

CONYERS



British Virgin Islands Funds

Preface

This publication has been prepared for the assistance of those who are considering the formation of a fund in the British Virgin Islands (the “BVI”). It deals in broad terms with the requirements of BVI law for 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 the BVI on their specific proposals before taking steps to implement them.

Before proceeding with the incorporation of a company or the formation of a partnership (general or limited) or a unit trust in the BVI, persons are advised to consult their tax, legal and other professional advisers in their respective jurisdictions.

Conyers Dill & Pearman

TABLE OF CONTENTS

1.	INTRODUCTION	4
2.	TYPES OF FUNDS	4
3.	PROCEDURE	6
4.	FUNCTIONARIES	8
5.	ONGOING REGULATION	9
6.	FEES	11
7.	UNIT TRUSTS	11
8.	SEGREGATED PORTFOLIO COMPANIES	11

1. INTRODUCTION

The principal legislation pertaining to funds in the British Virgin Islands (“BVI”) is the Securities and Investment Business Act (“SIBA”) and regulations thereunder (the “Regulations”). This Act sets out the requirements for the recognition and registration of funds incorporated or formed under the laws of the BVI or otherwise carrying on business from within the BVI.

Funds in the BVI may be incorporated as business companies or formed as partnerships or unit trusts. The business company, being a corporate vehicle, is the most common structure used to form a fund in the BVI. Fund companies can be incorporated as segregated portfolio companies. For ease of reference, we have in this publication assumed that the fund is structured as a business company, except where otherwise noted.

2. TYPES OF FUNDS¹

2.1. Funds Generally

SIBA defines a fund as a business company, partnership, unit trust or any other body which “(a) collects and pools investor funds for the purpose of collective investment, and (b) issues fund interests that entitle the holder to receive on demand or within a specified period after demand an amount computed by reference to the value of a proportionate interest in the whole or in a part of the net assets of the company or other body, partnership or unit trust, as the case may be”.

The definition of fund includes hedge funds and other vehicles which otherwise satisfy the definition of a fund as set out above. It will not generally catch close-ended funds, such as private equity funds.

A fund which is incorporated or formed under the laws of the BVI or otherwise carrying on business from within the BVI must be registered or recognised under SIBA as:

- (a) a professional fund;
- (b) a private fund; or
- (c) a public fund.

In respect of a fund which is incorporated and already operating in another jurisdiction, it is also possible for the fund to apply to become a recognised foreign fund in the BVI.

2.2. Professional Funds

A professional fund is a fund whose shares are made available only to professional investors and the initial investment of each investor in the fund (other than certain “exempted investors”) is not less than US\$100,000 or its equivalent in another currency. “Exempted investors” is narrowly defined and includes employees of the manager or promoter of the fund and fund functionaries.

¹ This publication does not deal with incubator funds or approved funds which are low-cost fund vehicles suitable for start-up managers and small groups of investors, respectively.

A professional investor is defined as a person (i) whose ordinary business involves, whether for that person's own account or the account of others, the acquisition or disposal of property of the same kind as the property, or a substantial part of the property, of the fund; or (ii) who has signed a declaration that he, whether individually or jointly with his spouse, has net worth in excess of US\$1,000,000 (or its equivalent in another currency) and that he consents to being treated as a professional investor.

2.3. Private Funds

A private fund is a fund whose constitutional documents specify either that it will have no more than 50 investors or that the making of an invitation to subscribe for or purchase shares issued by the fund is to be made on a private basis only. An invitation made on a "private basis" includes an invitation which is made (a) to specified persons and is not calculated to result in shares becoming available to other persons or to a large number of persons; or (b) by reason of a private or business connection between the person making the invitation and the investor.

2.4. Public Funds

A public fund is a fund which is not recognised as a professional fund or a private fund.

2.5. Recognised Foreign Funds

A fund which is incorporated and already operating in another jurisdiction may apply to become a recognised foreign fund in the BVI. The only reason a foreign fund would apply for recognition as a foreign fund is if it intends to offer its shares to investors in the BVI or otherwise intends to carry out its business in or from within the BVI.

