

# CONYERS

A photograph of a modern glass skyscraper with a grid-like facade, reflecting the sky and surrounding environment. The building is set against a clear blue sky. In the foreground, there is a paved plaza with a geometric pattern of light and dark tiles. A dark blue horizontal bar is positioned below the title text.

## **Investment Funds in Bermuda**

## Preface

This publication has been prepared for the assistance of those who are considering the establishment of a Bermuda entity to act as an investment (or “mutual”) fund. It deals in broad terms with the requirements of Bermuda law with respect to the establishment and operation of such entities. 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 seek legal advice in Bermuda on their specific proposals before taking steps to implement them.

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## 1. INTRODUCTION

The sub-tropical islands of Bermuda are found at the mid-Atlantic crossroads between the Americas and Europe. The United States of America (the “**US**”) is the nearest Continental landfall, 800 miles due west of Bermuda. Despite its remote location and small size, Bermuda is a key player in the global financial world. English is the language spoken in Bermuda, hence the language used for business. Bermuda’s infrastructure is modern, well developed and technologically advanced.

Bermuda remains a British Overseas Territory, but is responsible for its own internal self-government and law courts. Bermuda has an independent legal and judicial system, with a right of final appeal to the Privy Council in London.

The laws of Bermuda are based substantially upon English common law. Bermuda’s legislation derives for the most part from a number of principal statutes from the United Kingdom (“**UK**”), but also includes original local statutes. Bermuda’s business laws and legal system have evolved in keeping with being a leading international offshore financial centre in the 21st century.

Over the years, Bermuda has strived through legislation and codification of practices to meet the highest international standards in order to ensure that its name would be synonymous with ethics and quality. By being diligent in “knowing its customers”, it has often declined lucrative business when provenance was in doubt.

Bermuda is a major centre in the international offshore investment fund industry. As of December 2019, there were over 630 funds registered or authorised by the BMA (as defined below), with collective assets of over US\$175 billion (which does not account for funds more recently brought into scope of regulation). A number of the larger investment funds are quoted on stock exchanges such as the London Stock Exchange and the Hong Kong Stock Exchange.

Bermuda remains committed to attracting quality funds by offering demonstrable political and demographic stability, excellent fund administration services, and welcome regulation of the investment industry to provide more transparency and disclosure.

## 2. BERMUDA MONETARY AUTHORITY

The Bermuda Monetary Authority (the “**BMA**”) was established in 1969 under The Bermuda Monetary Authority Act 1969 (the “**BMA Act**”). The BMA is the competent authority responsible for supervising, regulating and inspecting financial institutions operating in or from Bermuda and is responsible for exchange control. It also issues and redeems Bermuda’s currency notes and coins. The BMA is the principal body responsible for the regulation of investment funds, including those listed on the Bermuda Stock Exchange (the “**BSX**”). The BMA is a full voting member of the International Organisation of Securities Commissions (“**IOSCO**”).

The BMA insists that persons proposing to establish funds in Bermuda are persons of sound business integrity and good financial standing in addition to having high industry credentials. By maintaining such an approach, Bermuda has become the jurisdiction of choice for discerning fund managers.

Bermuda investment funds are regulated under the Investment Funds Act 2006 and the rules and regulations relating thereto (collectively, as amended, the “**IFA**”). The IFA establishes and maintains standards and criteria applicable to the establishment and operation of investment funds in Bermuda with a view to protecting the interests of investors.

The IFA deals with regulatory disclosure, the content of offering documents and the responsibilities of various service providers to Bermuda investment funds. Operators<sup>1</sup> of Bermuda investment funds must comply with the IFA.

### **3. INVESTMENT FUNDS**

#### **3.1. General**

Under the IFA, an investment fund is defined as any arrangement with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangement 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. The arrangements must be such that the persons who are to participate do not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions. To constitute an investment fund, the arrangements must also have one or both of the following characteristics:

- (a) the contributions of the participants and the profits or income out of which payments are to be made to them are pooled; and
- (b) the property is managed as a whole by or on behalf of the operator of the investment fund.

Notwithstanding the above definition, certain types of arrangements are expressly excluded from the definition of investment fund by virtue of the Investment Funds (Definition) Order 2019, as amended. Excluded arrangements include, *inter alia*, arrangements operated by a person otherwise than by way of business, joint ventures, holding entities for the purposes of the Economic Substance Regulations 2018, pension funds and sovereign wealth funds. Such arrangements are not considered “investment funds” for the purposes of the IFA and are therefore outside the scope of the requirement to register or become authorised with the BMA and are not regulated under the IFA.

References herein to “fund” or “investment fund” should be interpreted in accordance with the above.

#### **3.2. Open-Ended vs Closed-Ended Funds**

An investment fund may be ‘open-ended’ in that it may issue and redeem its participating shares on a continuous basis at their net asset value. An investor in an open-ended investment fund generally has the right to require such investment fund to redeem his or her investment at current net asset value on an ongoing basis. In the past, the IFA only applied to open-ended funds, but recent amendments have

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<sup>1</sup> As defined in the IFA, the operator means (i) the trustee in relation to a unit trust fund, (ii) the board of directors in relation to a company fund, (iii) the general partner in relation to a partnership fund and (iv) the manager in relation to an LLC fund.

brought closed-ended funds in scope. Funds are ‘closed-ended’ where investors do not have such a right to require redemption.

## 4. FUND STRUCTURES

### 4.1. General

Bermuda investment funds may be structured and organised in several ways including as:

- (a) a company under the Companies Act 1981 (the “**Companies Act**”);
- (b) a limited liability company (“**LLC**”);
- (c) a limited partnership; or
- (d) a unit trust.<sup>2</sup>

In addition, in circumstances where special corporate objects or powers are required, a company may be incorporated by petition to the Bermuda legislature for a private act of Parliament (a “**Private Act**”). A Private Act is customised legislation which would provide for a specifically required corporate structure.

