

COMPARISON OF BERMUDA, BRITISH VIRGIN ISLANDS, CAYMAN ISLANDS AND MAURITIUS INVESTMENT FUNDS

This article has been prepared for the assistance of those who are considering the formation of an investment fund in an offshore jurisdiction such as Bermuda, the British Virgin Islands (“BVI”), the Cayman Islands (“Cayman”) or Mauritius.

This article deals in broad terms with the requirements of each jurisdiction for the establishment and operation of an investment fund. 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 relation to each jurisdiction on their specific proposals before taking steps to implement them.

Before proceeding with the incorporation of an investment fund in any of the jurisdictions, persons are advised to consult their tax, legal and other professional advisors in their respective jurisdiction.

This article has been prepared on the basis of the law and practice as of the date referred to above.



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TABLE OF CONTENTS

1. INTRODUCTION
2. TYPES OF FUNDS
3. INCORPORATION PROCEDURE AND TIMING
4. NAME RESERVATIONS
5. LOCAL REQUIREMENTS
6. BOARD AND SHAREHOLDER MEETINGS
7. AUDITORS
8. PROSPECTUSES
9. ONGOING GOVERNMENT REGULATION

1. INTRODUCTION

As the establishment of mutual funds, hedge funds and other investments funds in offshore jurisdictions continues to grow, it is becoming increasingly important to understand the advantages offered by each jurisdiction. The purpose of this article is to help our clients identify which jurisdiction is best for them.

2. TYPES OF FUNDS

Bermuda

An investment fund in Bermuda may take the form of a company, unit trust scheme or limited partnership and will be recognised under the Investment Funds Act 2006 (the “IFA”) as one of the following:

Exempted Funds (Bermuda)

A fund may apply to be exempted from classification under the IFA if: (i) it is only open to ‘qualified participants’ (as defined below), (ii) it uses an administrator recognised by the Bermuda

Monetary Authority (the “BMA”), (iii) it appoints an auditor, and (iv) it has an officer, trustee, or resident representative in Bermuda who has access to the books and records of the fund.

Excluded Funds (Bermuda)

Private funds and closed-ended funds are excluded from the scope of the IFA and are not regulated by the BMA. A private fund is one that has less than 20 investors (no “look through” – only registered holders are counted) and it does not promote itself by communicating an invitation to the public generally.

Classified Funds (Bermuda)

Institutional Funds (Bermuda)

A fund may be classified and an institutional fund if: (i) pursuant to its constitution and prospectus

- (a) it is only open to qualified participants; or
- (b) it requires each participants to invest a minimum amount of \$100,000 in the fund; and

(ii) it has an officer, trustee, or representative resident in Bermuda who has access to the books and records of the investment fund.

A person is a ‘qualified participant’ if: (i) he is 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 his spouse in the excess of \$300,000 in each of those years, and has a reasonable expectation of reaching the same income level in the year in which he purchases an investment; or

(ii) he is an individual whose net worth or joint net worth with his spouse in the year in which he purchases an investment exceeds \$1,000,000 (a ‘high net worth investor’); or

(iii) he is 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 purchases of investments; or
(iv) it is a body corporate, unincorporated association, partnership or trust that has total assets of not less than \$5,000,000, whether such assets are held solely by that entity or held partly by that entity and partly by any other body corporate of which it is a subsidiary or holding company; or
(v) it is an entity all of whose shareholders, members or beneficiaries fall into the classes set out above.

Administered Funds (Bermuda)

A fund will qualify for classification as an administered fund if its administrator is licensed under the IFA and:

- (a) pursuant to its constitution and prospectus it requires participants to invest a minimum of \$50,000 in the fund; or
- (b) it is listed on a stock exchange recognised by the Authority for this purpose.

Standard Funds (Bermuda)

A fund will be classified as a standard fund if it does not fall within the other two classifications.

The Minister of Finance has the power to amend the current qualification for any class of fund, and may add additional classes of funds.

Authorised funds are required to appoint certain service providers, including an investment manager, administrator, registrar and custodian/prime broker, none whom, except in the case of a standard fund, need to be resident in Bermuda provided there is some other Bermuda 'nexus'. In the case of a standard fund, except where the administrator is carrying on fund administration business in Bermuda, the custodian of the standard fund must be a person licensed by the BMA.