Recognition will only be granted if the foreign fund is already subject to an authorisation and supervisory regime in the jurisdiction in which it is constituted which, in the opinion of the Financial Services Commission (British Virgin Islands) (the "FSC"), provides to investors in the BVI protection at least equivalent to the protection provided for investors of public funds and adequate arrangements exist for co-operation between the authorities of that jurisdiction and the BVI.

This publication does not deal further with recognised foreign funds.

2.6. Private Investment Funds

In 2019, SIBA was amended to bring private investment funds under the regulatory remit of the FSC. A private investment fund is defined to include a company, partnership or unit trust which collects and pools investor funds for the purposes of collective investment and diversification of portfolio risk, and which issues fund interests that entitle the holder to receive an amount computed by reference to the value of a proportionate interest in the net assets of the fund. Most closed-ended and private equity funds will be considered private investment funds under the new regime.

In order to be recognised by the FSC, a private investment fund's constitutional documents will need to specify that (i) it will have no more than 50 investors, (ii) an invitation to subscribe for or purchase shares or fund interests issued by the fund is to be made on a private basis only or (iii) shares or fund interests are made available only to professional investors and the initial investment of each investor in the fund

(other than certain ‘exempted investors’) is not less than US\$100,000 or its equivalent in another currency.

An invitation made on a ‘private basis’ includes an invitation which is made (a) to specified persons and is not calculated to result in shares or fund interests becoming available to other persons or to a large number of persons or (b) by reason of a private or business connection between the person making the invitation and the investor. ‘Exempted investors’ is currently not defined but is expected to comprise a narrow category which includes employees of the manager or promoter of the fund.

A ‘professional investor’ is defined as a person (i) whose ordinary business involves, whether for that person’s own account or the account of others, the acquisition or disposal of property of the same kind as the property, or a substantial part of the property, of the fund or (ii) who has signed a declaration that he, whether individually or jointly with his spouse, has net worth in excess of US\$100,000 (or its equivalent in another currency) and that he consents to being treated as a professional investor.

An offer or invitation to an investor or a potential investor to purchase or subscribe for fund interests in a private investment fund must be made within an offering document or a term sheet. The offering document or term sheet must clearly indicate that the fund is recognised by the FSC as a private investment fund and contain (a) an indication as to whether (i) the fund is suitable for private investors only and is limited to 50 investors, or any invitation to subscribe for fund interests may be made on a private basis only, or (ii) the fund is only suitable for professional investors and a minimum investment of US\$100,000 (or such larger sum as may apply with respect to the fund) is required, (b) the investment objective of the fund, (c) a written statement that investors do not have the right to redeem or withdraw fund interests on demand, (d) the names and addresses of the appointed persons for the fund and (e) any fees to be paid by the fund. The fund may choose not to issue an offering document or term sheet subject to providing to the FSC the reason for not doing so and explaining how relevant information concerning the fund and any invitation or offer will otherwise be provided to investors or potential investors.

3. PROCEDURE

3.1. Generally

A fund structured as a business company under the BVI Business Companies Act is incorporated by filing with the Registrar of Corporate Affairs the memorandum and articles of association of the company. The memorandum and articles of association prescribe the operational aspects of the fund, including dealing dates, valuation dates, the procedures for the issue and redemption of shares, the methods for pricing shares and valuing assets, and investment restrictions, if any. The fund may generally be incorporated within 24 hours once the memorandum and articles of association are in final form. However, additional time must be given before the commencement of the offer of shares in order to allow the prospectus and various agreements to be finalised and signed and for the necessary governmental approvals to be obtained.

3.2. Professional and Private Funds

Once incorporated, a company which proposes to carry on business as a professional or private fund must apply for “recognition” under SIBA. In order to be recognised, the professional or private fund must

demonstrate to the FSC that it satisfies the requirements set out in SIBA. Generally, this obligation is satisfied by submitting to the FSC an application form, together with a certified copy of the memorandum and articles of association of the fund, the fund's offering document and a copy of the fund's valuation policy. The FSC may exempt the fund from preparing and submitting an offering document if it is satisfied as to how information will otherwise be communicated to potential investors.

The FSC will review the application form to ensure the functionaries are acceptable (as to which see section 4 below) and will use the certified copy of the memorandum and articles of association to ensure the fund has been duly incorporated. In the case of a professional fund, the subscription agreement will also be submitted to ensure it, and the memorandum of association and offering document, have the requisite professional fund language. With respect to a private fund, the FSC will review the memorandum of association and offering document to ensure it has the requisite private fund language. The FSC will refuse to recognise the fund if it does not comply with the provisions of SIBA or if the FSC determines that granting recognition is not in the interests of investors or in the public interest.

