

BRITISH VIRGIN ISLANDS MUTUAL FUNDS

This article has been prepared for the assistance of those who are considering the formation of a mutual fund in the British Virgin Islands (“BVI”). It deals in broad terms with the requirements of BVI Law for the establishment and operation of 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 relation to 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 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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1. INTRODUCTION

The principal legislation pertaining to mutual funds in the British Virgin Islands (“BVI”) is the Securities and Investment Business Act, 2010 as amended (“SIBA”) and the Mutual Fund Regulations, 2010, as amended (the “Regulations”). SIBA and the Regulations impose requirements for the recognition and registration of mutual funds incorporated or formed under the laws of the BVI or otherwise carrying on business from within the BVI.

Mutual 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 mutual fund in the BVI. Mutual fund companies can be incorporated as segregated portfolio companies. For ease of reference, we have in this article assumed that the mutual fund is structured as a business company, except where otherwise noted.

2. TYPES OF FUNDS

Mutual Funds Generally

Section 40(1) of SIBA defines a mutual fund as a business company, partnership or unit trust which “(a) collects and pools

investor funds for the purposes 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 mutual fund includes an umbrella fund whose fund interests are split into different classes or sub-funds and a fund which has a single mutual fund investor not registered or recognised under SIBA. This encompasses open ended “hedge” funds.

A mutual 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:

- (i) a private fund;
- (ii) a professional fund; or
- (iii) a public fund.



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Private Funds

A private fund is a mutual 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 fund interests issued by the mutual fund is to be made on a private basis.

Professional Funds

A professional fund is a mutual fund whose shares are made available only to professional investors and the initial

investment in which, in respect of the majority of each of such investors, is not less than US\$100,000 (or its equivalent in another currency).

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”.



Public Funds

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

3. PROCEDURE

Generally

A mutual fund structured as a business company under the BVI Business Companies Act, 2004, as amended (“BVIBCA”) 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.

Private and Professional Funds

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

In order to be recognised, the private or professional fund must demonstrate to the Financial Services Commission (British Virgin Islands) (the “FSC”) that it satisfies the requirements as set out in SIBA and the Regulations. Generally, this obligation is satisfied by submitting an application form, along with a certified copy of the memorandum and articles of association, and the certificate of incorporation of the fund, the offering and subscription agreements, together with an auditor’s letter of consent to the FSC. The FSC will review the application form to ensure the functionaries are in acceptable recognised jurisdictions and will ensure the fund has been duly incorporated. With respect to a private fund, the FSC will review the memorandum of association to ensure it has the requisite professional fund language. In the case of a professional fund, the prospectus and subscription agreement are also submitted so that the FSC may ensure that these documents have the requisite professional fund language. The FSC will refuse to recognise the fund if it does not comply with the provisions of SIBA and the Regulations or if the FSC determines that granting recognition is not in the interests of investors or in the public interest.

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

However, a professional fund should exercise caution in this regard, as the fund may have to stop carrying out business or stop managing or administering its affairs if it has not received recognition by the expiry of the 14 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.

A mutual fund is also required to have a regulated authorised representative to act as the main intermediary between the fund and the FSC, to accept service of notice or documents on behalf of the fund, and keep any required records.

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

- (a) the address of the fund’s place of business and address for service in the BVI;
- (b) the fund’s authorised representative;
- (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.

Such register is open to public inspection.

Any change in the details referred to in subparagraphs (a) to (c) above must be filed with the FSC within 14 days after the change.

Public Funds

A mutual fund which will not be “recognised” as a private fund or professional fund must apply for “registration” as a public fund under SIBA and the Regulations. 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 and the Regulations. An application form must be submitted to the FSC along with a certified copy of the memorandum and articles of association, and certificate of incorporation of the company, the offering documents and subscription agreement, a copy of each functionary agreement, and a statement of the nature and scope of the business of the fund. The application form is similar to the application form for a private and professional fund, although more detailed information is required. 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 be a limited partnership.

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

4. FUNCTIONARIES

A mutual fund incorporated as a British Virgin Islands business company or limited partnership must have a



registered office and registered agent in the BVI. A mutual fund is required to have a manager and/or investment advisor who is licensed in an acceptable jurisdiction and an independent administrator and custodian which are also in acceptable jurisdictions. A functionary that is not incorporated in a 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.

The following jurisdictions are officially recognised for the purposes of the Mutual Fund Act:- Argentina, Australia, Bahamas, Belgium, Bermuda, Brazil, Canada, Cayman Islands, Chile, China, Curacao, Denmark, Finland, France, Germany, Gibraltar, Greece, Guernsey, Hong Kong, Ireland, Isle of Man, Ireland, Italy, Japan, Jersey, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Norway, Panama, Portugal, Singapore, Spain, South Africa, Sweden, Switzerland, the UK and the USA.

5. ONGOING REGULATIONS

Generally

All mutual funds must obtain the prior consent of the FSC before changing the basis of their registration or recognition, and before changing a functionary (being their investment manager, investment advisor, custodian or administrator). The FSC requires that they be notified of any material change to a mutual fund, including any suspension of trading or valuation of the fund, or any regulatory action being brought against the fund or any director or functionary of the fund.

A mutual fund must have an auditor and audited financial statements must be filed with the FSC on an annual basis. Further an annual return must be filed with the FSC by 30 June each year.

Public Funds

Certain additional ongoing requirements are specific 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. A public fund must:

- (b) maintain adequate accounting records and prepare audited financial statements in respect of each financial year in accordance with generally accepted accounting principles, which statements must be filed with the FSC;
- (c) cause its financial statements to be audited by an auditor in a recognised jurisdiction approved by the FSC and made available to all shareholders of the public fund; and
- (d) if it carries on business in any other country, within three months of its year-end file with the FSC a certificate of compliance issued by the foreign competent authority supervising the fund.

A public fund is also required to publish in writing and file with the FSC a copy of a prospectus offering its shares. Such prospectus must include the following:

- 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, together with additional disclosure as required under the Code;
- b) a summary of the statutory shareholders' rights as stated in SIBA; and
- c) a copy of available financial statements for the last financial year and auditor's report thereon if the public fund has completed a financial year in operation.

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.

Where any prospectus published by a public fund contains a misrepresentation relating to the matters prescribed by the SIBA, a person who purchases shares pursuant to the prospectus shall be deemed to have relied upon 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 unit trust).

6. FEES

In addition to the fees payable under the BVIBCA, a fee is payable on recognition, as the case may be, and annually thereafter. For a current listing of fees please contact Palladium.

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 "mutual fund" a unit trust, whether organised under 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 exempted from certain registration requirements in the BVI.

The trust deed will contain general provisions for the establishment of the trust and 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. A unit trust mutual fund has the same requirements concerning functionaries as a corporate mutual fund.

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

8. SEGREGATED PORTFOLIO COMPANIES

The BVIBCA and SIBA make provision for the incorporation and recognition or registration of mutual fund companies as segregated portfolio companies ("SPC's"). The Segregated Portfolio Companies Regulations, 2005 (the "SPC Regulations") 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 the 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).

The application to register a mutual fund as an SPC is generally made at the same time as the application under the Act for recognition or registration as a mutual 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 remitting an application form together with the proposed memorandum and articles of association of the company. To receive permission to register or incorporate, a mutual 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, as 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 mutual funds.

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.

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