British Virgin Islands

A mutual fund will be recognised under the Mutual Funds Act, 1996 as amended (the "Mutual Funds Act") as one of the following three types of mutual funds:

Private Fund (BVI)

A private fund is recognised as one (a) 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 mutual fund is to be done on a private basis, or (b) one which is designated as a private fund by regulations.

Professional Fund (BVI)

A professional fund is recognised as one (a) whose shares are made available only to professional investors and their initial investment in which, in respect of the majority of each such investors, is not less than US\$100,000 (or equivalent in another currency), or (b) one which is designated as a professional fund by regulations.

A professional investor is defined as "a person (i) whose ordinary business involves, whether for its own account or the accounts 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 any other currency) and that he consents to being treated as a professional investor".

Public Fund (BVI)

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

The Mutual Funds Act only applies to regulate those entities which meet the statutory definition of "mutual fund" in that act. The Mutual Funds Act defines a mutual fund as an entity which collects and pools investor funds for the purpose of collective investment and which issues shares 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 part of the net assets of the entity.

No private or professional fund may carry on business in the BVI unless it is "recognised" under the Mutual Funds Act and no public fund may carry on business in the BVI unless it is "registered" under the Mutual Funds Act. An exception is granted to professional funds, which may carry on business for up to 14 days prior to being recognised.

In order to be recognised, a proposed private or professional fund must prove to the Financial Services Commission (British Virgin Islands) (the "FSC") that it satisfies the requirements set out in the Mutual Funds Act. The FSC will refuse to recognise the fund if it fails to comply with the provisions of the Mutual Funds Act or if the FSC determines that it is not in the interests of investors or in the public interest that recognition be granted.

In order to be registered, a proposed public fund must apply to the FSC to be registered as such. The FSC may in its discretion refuse to grant the registration. In any event, the FSC will refuse to grant registration if the fund has a name which is undesirable or misleading, the fund does not have a custodian who is functionally independent of the manager or administrator, or the FSC determines that it is not in the public interest that such registration be granted. In order to be registered, the public fund is required to publish in writing and file with the FSC a copy of a prospectus offering its shares.

Cayman

The Mutual Funds Law (the "Law") defines a mutual fund as "a company, unit trust or partnership that issues equity interest, the purpose or effect of which is the pooling of investor funds with the aim of spreading investment risk and enabling investors in the mutual fund to receive profits or gains from the acquisition, holding, management or disposal or investments". A mutual fund will be treated under the Law as one of the following three types of funds:

Unregulated (Cayman)

A fund will not be regulated by the Law if (a) it is not a mutual fund within the statutory definition (for example, a closed ended fund) or (b) it does not have a significant link with

Cayman. A mutual fund is deemed to have a significant link with Cayman if either it is incorporated or established in Cayman, or it makes an invitation to the public in Cayman to subscribe for this equity interests. Please note that there are extensive exemptions from the notion of offering equity interests to the public in the Cayman Islands, including offers to sophisticated and high net worth persons. A fund that is not incorporated or established in Cayman and makes an offer to the public in Cayman through a person who is the holder of a licence under the Services Investment Business Act and (i) its interests are listed on an approved stock exchange or (ii) the fund is regulated by an approved overseas regulatory authority will also qualify as an unregulated fund.

Private Fund (Cayman)

A private fund is one in which the equity interests are held by not more than fifteen investors, the majority of whom are capable of

risk, (c) that has the obligation, on request of the holder of the securities, to redeem them at their net assets value, less commission or fees, and (d) where the participants 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 in respect of such management. Pursuant to the Securities (Collective Investment Schemes and Closed-end Funds) Regulations 2008, a CIS ("the Regulations") may be set up as:

Professional CIS (Mauritius)