Each professional and private fund must have at least two directors, at least one of whom must be an individual.

The offering document of a professional or private fund must contain a form of investment warning which is prescribed by the Regulations. In summary, the prescribed investment warning states that the requirements considered necessary for the protection of investors that apply to public funds do not apply to professional or private funds. If an offering document is not issued, the investment warning must be provided to each investor as a separate document.

A professional or private fund must maintain a clear and comprehensive policy for the valuation of fund property with procedures that are sufficient to ensure that the valuation policy is effectively implemented. It must ensure that its administrator or such other person having responsibility for the valuation of fund property, values fund property in accordance with its valuation policy.

A professional fund may carry on its business in or from within the BVI for a continuous period not exceeding 21 days without being recognised under SIBA if it satisfies the criteria for a professional fund and complies with, and is managed and administered in accordance with, the requirements of SIBA and the Regulations. However, a professional fund should exercise caution in this regard, as the fund may have to stop carrying on business or stop managing or administering its affairs if it has not received recognition by the expiry of the 21 day grace period. While a well structured application will generally be processed within three to five business days, BVI professional advice should be obtained to determine the likelihood of the success of the application.

Where a fund is recognised as a professional or private fund, the FSC will enter its details in the Register of Professional funds or the Register of Private funds and issue a certificate of recognition. The register contains the following details:

- (a) the address of the fund's place of business in the BVI;
- (b) the name and address of the person in the BVI authorised to accept service on the fund's behalf;

- (c) the address, if any, outside the BVI where the fund has a place of business;
- (d) the date of recognition of the fund; and
- (e) the status of the recognition of the fund.

3.3. Public Funds

A fund which will not be “recognised” as a professional fund or private fund must apply for “registration” as a public fund under SIBA. In order to be registered, the public fund must demonstrate to the FSC that it satisfies the requirements of a public fund as set out in SIBA.

An application form must be submitted to the FSC along with a certified copy of the memorandum and articles of association of the company, a statement setting out the nature and scope of business of the fund, a copy of the prospectus to be issued by the fund and a copy of each functionary agreement. The application form is similar to the application form for professional and private funds, although more detailed information is required. In particular, the prospectus of a public fund must contain prescribed information (as to which, see below) and be registered with the FSC and the fund’s functionaries must satisfy the FSC’s ‘fit and proper’ criteria. The FSC has issued detailed guidance on this criteria, which, broadly, require the FSC to be satisfied of the honesty, integrity, reputation, competence, capability and financial soundness of the relevant persons. The FSC will require a resume, two personal references, a bank reference, a photocopy of the passport picture page and a police clearance certificate on each director of the public fund. A public fund may not have corporate directors.

A public fund may not carry on business or manage or administer its affairs until it is registered under SIBA.

3.4. Private Investment Fund

A simple application form must be completed and submitted to the FSC together with the relevant application fee and basic supporting documentation in respect of the fund, including a copy of the (i) certificate of incorporation or formation, (ii) constitutional documents, (iii) register of directors (if a company), (iv) a curriculum vitae for each director, or director of the general partner or trustee, (v) the offering document or term sheet and (vi) the fund valuation policy. A new fund may carry on business for a period of 21 days prior to submitting an application provided that such application is made within 14 days of commencing business.

4. FUNCTIONARIES

A professional fund and a private fund must at all times have a fund manager, a fund administrator and a custodian, and the application for recognition must include information regarding each of these functionaries. The custodian of a professional or private fund must be functionally independent from the manager and administrator unless the custodian has sufficient systems and controls in place to ensure functional independence. Each professional and private fund is also required to have an auditor that satisfies certain conditions prescribed by SIBA and the BVI Regulatory Code.

The Investment Business (Approved Manager) Regulations, 2012 introduced a less stringent regulatory regime for BVI investment managers or advisors of private and professional funds who do not have more

than US\$400m of assets under management. Investment managers or advisors that meet these criteria may apply to the FSC for approval as an “approved investment manager”. Approved managers are subject to fewer continuing obligations than managers and advisors holding an investment business licence under SIBA.