### 4.2. Companies

Historically, most funds regulated under the IFA were structured as “mutual fund” companies, meaning an open-ended fund company that states in its memorandum of association that it is a mutual fund and has the power to purchase for cancellation or redeem its shares without reducing its authorised share capital. A mutual fund is exempted from certain requirements under the Companies Act which would otherwise require it to have a share premium account or prevent it from freely redeeming or purchasing its shares or making payments of dividends or distributions. A mutual fund also benefits from an exemption from the requirement to have its share register open to the public or other shareholders, thereby providing a higher degree of privacy to investors. Pursuant to recent amendments, the IFA also applies to non-mutual fund companies that fall within the IFA’s definition of investment fund.

An investment fund may create and offer one or more classes or series of shares. Typically, an investment fund structured as a company would be incorporated with two or more classes or series of shares that would include the manager’s shares (usually with voting rights but without participation rights) comprising one class of shares that are issued to and held by the manager. The remaining shares would typically be participating shares issued to investors, who may be entitled to request the redemption thereof at the current net asset value.

An investment fund which is a company under the Companies Act will be subject to certain Companies Act provisions applying to all companies. Such provisions include, among other things, the requirement:

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<sup>2</sup> Bermuda entities are categorized as either “local” or “exempted”, depending on whether they are designated as resident (local) or non-resident (exempted) for Bermuda exchange control purposes. Exempted entities are exempted from certain minimum ownership and control requirements which otherwise apply to Bermuda entities.

- to maintain at its registered office in Bermuda, its register of members, its register of directors and officers (including the resident representative, if any) and signed minutes of meetings of all directors and shareholders;
- to hold an annual general meeting of its members in each calendar year, unless such requirement is waived by resolution of the members;
- to make financial statements available to the members;
- to pay the prescribed annual government fee by 31 January of each year (see “**Government Fees**” below).

### 4.3. Segregated Accounts

Companies wishing to operate segregated accounts may either petition the Bermuda Legislature for private legislation or it may register under either The Segregated Accounts Companies Act 2000 (the “**SAC Act**”) or the Incorporated Segregated Accounts Companies Act 2019 (the “**ISAC Act**”). The SAC Act sets out rules for governing the operation of segregated accounts and the ISAC Act sets out the rules governing the formation and operation of incorporated segregated accounts.

Pursuant to the SAC Act, a segregated accounts company (“**SAC**”) is permitted to create and operate segregated accounts. Any asset which is linked by the SAC to a segregated account shall be held by the SAC as a separate fund which is not part of the company’s general account and shall be held exclusively for the benefit of the segregated account owners and any counterparty to a transaction linked to that segregated account. The assets linked to a segregated account are available only to meet liabilities to the account owners and creditors of that segregated account and are not available, and may not be used, to meet liabilities to, and shall be protected from, the general shareholders and from the creditors of the company who are not creditors with claims linked to that segregated account.

Pursuant to the ISAC Act, Bermuda law also provides for the creation of segregated accounts with separate legal personality. Incorporated segregated accounts companies (“**ISACs**”) differ from SACs in that each incorporated segregated account (“**ISA**”) is incorporated as a separate legal entity in its own right. As such, each ISA will have all of the attributes of a company, including the ability to hold assets, sue and be sued in its own name, be subject to winding up proceedings with no impact on other ISAs or the ISAC and merge or amalgamate with other ISAs of the ISAC. Additionally, each ISA within an ISAC could be a separate investment fund for the purposes of the IFA (as opposed to segregated accounts within the same investment fund).

Except for those provisions which are specifically amended pursuant to the SAC Act or ISAC Act (as applicable), a SAC fund or ISAC fund is otherwise subject to all the provisions of the Companies Act and the Act. Please refer to your contact at Conyers should you require more information regarding SAC and ISAC funds.

### 4.4. Limited Partnerships

The partnership is a popular vehicle for international ventures primarily because it is generally regarded as a fiscally transparent and flexible structure.

The principal statutes governing the formation and operation of Bermuda partnerships are:

- the Partnership Act 1902, as amended;
- the Limited Partnership Act 1883, as amended; and
- the Exempted Partnership Act 1992, as amended

(collectively, the “**Partnership Acts**”).

In Bermuda, a partnership may elect to have a separate legal personality. If such election is not made, the partnership is not a legal entity with any degree of legal personality, but merely a relationship between the partners.

There are two types of partnership under Bermuda law: a general partnership (where all the partners have unlimited liability for the debts and obligations of the partnership) and a limited partnership (where one or more “general partners” have unlimited liability for the debts and obligations of the partnership and the liability of the other “limited partners” is, subject to satisfaction of certain requirements, limited to the amount of capital contributed or agreed to be contributed by such limited partners).

The Partnership Acts do not attempt to regulate the affairs of a partnership to the same extent as the Companies Act does in relation to companies. For the most part, the operation of the partnership is left to agreement between the partners. It is generally only where the partnership agreement is silent that the provisions of the Partnership Acts apply. There are however, certain required provisions, including that the governing law of an exempted partnership must be Bermuda law, the general nature of the partnership business must be stated in the partnership agreement, the exempted partnership’s registered office must be in Bermuda, a register of limited partners must be maintained at the registered office and a resident representative in Bermuda must be appointed.

The partnership agreement is private (except for information in the Certificates of Exempted and Limited Partnership, which are registered with the Registrar of Companies).

Bermuda exempted partnerships may be resident in Bermuda and can only carry on business from Bermuda in connection with transactions and activities which are external to Bermuda. In practice, the activities carried out by partnership funds managed and marketed outside of Bermuda have no difficulty in meeting this requirement.

Limited partnerships, which are formed under the Limited Partnership Act, are commonly used for venture capital investments and closely held investments. The position of a limited partner in a limited partnership is analogous to that of a shareholder in a company. The IFA applies to open-ended investment funds structured as limited partnerships, and to any prospectus issued thereby. Common law principles relating to true, accurate and full disclosure made in any such prospectus will also apply.