A Professional CIS is one which offers its shares, as private placements, solely to sophisticated investors. A "sophisticated investor" means (a) the Government of Mauritius, (b) a statutory authority or an agency established by an enactment for a public purpose, (c) a company, all the shares in which are owned by the Government of Mauritius or a statutory authority



appointing or removing the operator of the fund (either the Director, Trustee or General Partner, as the case may be). A private fund may conduct business without obtaining a licence under the Law, without appointing a licensed mutual fund administrator and without registering with the Cayman Islands Monetary Authority ("CIMA")

Regulated Fund (Cayman)

A regulated fund may qualify to conduct business in Cayman in three different ways, namely, by (i) obtaining a licence from the CIMA; (ii) appointing a licensed mutual fund administrator in Cayman provide the fund's principal office; or (iii) simply registering as a regulated mutual fund with the CIMA on the basis that the minimum initial investment per investor in the fund is at least US\$100,000 (or the equivalent, for sophisticated investors), or the equity interests of such a fund are listed on the recognised stock exchange. The majority of Cayman funds are registered funds.

Mauritius

A collective investment scheme ("CIS") may be constituted under the Securities Act 2005 ("the Law") as a company limited by shares, a trust, or any other legal form approved by the Financial Services Commission ("the FCS"). The law defines the CIS as a scheme (a) whose sole purpose is the collective investment of funds in a portfolio of securities, or other financial assets, real property or non-financial assets as may be approved by the FSC, (b) whose operation is based on the principle of diversification of

or agency, (d) the government of a foreign country, or an agency of such government, (e) a bank licensed by the Bank of Mauritius, (f) a CIS manager, (g) an insurer, (h) an investment adviser, (i) and investment dealer, or (j) a person declared by the FSC to be a sophisticated investor.

Expert Funds (Mauritius)

An Expert Fund is available only to a sophisticated investor or to an investor making an initial investment, for his own account, of no less than US\$100,000.

Specialised CIS (Mauritius)

This type of scheme is the one that invests in real estate, derivatives, commodities, or any other product authorised by FSC.

Private Funds (Mauritius)

A Private Fund is one offering its securities as private placements which is defined under the Law as meaning an offer of securities where the total cost of subscription or purchase for each person to whom the offer is made is at least equal to the amount determined by FSC Rules and where each person subscribe or purchases for his own account and no publicity is made by the person making the offer.

Closed-end Funds (Mauritius)

A closed-end Fund refers to an arrangement or scheme, other than a CIS, whose object is to invest funds, collected from

subscribers during an offering made in accordance with the Law, or from sophisticated investors, in a portfolio of securities, or in other financial or non-financial assets, or real property, as may be approved by the FSC.

3. INCORPORATION PROCEDURE AND TIMING

Bermuda

Applications for the authorisation of a fund is made on an IF Application Form submitted to the BMA concurrently with or, if desired, subsequently to a request for permission to incorporate, form and /or establish the fund and blanket permission for the issue and transfer of the fund's units. Application for authorisation must also include evidence of the promoter's expertise and experience in investment management, background information on the ultimate beneficial owners of the initial issued capital (usually issued to the promoter) and a draft prospectus complete with all pertinent details.

It takes approximately 2 to 5 working days to obtain the classification consent of the BMA. During that time, the promoters and the lawyers will be working on drafting the bye-laws, agreements, and other necessary documents required for the launch of the fund.

signed copies of the memorandum and articles of association. No governmental approvals are required for incorporation (provided that the proposed name is not contrary to the Companies Law) and the incorporation process can generally be completed within 24 hours after receipt of all necessary due diligence documentation. However, before the fund can launch, the articles of association, prospectus and agreements will need to be finalised. If the fund is to be a regulated fund, then before it can commence operations as a mutual fund it must file statutory particulars (usually accompanied by the prospectus and consent letters from the fund's auditor and administrator) with the CIMA. CIMA must confirm approval of such documents before the fund can commence operations.

Mauritius

A CIS is set up as a company under the Companies Act 2001, or as a trust under the Trusts Act 2001. Applications for incorporation are made to the Registrar of Companies whilst applications for authorisation of a CIS and for a Category 1 Global Business Licence are made to the FSC.

Timing

From a timing perspective, it takes approximately the same amount of time to launch a fund in any of the four jurisdictions.