It is possible to apply to the FSC for an exemption from the requirement to appoint a custodian, manager or auditor (although not an administrator). However, the FSC will need to be satisfied that there are adequate systems and controls in place for the protection of investors prior to granting such an exemption.

A public fund is required to have a manager, administrator and custodian. Each functionary of a public fund is required to be functionally independent from every other functionary of the fund. It is possible to apply to the FSC for an exemption from the requirement to appoint a custodian (although not a manager or administrator). Each public fund must also have an auditor which has been specifically approved by the FSC.

A private investment fund must at all times have an appointed person or persons who is or are responsible for undertaking (a) the management of fund property, (b) the valuation of fund property and (c) the safekeeping of fund property, including the segregation of fund property. The application for recognition must include the name and address of each appointed person. An appointed person may be (i) a person licensed by the FSC or a regulatory authority in a recognised jurisdiction to perform the specified functions, (ii) an independent third party with experience in performing the specified functions or (iii) a director, partner or trustee of the private investment fund. The same appointed person may carry out more than one of the functions of managing, valuing and safekeeping of fund property except that the appointed person responsible for the fund’s management function must be independent from the appointed person responsible for the valuation process.

A fund incorporated as a British Virgin Islands business company or limited partnership must also have a registered office and registered agent in the BVI. Conyers Trust Company (BVI) Limited (“Conyers Trust”), our affiliated trust company, can provide this service. A fund is also required to appoint an “authorised representative” in the BVI. The authorised representative acts as the liaison between the FSC and the licensee, and is required to maintain certain records. An affiliate of Conyers Trust is licensed as an authorised representative and this function is part of the services provided by Conyers Trust as registered agent and secretary.

5. ONGOING REGULATION

5.1. Private and Professional Funds

Each professional and private fund is required to prepare financial statements complying with the International Financial Reporting Standards promulgated by the International Accounting Standards Board, UK GAAP, US GAAP, Canadian GAAP or internationally recognised and generally accepted accounting standards equivalent to any of the foregoing. Each professional and private fund is required to provide a copy of its audited financial statements to the FSC within six months after its financial year end.

Written notice is required to be given to the FSC within 7 days of any resignation or termination of a functionary of a professional or private fund. Further, no new functionary may be appointed without at least 7 days prior notification to the FSC of the proposed appointment. A fund does not breach the requirement of the Regulations if a functionary resigns, is terminated or otherwise ceases to act as a functionary and a replacement is appointed within 7 days of the original functionary ceasing to act.

The FSC is also required to be notified of any change to the directors, authorised representative or auditor of a professional or private fund, any change in the address of the fund's place of business, any amendment to the constitutional documents of the fund, the issue of an offering document that was not previously provided to the FSC and any amendment to such offer document or the fund's valuation policy.

5.2. Public Funds

In addition to the ongoing requirements specified in section 5.1 above, which applies equally to public funds, a public fund requires the FSC's prior consent for any material change to its prospectus or structure, including any change of a director, functionary or auditor.

There are also additional requirements regarding the prospectus of a public fund, which must contain the following information:

- (a) full and accurate disclosure of all such information as investors would reasonably require and expect to find for the purpose of making an informed investment decision; and
- (b) a summary of the statutory shareholders' rights.

Where any of the information required to be disclosed in the prospectus ceases to be accurate in a material particular, the fund must publish and file an amendment to the prospectus within 14 days.

Where any prospectus published by a public fund contains a misrepresentation relating to the matters prescribed by SIBA, a person who purchases shares pursuant to the prospectus is deemed to have relied upon any such misrepresentation and may elect to exercise a right of action (a) for the rescission of the purchase or (b) for damages. This action may be brought against the fund and every member of the board of directors of the fund (or its equivalent in the case of a partnership or unit trust).

5.3. Private Investment Funds

A private investment fund is required to prepare financial statements complying with the International Financial Reporting Standards promulgated by the International Accounting Standards Board, UK GAAP, US GAAP, Canadian GAAP or internationally recognised and generally accepted accounting standards equivalent to any of the foregoing. Each private investment fund is required to provide a copy of its audited financial statements to the FSC within six months after its financial year end. Application may be made to the FSC for (a) an exemption from the requirement to prepare and submit financial statements or (b) an extension of time to prepare and submit financial statements, in each case under certain limited circumstances. There is no requirement for a local BVI auditor or local BVI auditor sign-off.