A limited partnership must have at least one general partner. In general, only the general partner or partners of a limited partnership may engage in the management or transact the business of the limited partnership. The general partner will usually be a special purpose vehicle which appoints an investment manager. All suits in respect of the business of a limited partnership can generally only be brought

against the general partner(s). If a limited partner engages in the management of the partnership such limited partner will lose the benefit of limited liability although this is subject to certain exceptions; for example, limited partners may make decisions in respect of any investments made by the limited partnership without losing their limited liability.

Please ask your contact at Conyers for more information regarding Bermuda partnerships and the requirements of the Partnership Acts.

#### **4.5. Unit Trusts**

The IFA defines a unit trust as a fund under which the property is held on trust for the participants. A unit trust is not a separate legal entity but a contractual agreement embodied in a trust deed or instrument. It is a declaration of trust that is either executed by the trustee only or entered into by the trustee and the manager. The concept of a unit trust is that investors contribute funds to the trustee to hold such funds in trust as trustee whilst such funds are managed by the manager for their benefit. Each investor is effectively a beneficial owner (and is possibly also a settlor) of a proportion of the assets held by the trustee.

Units of a unit trust are units of the trust arrangement constituted by the trust deed. Each unit (whether described as a unit, as a sub-unit, or otherwise) is a right or interest of a beneficiary under the trust deed or instrument and is entitled to a pro-rata share of the trust's assets. Generally, each investor is issued with such number of units that represents the relevant proportion of assets belonging to such investor.

The trust laws of Bermuda essentially follow the trust laws of England. There is a substantial body of English case law on the subject. The trust deed, as well as containing provisions for the constitution of a trust, will be similar to the bye-laws of an investment fund, providing, among other things, for the regulation of the affairs of the unit trust in a manner similar to that of a company including meetings of unit holders, voting rights, appointment of an auditor and distribution of financial statements. It also provides for the calculation of net asset value per unit and sets out the terms for issue and redemption of units, for the unit holders' rights, the manner in which the trust is to be administered, the duties of the trustee and the manager, the appointment and removal of the trustee and the manager, investment and borrowing powers and restrictions and the termination and winding-up of the affairs of the trust.

Unit trusts are expressly made subject to the IFA and are required to be authorised or registered by the BMA thereunder. For most practical purposes a unit trust will operate and be regulated in the same manner as any other investment fund.

Unit trusts are the usual choice of managers marketing funds to investors in Japan, where participating in a unit trust is considered more acceptable or attractive than investing in shares in a company or acquiring interests in a limited partnership. Investing in units of a unit trust may result in more favourable tax treatment for the investor. In some other jurisdictions, unit trusts may offer regulatory advantages.

## 4.6. LLCs

A fund may be established as an exempted limited liability company (“**LLC**”) under the Limited Liability Company Act 2016 (the “**LLC Act**”). An LLC is a separate legal entity that, subject to its LLC agreement, has the capacity, rights, powers and privileges of a natural person. Subject to the LLC Act, any one or more persons may form an LLC for any lawful business, purpose or activity. An LLC is essentially a hybrid entity combining many of the characteristics of companies and partnerships. It is a flexible commercial vehicle designed to enable parties to more easily reflect their commercial agreement in the entity’s constitution and allow for simpler and more efficient operation (the LLC Act’s stated intention is to give the maximum effect to the principle of freedom of contract and the enforceability of LLC agreements). As such, similarly to a partnership, an LLC’s operations will generally be governed primarily by its LLC agreement but it will be subject to certain requirements under the LLC Act, including (among other things) to have a registered office in Bermuda, to maintain a register of members and to appoint a resident representative in Bermuda. Please ask your contact at Conyers for more information regarding the formation and ongoing requirements of an LLC.

## 4.7. Formation/Incorporation

Generally, shelf entities are not available in Bermuda. As such, it is necessary to establish a new company, partnership or LLC where setting up a new fund with one of those structures. The consent of the BMA is required for the incorporation/formation of any new company, partnership or LLC in advance of such incorporation or formation, as applicable. Such an application requires the submission of certain information and documentation relating to each individual who will ultimately beneficially own, or be beneficially entitled to, on a look-through basis, ten per cent or more of the proposed company (or of the general partner, in the case of a partnership), or in the case of an investment fund, of the manager of the investment fund. The timeline for incorporation or formation can vary somewhat but in normal circumstances the process can be completed within a few days following receipt of the necessary information and documentation.

Generally, the issue or the transfer of shares in a Bermuda company also requires the permission of the BMA. Upon its incorporation or formation, an investment fund will typically seek from the BMA blanket permission for the issue and transfer of its participating shares subject to, inter alia, receiving BMA approval for any material change(s) in the investment fund’s prospectus.

Please ask your contact at Conyers for more information regarding the incorporation of a company or formation of a partnership or LLC.

# 5. REGISTRATION AND AUTHORISATION UNDER THE INVESTMENT FUNDS ACT

## 5.1. General

An investment fund (as defined in the IFA) is required to be authorised or registered under the IFA in order to conduct business as an investment fund in Bermuda. A fund may apply for registration under the following classifications if it satisfies the relevant criteria (as set out below):

- Private Fund;

- Professional Closed Fund;
- Professional Class A Fund; or
- Professional Class B Fund

(collectively referred to herein as “**Registered Funds**”).

A fund that does not qualify for registration will need to apply for authorisation under the IFA. Provided it satisfies the relevant criteria (as set out below) a fund may apply for authorisation under the IFA under the following classifications:

- Institutional Fund;
- Administered Fund;
- Specified Jurisdiction Fund; or
- Standard Fund

(collectively referred to herein as “**Authorised Funds**”).

An application for registration or authorisation must be submitted to the BMA in a prescribed form, which will require the submission of certain information and documentation relating to the fund and payment of a registration fee. Generally, any application for registration or authorisation will require submission of certain information relating to the fund, its directors, general partners, managers or trustees (as applicable) and its service providers (with applications for authorisation being more detailed) and will need to be accompanied by the fund’s offering document(s), its AML/ATF policies and procedures and personal declaration forms for any directors and officers (or general partners, managers or trustees, as applicable) not already known to the BMA.