4. NAME RESERVATIONS

In Bermuda, the proposed name of the fund can be reserved free of charge with the Registrar of Companies for a three-month period. In BVI, the proposed name can be reserved with the Registrar of Corporate Affairs for a period of 3 months for a nominal fee. In Cayman the proposed name can be reserved for up to six months for a small monthly fee. In Mauritius, the proposed name can be reserved with the Registrar of Companies for a period of 2 months for a nominal fee.

5. LOCAL REQUIREMENTS

Bermuda

Every Bermuda company must maintain a registered office in Bermuda. It is required to satisfy one of the following options in relation to the provision of local representation: (i) two Bermuda based directors; or (ii) one Bermuda based director and a Bermuda based secretary, or (iii) a Bermuda based secretary and a Bermuda resident representative; or (iv) if its shares are listed on a recognised stock exchange, a Bermuda resident representative only. Corporate directors are not permitted. Every authorised fund must also appoint a registrar who is required to maintain in Bermuda a register of the participants.

British Virgin Islands

A BVI company must maintain a registered office and have a licensed registered agent in the BVI. The minimum number of directors is one but such director need not be resident in the BVI. The Mutual Funds Act does not impose specific



British Virgin Islands

A BVI mutual fund being set up as a company would be incorporated as an ordinary "business company". The fund would be incorporated by filing with the Registrar of Corporate Affairs the memorandum and articles of association of the proposed company, together with a form confirming the company's first registered agent. The incorporation process can generally be completed within 24 hours. However, the prospectus and agreements would still need to be finalized.

A professional fund may carry on its business or manage or administer its affairs in or from within BVI for a maximum period of 14 days without being recognised under the Mutual Funds Act.

Cayman

A Cayman mutual fund being set up as a company would be incorporated as an exempted company under the Companies Law. It would be required to file with the Registrar of Companies two

requirements with regard to the location of the manager, investment advisor, administrator, custodian or other functionary of a mutual fund. However, it does provide that certain terms, conditions, limitations or restrictions may be imposed upon the issue of a certificate of recognition or registration. A certificate will not, in principle, be subject to terms, conditions, limitations or reservations when the mutual fund concerned has appointed functionaries that are incorporated in the BVI or in a jurisdiction that has been "recognised" under the Mutual Funds Act. A foreign functionary that is incorporated in a non-recognised jurisdiction may also be acceptable to the FSC, provided the jurisdiction is regarded as having a prudent system of regulation and supervision of mutual funds business. If this is not the case, the FSC may exercise its discretion and refuse to recognise or register the fund.

Cayman

A Cayman mutual fund must maintain a registered office in Cayman. A corporate fund must have a minimum of two individual directors at all times, although there is no requirement that such directors be resident in Cayman. Corporate directors are permitted in certain circumstances.

Mauritius

A CIS must maintain a registered office in Mauritius and be administered by a management company. It must have at least 2 resident directors and keep its principal bank account and accounting records in Mauritius. A CIS holding a Category 1 Global Business Licence is subject to a maximum tax rate of 3% but enjoys various benefits under the Mauritius network of Double Taxation Avoidance Treaties such as low/no withholding tax on dividends, interests or royalties and no capital gains tax where applicable.

6. BOARD AND SHAREHOLDER MEETINGS

Bermuda

A Bermuda fund that is set up as a company must hold an annual general meeting of voting members, but such meeting need not be held in Bermuda. Likewise, board meetings need not be held in Bermuda.

British Virgin Islands

A BVI fund does not need to hold an annual general meeting. If one is convened, it is not necessary that it be held in BVI. Likewise, board meetings need not be held in the BVI.

Cayman

A Cayman fund does not need to hold an annual general meeting, nor is there a need for annual directors meetings (although it is recommended that the directors hold quarterly meetings). If any such meetings are convened, it is not necessary that they be held in Cayman.

Mauritius

A Mauritius fund set up as a company must hold an annual meeting of its voting members, but such meeting need not be held in Mauritius. However, meetings of the directors must include the two resident directors and must be held, chaired and minuted in Mauritius. Non-resident directors may participate by audio, or audio and visual communication by which all directors participating and constituting a quorum can simultaneously hear each other throughout the meetings.