The FSC is required to be notified of (i) any change to the directors, appointed persons, authorised representative or auditor of a private investment fund, (ii) any change in the address of the fund's place of business, (iii) any material change in the nature and scope of the fund's business, in the case of a fund

incorporated, constituted, formed or organised under the laws of a country outside the BVI, (iv) any amendment to the constitutional documents of the fund, (v) the issue of an offering document or a term sheet that was not previously provided to the FSC, (vi) the amendment of any offering document or term sheet previously provided to the FSC and (vii) any amendment to the fund's valuation policy.

5.4. Other Requirements

Both mutual funds and private investment funds are required to maintain a clear and comprehensive policy for the valuation of fund property with procedures that are sufficient to ensure that the valuation policy is effectively implemented. The policy must, among other things, be appropriate for the nature, size and complexity of the fund and fund property and require valuations to be undertaken at least on an annual basis.

A licensed fund manager and a licensed private investment fund manager must notify the FSC within 21 days of commencing to act as an investment manager of a mutual fund or a private investment fund, or a fund with equivalent characteristics to a mutual fund or a private investment fund.

6. FEES

In addition to the fees payable under the BVI Business Companies Act, a fee is payable on recognition or registration, as the case may be, and annually thereafter. For a current listing of fees please contact Conyers Dill & Pearman.

7. UNIT TRUSTS

A unit trust will operate and be regulated in much the same way as a corporate-form fund. SIBA includes within the definition of "fund" a unit trust, whether organised under the laws of the BVI or elsewhere, and defines "shares" to include units in a unit trust. The unit trust is constituted by a trust deed, and such deed is exempt from certain registration requirements in the BVI.

The trust deed will contain general provisions for the establishment of the trust and will also prescribe the commercial and operational aspects of the unit trust, including dealing periods, issues and redemptions of units, pricing and valuations, investment restrictions (if any), etc. There is no requirement that a unit trust appoint a local custodian or manager in the BVI, although it is not uncommon for the promoters of a unit trust to establish an affiliated business company to act as manager. In practice, a unit trust will usually appoint an administrator to issue, redeem and transfer units.

A properly structured unit trust is exempt from BVI income tax, estate tax, inheritance tax, succession tax, gift tax or any other duty.

8. SEGREGATED PORTFOLIO COMPANIES

The BVI Business Companies Act makes provision for the incorporation or registration of fund companies as segregated portfolio companies ("SPCs"). The BVI Business Companies Act and Segregated Portfolio Companies (Mutual Funds) Regulations, 2018 set out rules governing the operation of such companies.

The most significant aspect of an SPC is that any asset which is linked to a particular portfolio is held as a separate fund which is not part of the general assets of the company itself. Such segregated portfolios

are held exclusively for the benefit of the account owner of that portfolio and any counterparty to a transaction linked to that segregated portfolio. Any asset which attaches to a particular portfolio is not available to meet liabilities of the company (subject to any agreement to the contrary in the governing instrument). Procedures exist whereby a segregated portfolio with no assets and liabilities can be terminated. Terminated portfolios can later be reinstated if required subject to notifying the FSC. There is also a procedure which allows the directors to correct any failure to properly attribute any contract to a particular segregated portfolio. A segregated portfolio company may enter into a contract or other agreement with another segregated portfolio in the same segregated portfolio company.

The application to register a fund as an SPC is generally made at the same time as the application under SIBA for recognition or registration as a fund (although existing funds can apply to register to become an SPC at any time). All of the particulars are provided to the FSC, together with a copy of the offering document for each segregated portfolio that it is intended will be created. Prior approval of the FSC must be obtained to incorporate an SPC. The application is satisfied by submitting an application form together with the proposed memorandum and articles of association of the company. To receive permission to register or incorporate, a fund SPC must have an administrator, manager and/or custodian. An SPC must have an auditor and audited financial statements must be filed with the FSC regularly.

Once established, a segregated portfolio company constitutes a single legal entity; each segregated portfolio does not. The company can issue shares and declare dividends on its own account, as well as with respect to each individual portfolio. As such, the SPC is a particularly useful vehicle for funds.

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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