## 5.2. Registered Funds

Registered Funds are generally subject to less extensive regulation than Authorised Funds. In order to be registered under a given classification, an investment fund must satisfy certain criteria as set out below.

### (a) Private Funds

A fund may be registered as a Private Fund if the number of participants does not exceed 20 persons and the fund does not promote itself by communicating an invitation or inducement to the public generally.

A Private Fund must appoint a local service provider<sup>3</sup> authorised and regulated by the BMA. The operator of an open-ended Private Fund is required to appoint a custodian

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<sup>3</sup> For the purposes of the IFA, “service providers” include a fund’s auditor, custodian, fund administrator, investment manager, corporate service provider or registrar and any person to whom such a service provider has delegated part or all of its functions. References to “service providers” in this publication should be construed accordingly except where otherwise provided.

with regard to ensuring safekeeping of the fund's assets and a fund administrator. The operator of a closed-ended Private Fund is required to designate responsibility for segregating and safekeeping the investment fund property to a fit and proper person to act as such based on the nature of the investment fund property.

**(b) Professional Closed Funds**

A fund may be registered as a Professional Closed Fund if:

- it is a closed-ended investment fund;
- it is open only to qualified participants;
- all qualified participants are provided with an investment warning prior to the time of purchase of units in such form and containing such statements and information as the BMA deems appropriate;
- the operator of the fund has appointed a local service provider who is licensed by the BMA or an officer, trustee or representative resident in Bermuda who has authority to access the books and records of the fund;
- the operator of the fund has appointed an auditor;
- the financial statements are prepared in accordance with International Financial Reporting Standards (“IFRS”), Generally Accepted Accounting Principles (“GAAP”) in Bermuda, Canada, the UK or the US, or such other GAAP as the BMA may recognise.

Additionally, the operator of Professional Closed Fund is required to designate responsibility for segregating and safekeeping the investment fund property to a fit and proper person to act as such based on the nature of the investment fund property.

**(c) Professional Class A Funds**

A fund may be registered as a Professional Class A Fund if:

- it is open only to qualified participants;
- the operator of the fund has appointed as investment manager for the fund a person who:
  - is licensed under the Investment Business Act 2003;
  - is authorised or licensed by a foreign regulatory recognised by the BMA; or
  - for the purposes of the IFA is carrying on business in or from Bermuda or in a jurisdiction recognised by the BMA and (A) has gross assets under management of not less than \$100 million or (B) is a member of an

investment management group that has consolidated gross assets under management of not less than \$100 million;

- the operator of the fund has appointed for the fund an officer, trustee or representative resident in Bermuda who has authority to access the books and records of the fund;
- the operator of the fund has appointed the following service providers to the fund:
  - a fund administrator;
  - an auditor; and
  - a custodian or prime broker; and
- the financial statements of the fund are prepared in accordance with IFRS, GAAP in Bermuda, Canada, the UK or the US, or such other GAAP as the BMA may recognise.

(d) **Professional Class B Funds**

A fund may be registered as a Professional Class B Fund if:

- it is open only to qualified participants;<sup>4</sup>
- the operator of the fund has appointed for the fund an officer, trustee or representative resident in Bermuda who has authority to access the books and records of the fund;
- the operator of the fund has appointed the following service providers to the fund:
  - an investment manager;
  - a fund administrator;
  - an auditor; and
  - a custodian or prime broker; and
- the financial statements of the fund are prepared in accordance with IFRS, GAAP in Bermuda, Canada, the UK or the US, or such other GAAP as the BMA may recognise.

### 5.3. Authorised Funds

As noted above, an investment fund that does not qualify for registration under one of the above classifications will need to apply for authorisation under the IFA. Authorised Funds are generally

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<sup>4</sup> For the purposes of the IFA, “qualified participant” has the meaning set out in Schedule One hereto.

subject to a higher level of regulation than Registered Funds, with Standard Funds being subject to the most extensive regulation.

In addition to the classification-specific criteria set out below, an investment fund must satisfy the following criteria in order to become authorised:

- the fund must prepare annual financial statements which must be audited;
- the fund must appoint the following:
  - an investment manager;
  - an auditor (who must be independent of the operator of the fund and its service providers); and
  - a fund administrator;
- the fund property must be entrusted to a custodian, who must be licensed under the Banks and Deposit Companies Act 1999, the Trusts (Regulation of Trust Business) Act 2001 or the Investment Business Act 2003 if incorporated in Bermuda or be subject to equivalent regulatory supervision if incorporated elsewhere, and (unless a waiver is obtained from the BMA) must be independent of the operator of the fund and the fund's directors, partners or managers (as applicable);
- the operator of the fund, its officers and proposed service providers must be fit and proper persons to act as such;
- the combination of the experience and expertise of the fund's operator and service providers is appropriate for the purposes of the fund; and
- the fund must comply with the requirements of the applicable fund rules and fund offering document rules.

Additionally, the constitution<sup>5</sup> of the fund must include provisions for the following:

- the rights and restrictions attaching to the units;
- the terms for valuation of assets and liabilities;
- the manner of calculation of the net asset value of each unit and the issue price and redemption price of units;
- the terms upon which units are issued;

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<sup>5</sup> For the purposes of the IFA, a fund's constitution means (a) in relation to a unit trust, its trust deed (or other instrument establishing the trust), (b) in relation to a company, its memorandum and bye-laws, (c) in relation to a partnership, its partnership agreement, and (d) in relation to a LLC, its LLC agreement.

- the terms upon which units may be transferred or converted, if applicable;
- the terms upon which units may be redeemed and the circumstances in which redemptions may be suspended; and
- the investment restrictions or borrowing limitations, if any.

(a) **Institutional Funds**

A fund may be authorised as an Institutional Fund if:

- (i) pursuant to its constitution and offering document, it is only open to qualified participants or it requires each participant to invest a minimum amount of \$100,000 in the fund; and
- (ii) it has an officer, trustee or representative resident in Bermuda that has access to the books and records of the fund.

