity, having regard to appropriate risk assessment, considers may not be authentic or may be doubtful or generally has concern with.

(e) **Recognized jurisdictions**

The Code includes a schedule of jurisdictions recognized as jurisdictions (a) which apply the FATF recommendations; and (b) whose anti-money laundering and terrorist financing laws are equivalent with the provisions of the Regulations and the Code, as amended. These jurisdictions include not only major onshore jurisdictions such as China, the United Kingdom and the United States but also well regulated offshore jurisdictions such as Bermuda and the Cayman Islands. The main advantage of the list of recognized jurisdictions is that business relationships emanating from listed jurisdictions would attract reduced customer due diligence measures, while business from other jurisdictions is not precluded but would attract more onerous customer due diligence. The list will be reviewed on a regular basis and is available at the FSC's website at www.bvifsc.vg.

(f) **Independent audit**

Finally, in addition to stressing the need for adequate staff training on anti-money laundering compliance generally, the Code includes a requirement that regulated entities establish and maintain an independent audit function that is adequately resourced to test compliance, including sample testing, with its or his written system of internal controls and the other provisions of the Regulations and the Code.

The Code gives great flexibility to BVI mutual funds, fund managers and administrators and private investment funds in how they meet their AML obligations while ensuring compliance with the highest international standards. These and other ongoing initiatives should cement the BVI's reputation as a leading offshore financial centre. Any of our BVI attorneys would be pleased to advise on the specific aspects of the Code that may be of relevance.