7. AUDITORS

Bermuda

A fund must appoint an auditor acceptable to the BMA. The auditor can be based anywhere in the world.

British Virgin Islands

A public fund must appoint an approved auditor acceptable to the FSC. A private or professional fund does not have to appoint an auditor.

Cayman

A regulated fund must appoint an auditor based in Cayman. Unregulated and private funds do not have to appoint an auditor.

Mauritius

The financial statements of a CIS must be audited by an auditor in Mauritius.

8. PROSPECTUSES

Bermuda

A Bermuda fund must file a copy of its prospectus with the Registrar of Companies prior to making and offer of its shares or as soon as reasonably practicable thereafter. Any material changes to the prospectus thereafter must be filed as supplemental particulars with the Registrar of Companies. The prospectus must contain the particulars as specified in The Companies Act 1981 and the IFA (unless it is exempted from the IFA).

British Virgin Islands

A public fund is required to file with the FSC a copy of its prospectus, which must contain provisions as specified in the Mutual Funds Act. There is no requirement under the Mutual Funds Act for a private fund or a professional fund to file a prospectus although it is accepted practice to do so upon applying for recognition.

Cayman

A regulated fund must produce an offering document containing all material information about the fund. The offering document must be filed with the CIMA together with the

statutory particulars. The Law requires that the offering documents for a mutual fund must describe the offered interests in all material respects and contain such other information as is necessary to enable a prospective investor to make an informed decision as to whether or not to subscribe.

Mauritius

CIS offering securities to the public must file with the FSC a prospectus containing the provisions prescribed in the Law and the Regulations. A prospectus is valid for 6 months from the date of filing with the FSC and any alteration thereto is reflected in an addendum which must be immediately filed with FSC. A prospectus is not required, inter alia, where the offer/issue is a private placement or is made only to sophisticated investors.

9. ONGOING GOVERNMENT REGULATION

Bermuda

Once a fund has been incorporated, unless it is an exempted fund, it must apply to the BMA for approval in respect of any material changes to its prospectus or offering document or to replace a service provider. The BMA must also be notified of any proposal to replace a director of the company.

A fund must make provision for the preparation and distribution of a financial report to investors including copies of its audited financial statements.

Financial statements must be prepared in accordance with generally accepted accounting principals and audited in accordance with generally accepted auditing standard, either of which may be those of a jurisdiction other than Bermuda. There is no requirement to file audited accounts.

The IFA gives the BMA the power to require a fund operator to furnish it with such reports on the fund's activities as the BMA may reasonably require. In particular, standard funds must make monthly reports to the BMA advising of any changes in net asset value, new subscriptions and redemptions while institutional funds and administered funds must file such reports on a quarterly basis.

A fund is required to submit to the Authority within six months after the financial year end, a statement confirming that the fund has been in compliance with the IF Act, fund rules and fund prospectus rules.

British Virgin Islands

The FSC maintains a register of mutual funds which must contain certain details. Any change in such details must be filed with the FSC within 21 days of such change. If a private or professional fund wishes to change a manager, administrator, investment advisor or custodian, it must obtain the prior consent of the FSC. A public fund requires the FSC's prior consent for any material change to its prospectus or structure, including changes to directors, functionaries or auditors.

Cayman

A regulated fund must file with the CIMA an amended offering document or amended statutory particulars, as the case may be, if there is a material change to the relevant document, within 21 days of such change. A regulated fund must file a copy of its annual audited accounts with the CIMA, unless an exemption is required and granted. Regulated funds are required to file an annual report with CIMA.

Mauritius

No alteration to a CIS is valid unless the FSC has been duly informed. Prior approval of the FSC is required for (a) the nomination of an officer of the CIS, the CIS manager, or the custodian, (b) change in portfolio managers, (c) change in ownership or the acquisition of shares in the CIS manager, and (d) the establishment of a subsidiary by the CIS manager.

Quarterly interim financial statements and interim management report and the audited annual financial statements and the management report are filed with the FSC.

For further information, please contact Palladium.

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Note from Palladium:

This article is not intended to be a substitute for legal advice. Further, it deals in broad terms only and it is intended to merely provide a brief overview and give general information.

October 2018