(b) **Administered Funds**

A fund may be authorised as an Administered Fund if:

- (i) its administrator is licensed under the Fund Administration Provider Business Act 2019; and
- (ii) it requires participants to invest a minimum amount of \$50,000 in the fund pursuant to its constitution or it is listed on a stock exchange recognised by the BMA.

(c) **Specified Jurisdiction Funds**

A fund may be authorised as a Specified Jurisdiction Fund if:

- (i) the Minister of Finance by Order recognises:
  - a. the jurisdiction, outside Bermuda, in which the fund operates; and
  - b. a particular law, or particular set of laws, of such jurisdiction as applicable to such fund; and
- (ii) the fund satisfies the requirements set out in the fund rules made by the BMA relating to that class of fund and that jurisdiction.

To date, only Japan has been recognised for this purpose pursuant to the Investment Funds (Specified Jurisdiction Fund) (Japan) Order 2012 (the “**Japan Fund Order**”). In connection with the Japan Fund Order, the BMA made the Investment Funds (Specified Jurisdiction Fund) (Japan) Rules 2012, which together with the Japan Fund Order permit Bermuda domiciled funds established pursuant to the Order (“**Japan Funds**”) to be marketed to the Japanese public. The Japan Fund Order has been specifically created

to ensure that the rules applicable to Japan Funds domiciled in Bermuda will meet the requirements of the Japanese Securities Dealers Association Regulations which provide that Japanese investment dealers may only solicit customers to subscribe to securities of any foreign investment trust that is established in a jurisdiction, the laws and regulations and disclosure system of which are “well-provided”. Japan Funds will be regulated by the BMA, which will require additional information, governance and disclosure with respect to a Japan Fund.

(d) **Standard Funds**

A fund may be authorised as a Standard Fund if it does not fall within any other class of fund.

## **6. CONTINUING OBLIGATIONS UNDER THE INVESTMENT FUNDS ACT**

### **6.1. Fees**

Each Registered Fund and Authorised Fund is required to pay an annual fee to the BMA in connection with such registration or authorisation, the amount of which varies depending on the classification. Such fees are due on or before 31 March of each year.

### **6.2. Offering Document Requirements**

Each Registered Fund and Authorised Fund is required to prepare an offering document that complies with the Investment Fund Offering Document Rules 2019 (the “**Offering Document Rules**”) and file the same with the BMA for approval prior to the offering of units to participants or potential participants. The Offering Document Rules prescribe a required disclaimer and various content requirements for the offering documents of Registered Funds and Authorised Funds. The Offering Document Rules also require such offering documents to be published or otherwise made available to participants and potential participants and made available to participants without charge at the fund’s registered or principal office in Bermuda or the office in Bermuda of at least one of its service providers. Waivers from the requirements of the Offering Document Rules are available in certain circumstances.

### **6.3. Registrar**

The operator of a Registered Fund or Authorised Fund must appoint a registrar, which must establish and maintain in Bermuda a register of the participants in the fund in accordance with the IFA.

### **6.4. Valuations**

The operator of a Registered Fund or Authorised Fund must carry out valuations of the assets and liabilities of the fund for the purposes of determining its net asset value. Under the Investment Fund Rules 2019 (the “**Fund Rules**”), such valuations are required to be performed at least monthly for Standard Funds, at least quarterly for Institutional Funds, Administered Funds and Specified Jurisdiction Funds and at least annually for Registered Funds. The Fund Rules require the valuation method to be disclosed to investors in the fund’s offering document and be consistently applied (unless change is desirable in the interests of investors).

The Fund Rules also impose requirements in relation to the person carrying out the valuation function for a Registered Fund or Authorised Fund. Generally this function should be performed by an external valuer or (subject to certain additional requirements) the fund's investment manager or fund administrator. Where not performed by an external valuer, the fund's valuation procedures and/or valuations must be verified by an external valuer or where appropriate during the fund's annual audit procedures. The operator of the fund must ensure that the fund's valuation procedures are at all times objective and proper.

### **6.5. Publication of Prices**

The issue and redemption prices for units of a Registered Fund or Authorised Fund must be published on its website or otherwise made available without charge at the registered or principal office of the fund in Bermuda, or at the office of at least one of the service providers of the fund located in Bermuda.

### **6.6. Constitution to be Available for Inspection**

The operator of a Registered Fund or Authorised Fund is required to make copies of the fund's constitution available for inspection by participants or potential participants, permit a copy of the constitution to be inspected without charge at the registered or principal office of the fund in Bermuda or at the office in Bermuda of at least one of the fund's service providers and make copies available to participants or potential participants on request on payment of any reasonable costs associated with the making and distribution of such copies.

### **6.7. Financial Reports**

The operator of a Registered Fund or Authorised Fund is required to prepare, within six months after the end of its financial year, a financial report for the fund (which must contain the audited financial statements in the case of an Authorised Fund), which must be distributed or otherwise made available to the participants in the fund without charge.

### **6.8. Financial Statements and Audit**

The operator of a Registered Fund (other than a Private Fund) or an Authorised Fund is generally required to prepare financial statements and have them audited, although waivers are available in certain circumstances. Where required, the financial statements must be prepared in accordance with IFRS, GAAP in Bermuda, Canada, the UK or the US, or such other GAAP as the BMA may recognise upon application. Where an audit is required, it must be conducted in accordance with the International Standards on Auditing ("ISA"), Generally Accepted Auditing Standards ("GAAS") in Bermuda, Canada, the UK or the US, or such other GAAS as the BMA may approve upon application.

### **6.9. Fit and Proper Persons**

As set out above, the operator of a Registered Fund or Authorised Fund is required to appoint certain service providers, depending on the classification. The IFA requires that the operator of a fund, its officers and service providers are fit and proper persons to act as such. In determining whether a person is a fit and proper person to hold any particular position, regard shall be had to such person's

probity, competence and soundness of judgement for fulfilling the responsibilities of that position, and to the diligence with which such person is fulfilling or likely to fulfil those responsibilities.

#### **6.10. Registered Funds - Annual Certification**

The operator of a Registered Fund is required to submit an annual certification in a form prescribed by the BMA within 6 months of its financial year end, which certifies the continuing satisfaction of the requirements for registration under the relevant classification.

When making this filing, the operator of:

- a Private Fund must include information on the net asset value of the fund and its underlying assets, amounts subscribed and amounts redeemed, a copy of the fund's management accounts or audited financial statements and information on any material changes that took place during the course of the year;
- Professional Class A Fund must include a copy of the fund's audited financial statements for the preceding year and a statement of any material changes to the fund's prospectus;
- a Professional Class B fund must include a statement of any material changes to the fund's prospectus, a copy of its audited financial statements for the preceding year and a schedule of any changes made to its directors and service providers;
- a Professional Closed Fund must include information on the net asset value of the fund and its underlying assets, a copy of the fund's audited financial statements and a statement of material changes to the fund's terms of offering.

#### **6.11. Authorised Funds - Reports to BMA**

The operator of an Authorised Fund is required to file an annual statement of compliance with the BMA using a prescribed form, which must be filed within six months of its financial year end. Additionally, the operator of an Authorised Fund is required to file periodic reports using a prescribed form (monthly for Standard Funds and quarterly for Institutional Funds, Administered Funds and Specified Jurisdiction Funds, in each case within 20 days of the end of such period) in relation to the fund's activities, which sets out the fund's net asset value, amounts subscribed and amounts redeemed.

#### **6.12. Authorised Funds – Service Provider Reports**

A service provider that becomes aware that the assets of an Authorised Fund have not been invested materially in accordance with its prospectus or that the general management of an Authorised Fund is not materially in accordance with the fund's constitution, is required to notify the BMA within 14 days of the occurrence and circumstances applicable thereto and make a report of such event to the operator. Such report must then be included in the Authorised Fund's next annual report and, if distributed sooner, the Authorised Fund's next periodic report.

### 6.13. Authorised Funds – Material Change Notifications/Applications

The operator of an Authorised Fund is required to notify the BMA of any proposal to make certain changes to the fund, including:

- (a) making a material change to its offering document;
- (b) replacing one of its service providers;
- (c) in relation to a unit trust, replace a trustee or appoint any additional trustee or decrease the number of trustees;
- (d) in relation to a company, replace a director or appoint any additional director or decrease the number of directors;
- (e) in relation to a partnership, replace a general partner;
- (f) in relation to an LLC, replace a manager or appoint any additional manager or decrease the number of managers;
- (g) in relation to a company, reconstruct or amalgamate the company; and
- (h) wind up the affairs of the fund.

The operator of an Authorised Fund must obtain written approval from the BMA in relation to any such proposal prior to implementation except in relation to a proposal as described in item (d) above in relation to a Standard Fund or Specified Jurisdiction Fund and any proposal as described in items (c) through (h) above in relation to an Institutional or Administered Fund, in which case prior notification to the BMA will suffice.

### 6.14. Standard Fund - Custodian or Administrator licensed by the BMA

Unless its administrator is carrying on fund administration provider business in Bermuda, a Standard Fund is required to appoint a custodian licensed by the BMA under the Banks and Deposit Companies Act 1999, the Trusts (Regulation of Trust Business) Act 2001 or the Investment Business Act 2003.

## 7. WAIVERS

In certain circumstances and depending on the classification, the operator of a fund may apply to the BMA for a waiver from certain requirements under the IFA, including in relation to the appointment of a custodian, financial statements, auditing, classification requirements and valuations. Please ask your contact at Conyers for more information.

## 8. REVOCATION OF REGISTRATION / AUTHORISATION

The BMA may revoke the registration or authorisation of a Registered Fund or Authorised Fund, as applicable, in certain circumstances, including where:

- the applicable requirements of registration or authorisation are no longer satisfied;

- the operator or any of its service providers has contravened or is likely to contravene a requirement imposed on such operator or service provider under the IFA, or has, in purported compliance with any such provision, knowingly or recklessly provided the BMA with information that is false or misleading in a material particular;
- no investment activity has been carried on by the fund for the previous 12 months; or
- the operator has requested revocation.

## 9. BMA SUPERVISORY POWERS

In addition to the requirements set out above, operators of Authorised and Registered Funds should be aware of the BMA's supervisory powers under the IFA. Among other things, the BMA has powers to require the operator of an Authorised or Registered Fund or any of its service providers to provide such information as the BMA may reasonably require for the performance of its functions under the IFA, require the operator of an Authorised or Registered Fund to provide such documentation as the BMA may reasonably require for the performance of its functions under the IFA, and conduct investigations where it appears to the BMA that certain breaches of the IFA may have occurred or where it considers it desirable to do so in the interests of participants or potential participants in an Authorised Fund or Registered Fund.

In addition, the BMA has disciplinary powers in the event of non-compliance under the IFA. Subject to completion of notice procedures set out in the IFA, the BMA may publish a public censure statement where it considers that a fund has contravened a requirement under the IFA and impose civil penalties on any person who fails to comply with a requirement or contravenes any prohibition imposed by or under the IFA. Depending on the nature of the breach, the BMA may impose a fine up to \$500,000 under the IFA.

Where it appears to the BMA that an individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by the operator of a fund, a person licensed by the BMA under the IFA or a person performing functions in relation to the activities of a service provider, the BMA may, subject to completion of a notice procedure set out in the IFA, make a prohibition order prohibiting such individual from performing a specified function, any function falling within a specified description, or any function. Failure to comply with a prohibition order is an offence, for which a person is liable (a) on summary conviction, to a fine of \$50,000 or to imprisonment for 2 years or both and (b) on conviction on indictment, to a fine of \$200,000 or to imprisonment for 4 years or both.

It should be noted that the BMA also has a similar supervisory capacity and powers under POCA (as defined below) in relation to Authorised Funds and Registered Funds as regulated financial institutions under POCA.

## 10. AML AND SANCTIONS REQUIREMENTS

The Proceeds of Crime Act 1997 ("**POCA**") contains provisions which deal with money laundering offences and other offences relating to the proceeds of criminal conduct. POCA is primarily aimed at preventing funds derived from the commission of offences relating to the proceeds of drug trafficking and/or serious crimes etc. from being laundered or legitimised. In addition to creating offences relating

to money laundering (or the provision of assistance in such activities), POCA also confers expansive information gathering powers on the Bermuda Police Department relating to investigations into drug trafficking and whether a person has benefited from criminal conduct.

Pursuant to POCA, the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008 (the “**POCA Regulations**”) were enacted. The POCA Regulations apply only to ‘regulated financial institutions’ as defined therein, which includes funds.

As regulated financial institutions, investment funds are required to comply with the POCA Regulations as interpreted by the Guidance Notes on the prevention of money laundering and terrorist financing. Regulated institutions are required to adopt anti-money laundering (“**AML**”) and anti-terrorist financing (“**ATF**”) policies and procedures and ensure that their employees are periodically trained on the POCA Regulations, related guidance and the applicable policies and procedures in order to ensure compliance with the duties imposed thereunder. Regulated financial institutions must also take steps to implement the required identification procedures, record keeping procedures, training procedures and procedures for the recognition and reporting of suspicious transactions. Further, regulated institutions are required to appoint a compliance officer to oversee compliance and a reporting officer to whom reports should be made and who shall have responsibility to make reports to the Financial Intelligence Agency when suspicious circumstances require.

Funds are also “relevant institutions” for the purposes of Bermuda’s sanctions regime, and are similarly subject to certain reporting and other obligations thereunder.

Please ask your contact at Conyers for more information regarding AML/ATF and sanctions requirements.

## 11. OVERSEAS FUNDS

The Companies Act generally prohibits companies incorporated outside Bermuda from engaging in or carrying on any trade or business in Bermuda without a permit to do so. Equivalent provisions apply to partnerships formed under a law other than the laws of Bermuda (“**overseas partnerships**”).

In general, in order to obtain such a permit, such a company must explain why it did not incorporate in Bermuda. For example, such an explanation might be that if such company were incorporated in Bermuda, it would suffer from some disadvantage to which the foreign company is not subject. Similarly, for overseas partnerships, the applicant must show good reason for wishing to conduct business in Bermuda through an overseas partnership rather than a Bermuda exempted partnership. For example, such good reason might be that there may be tax advantages available to the overseas partnership which would not be available to a Bermuda partnership.

A company incorporated outside Bermuda but having the characteristics of a mutual fund is exempted from the above prohibition if it engages a person in Bermuda to be its administrator or registrar to perform any or all of the following services or activities for it in Bermuda:

- (a) corporate secretarial;
- (b) accounting;
- (c) administrative;
- (d) registrar and transfer agency; and
- (e) certain activities in relation to the marketing or dealing with the holders of its shares.

Additionally, the IFA prohibits an investment fund incorporated or established in a jurisdiction outside Bermuda (an “**overseas investment fund**”) from being managed or carrying on promotion in or from within Bermuda unless it has been designated as an “Overseas Fund” by the BMA pursuant to the IFA. “Promotion” in this context includes advertising, issuing an offering document, application form or proposal form and stating the method of issue and/or 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.

In order to become designated as an Overseas Fund, a fund must (i) be an overseas investment fund, (ii) comply with the applicable rules and requirements of the overseas regulatory authority in the country or territory in which it is incorporated or established, (iii) apply to the BMA in a form and including such supporting documentation as prescribed under the IFA or by the BMA (including a copy of its offering document and any regulatory approval given by or notification given to the overseas regulatory authority in the country or territory in which the overseas investment fund is incorporated or established) and paying the applicable notification fee, and (iv) comply with such other requirements and conditions that may be prescribed by the BMA.

Once designated as an Overseas Fund, such a fund will be required to make an annual filing certifying that it continues to meet the criteria for designation and pay an annual fee but will not be subject to the same level of regulation by the BMA as funds that are registered or authorised under the IFA.

Please note that the management and/or promotion of Overseas Funds might also be subject to restrictions under other legislation, including the Investment Business Act 2003. Please ask your contact at Conyers should you require more information regarding overseas funds and permission to carry on business in Bermuda.

## 12. TAXATION

There is currently no Bermuda income, corporation or profits tax, withholding tax, capital gains tax, capital transfer tax, estate duty or inheritance tax payable by an exempted company, partnership, LLC or unit trust or its shareholders, partners, members or beneficiaries, other than shareholders, partners, members or beneficiaries ordinarily resident in Bermuda.

An exempted undertaking (i.e. an exempted company, exempted LLC exempted unit trust scheme or exempted partnership) may apply for and is likely to receive from the Minister of Finance under the Exempted Undertakings Tax Protection Act 1966 an undertaking that, in the event of there being enacted in Bermuda any legislation imposing tax computed on profits or income, or computed on any capital assets, gain or appreciation, or any tax in the nature of estate duty or inheritance tax, such tax

shall not until 31 March 2035 be applicable to such undertaking or to any of its operations or to the shares, debentures or other obligations of such undertaking except insofar as such tax applies to persons ordinarily resident in Bermuda (such as Bermudians holding shares in the exempted company) or to any Bermuda land held by or leased to the company.

### **13. STAMP DUTY**

No Bermuda stamp duty or other similar duty is payable by an exempted company, exempted LLC, exempted unit trust or an exempted limited partnership on capital or on the issue, redemption or transfer of shares, units or partnership interests.

### **14. EXCHANGE CONTROL**

Bermuda is independent for the purposes of exchange control which is operated under the Exchange Control Act 1972 and related regulations. Exempted undertakings (which includes exempted companies, exempted LLCs, exempted unit trusts and exempted limited partnerships) will be classified as non-resident of Bermuda for exchange control purposes by the BMA. The BMA will also grant permission for the issue or transfer of the participating shares of a fund or a closed-ended investment company, the units of a unit trust or the limited partnership interests, to persons regarded as non-resident of Bermuda for exchange control purposes without specific consent under the Exchange Control Act 1972 and regulations made thereunder.

The non-resident designation allows such exempted undertaking to operate free of exchange control regulations and enables it to make payments of dividends and distributions, to distribute capital, to open and maintain bank accounts and to purchase, hold and sell any currency and foreign securities without restriction.

### **15. GOVERNMENT FEES**

A Bermuda exempted company is liable to pay an annual registration fee on a sliding scale based upon its assessable capital, which is generally the sum of its authorised share capital and share premium account

An annual declaration is submitted each year at the time of payment of the annual registration fee. Such declaration states the type of business carried on by, and the amount of the capital of, the company.

A unit trust itself is not liable to pay an annual registration fee. If its manager, however, is a company to which the Companies Act applies, it will be required to pay an annual fee in respect of each unit trust it manages.

### **16. RELATED BERMUDA LEGISLATION**

#### **16.1. Investment Business Act 2003**

The Investment Business Act 2003 (the “**IBA**”) governs the financial services regime in Bermuda in accordance with international standards. This regime is similarly operated and supervised by the BMA. Essentially, the IBA provides that no one may carry on an investment business in or from Bermuda

unless they are licensed under the IBA or are exempt from being licensed. A person licensed under the IBA will be subject to the requirements thereof and to regulation by the BMA thereunder. A person exempted from the IBA will be subject to the conditions of such exemption. In addition, a person licensed or exempted under the IBA will also be a regulated financial institution for the purposes of Bermuda's AML/ATF regime and a relevant financial institution for the purposes of Bermuda's sanctions regime. Please ask your contact at Conyers for more information regarding carrying on investment business in Bermuda and the IBA.

## 16.2. Fund Administration Provider Business Act 2019

The Fund Administration Provider Business Act 2019 (the “**FAPBA**”) prohibits any person from carrying on or purporting to carrying on fund administration provider business in or from within Bermuda unless that person is duly licensed under the FAPBA. Fund administration provider business under the FAPBA means the business of providing one or more of the following services to an investment fund:

1. applying the subscription monies received by a fund in accordance with its constitution and prospectus;
2. processing the issue, conversion and redemption of units of a fund;
3. applying the income of a fund in accordance with its constitution and prospectus;
4. calculating the net asset value of the units, and their issue, conversion and redemption price;
5. maintaining the accounts of a fund;
6. distributing to the participants of a fund all dividends or other distributions which may from time to time be declared and paid by it on units in a fund; and
7. any other services or activities that the Minister of Notice, acting on the advice of the BMA, may specify by notice published in accordance with the FAPBA.

A person licensed under the FAPBA is subject to the requirements thereof and to BMA supervision thereunder. In addition, a person licensed under the FAPBA will also be a regulated financial institution for the purposes of Bermuda's AML/ATF regime and a relevant financial institution for the purposes of Bermuda's sanctions regime. Please ask your contact at Conyers for more information regarding the licensing and regulation of fund administrators in Bermuda.

## 17. LISTING

Established in 1971, the BSX has grown to become the world's leading fully electronic offshore securities market. The BSX is a full member of the World Federation of Exchanges and an affiliate member of IOSCO recognised by the US Securities & Exchange Commission (“**SEC**”) as a Designated Offshore Securities Market under Regulation S.

The listing regulations of the BSX80 relating to investment funds are contained in Section IV of the BSX Regulations.

Offshore funds that want to provide their investors with an additional degree of comfort may list themselves on the BSX. Even if their securities may not in fact be traded on the BSX, which would provide investors with an easy exit from the fund, such offshore funds must allow exchange officials to vet their prospectus and marketing materials. A fund listed on the BSX must provide the BSX with periodic updates of net asset values and any changes in its structure, investment policy, management, administrator or auditor. Whilst such requirements do not provide investors with much protection if things go wrong, since the only recourse the BSX has to deal with funds that fail to make timely reports is to suspend or terminate their listings, the BSX does discourage fund managers with questionable business practices.

The BSX lists institutional funds under a relatively light but effective regulatory regime that meets international standards. The BSX does not impose minimum capital requirements or investment restrictions (with the exception of disallowing a fund to take control of its underlying investments) and allows flexibility for funds and the use of prime brokers.

Please ask your contact at Conyers should you require more information regarding listing on the BSX.

## Schedule One

“Qualified participants” for the purposes of the IFA means –

- (a) high income private investors;
- (b) high net worth private investors;
- (c) sophisticated private investors;
- (d) bodies corporate, each of which has total assets of not less than five million dollars, where such assets are held solely by the body corporate or held partly by the body corporate and partly by one or more members of a group of which it is a member;
- (e) unincorporated associations, partnerships or trusts, each of which has total assets of not less than five million dollars, where such assets are held solely by such association, partnership or trust or held partly by it and partly by one or more members of a group of which it is a member;
- (f) bodies corporate, all of whose shareholders fall within one or more of the subparagraphs of this subsection;
- (g) partnerships, all of whose members fall within one or more of the paragraphs of this subsection;
- (h) trusts, all of whose beneficiaries fall within one or more of the paragraphs of this subsection;
- (i) limited liability companies (LLCs), all of whose members fall within one or more of the paragraphs of this subsection.

A “high income private investor” means an individual who has had a personal income in excess of \$200,000 in each of the two years preceding the current year or has had a joint income with that person’s spouse in excess of \$300,000 in each of those years, and has a reasonable expectation of reaching the same income level in the current year; and “current year” means the year in which he purchases an investment;

A “high net worth private investor” means an individual whose net worth or joint net worth with that person’s spouse in the year in which he purchases an investment exceeds \$1,000,000, excluding the value of that person’s residence and any benefits or rights under a contract of insurance; and net worth means the excess of the total assets at fair market value over total liabilities;

A “sophisticated private investor” means an individual who has such knowledge of, and experience in, financial and business matters as would enable him to properly evaluate the merits and risks of a prospective purchase of investments.

*This publication should not be construed as legal advice and is not intended to be relied upon in relation to any specific matter. It deals in broad terms only and is intended merely to provide a brief overview and give general information.*

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