

GUIDE TO MUTUAL FUNDS IN THE BRITISH VIRGIN ISLANDS

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PREFACE

This Guide provides an introduction to the law and procedures relating to the establishment and operation of mutual funds in the British Virgin Islands (**BVI**).

We recognise that this Guide will not completely answer detailed questions which clients and their advisers may have; it is not intended to be comprehensive. If any such questions arise in relation to the contents, they may be addressed to any member of the Funds and Investment Services Team, using the [contact information](#) provided at the end of this Guide.

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1. INTRODUCTION

In 1996, the Government of the BVI enacted the Mutual Funds Act, 1996, as amended, (**MFA**) which came into force in 1998, giving the BVI a formal legal and regulatory framework within which to conduct investment funds business.

On 17 May 2010, the Government introduced a new and modernised regime with Part III of the Securities and Investment Business Act, 2010 (as amended, **SIBA**) and the Mutual Funds Regulations, 2010 (**MFR**), repealing and replacing the MFA. Over the years, the BVI has developed a reputation around the world as a client-friendly jurisdiction in which to domicile offshore funds. With the enactment of the Securities and Investment Business (Incubator and Approved Funds) Regulations, 2015, the BVI has reinforced its commitment to ensuring that the jurisdiction remains a pre-eminent, dynamic and attractive domicile for investment funds products.

Key advantages of establishing an investment fund in the BVI (as compared with certain other offshore jurisdictions) include the following:

- tax neutral environment;
- a recognised and respected legal system derived from English common law as supplemented by modern local legislation;
- no regulatory restrictions on investment policies or strategies or on performance fee and other fee arrangements;
- no requirement to appoint local directors or local functionaries (except for an authorised representative - see section 9 of this Guide);
- fast track procedure for setting up private and professional funds;
- rapid and cost-efficient set-up, particularly for incubator and approved funds;
- the ability to amend the memorandum and articles of association of the fund without requiring a vote of the shareholders in most cases;
- statutory segregated portfolio ring-fencing;
- specialised and dedicated Commercial court;
- low start up and ongoing fees; and
- no requirement for a local auditor to sign off on the fund's accounts.

2. DEFINITION OF A MUTUAL FUND

The SIBA defines a mutual fund as a company incorporated, a partnership formed, a unit trust organised or any other body formed or organised under the laws of the BVI or of any other country which:

- (a) collects and pools investor funds for the purpose of collective investment; and
- (b) issues fund interests (defined as rights or interests, however described, of the investors with regard to the property of the fund but not including a debt) 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, partnership, unit trust or other body, as the case may be, and includes but is not limited to:
 - (i) an umbrella fund whose fund interests are split into a number of different class funds or sub-funds; and

- (ii) a fund which has a single investor which is a mutual fund not registered or recognised under the SIBA.

The SIBA does not use the term “open-ended” or “closed-ended”. However, pursuant to the definition of a mutual fund under the SIBA, only funds of an open-ended nature (whose equity interests are redeemable at the option of an investor) are funds within the meaning of the SIBA. Accordingly, the SIBA regulates open-ended funds and the managers and administrators of such open-ended funds. As the SIBA does not apply to closed-ended funds, closed-ended investment schemes are not entitled to nor are they required to be registered or recognised under the SIBA. Managers, administrators and custodians of closed-ended funds formed under the laws of the BVI are, however, required to be licensed under Part I of the SIBA as regards the carrying on of investment business.

3. INVESTMENT FUND VEHICLES

A fund may be constituted in the BVI as:

- (a) a BVI business company under the BVI Business Companies Act 2004, as amended (**BC Act**);
- (b) (with the exception of public funds) a limited partnership under the Partnership Act 1996, as amended; or
- (c) a unit trust.

The vast majority of BVI investment funds are set up as business companies under the BC Act.

A fund constituted under the BC Act can be incorporated as a segregated portfolio company (**SPC**) with the prior approval of the local regulator, the BVI’s Financial Services Commission (**Commission** or **FSC**). Existing funds can also apply to be registered as an SPC.

4. APPLICATION OF THE SIBA

The SIBA applies to the following:

- (a) mutual funds that are formed under the laws of the BVI;
- (b) mutual funds formed under the laws of a jurisdiction other than the BVI but which carry on business in the BVI through a branch or representative office;
- (c) foreign mutual funds which solicit any individual who is a BVI citizen or resident to subscribe for or purchase their fund interests;
- (d) mutual fund administrators, custodians and managers who are formed under the laws of the BVI; and
- (e) foreign mutual fund managers, custodians and administrators which carry on their business in the BVI (for example, through a branch operation or representative office).

5. TYPES OF FUNDS

The categories of mutual funds that may be established in the BVI are:

- private funds;
- professional funds;
- public funds;

- recognised foreign funds;
- incubator funds; and
- approved funds.

5.1 **Private funds**

A private fund under the SIBA is a fund (a) that shall have no more than fifty investors or (b) in which an invitation to subscribe for, or purchase fund interests issued by the fund shall be made on a private basis only. The SIBA provides that such an invitation includes an invitation which is made (a) to specified persons (however described) and is not calculated to result in 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. A private fund cannot commence business until recognised by the Commission.

5.2 **Professional funds**

A professional fund is a fund the interests of which shall only be issued to “professional investors” and the initial investment of each investor in the fund (other than “exempted investors”) ¹ shall be not less than USD100,000 or its equivalent in any other currency for all investors other than exempted investors. A “professional investor” under the SIBA is a person:

- (a) 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
- (b) who has signed a declaration that he, whether individually or jointly with his spouse, has net worth in excess of USD1,000,000 or its equivalent in any other currency and he consents to being treated as a professional investor.

5.3 **Public funds**

A public fund is a mutual fund whose offering of fund interests may be made to a large number of investors or to persons other than experienced investors (licensed entities), those who have a private or business connection to the fund or to a class of persons who are not limited in such a way as to make the offering of fund interests available to persons who are “professional investors” within the meaning of the SIBA.

In addition to satisfying the requirements for recognition by the SIBA, public funds will be required to satisfy the requirements of the MFR and the Public Funds Code, 2010 (**Public Funds Code**), including those relating to publication of a prospectus which must be approved by and signed on behalf of the fund’s directors.

5.4 **Incubator funds**

The incubator fund is designed for start-up investment managers. It provides the ability to set-up and run a cost-efficient legal entity for trading an investment strategy with limited on-going obligations. This product will appeal to the increasing number of pioneer managers who are looking to gain a track record before converting the incubator fund to a more sophisticated fund product.

The key features of an incubator fund are:

¹ An “exempted investor” is defined in the MFR as the investment manager, administrator or promoter, or persons connected to the investment manager or promoter.

- (a) it can have a maximum of 20 investors, each of whom must be invited to invest in the incubator fund and must make a minimum initial investment thresholds of US\$20,000, and the fund cannot exceed a cap of US\$20 million in relation to the aggregate value of its investments – these features can be summarised as the "20-20-20 criteria";
- (b) provided it continues to meet the 20-20-20 criteria, the incubator fund can operate for a period of two years (which may, on application to the FSC, be extended by one additional year) before it needs to either convert to a more sophisticated structure, such as an approved fund (see below) or a private or professional fund, or wind-up its operations.

5.5 **Approved funds**

An approved fund is similar to a private fund. It is, however, subject to less stringent regulation, has lower on-going costs, and targets investment managers originating out of the family office / friends and family market.

The key features of an approved fund are:

- (a) it can have a maximum of 20 investors, has no minimum initial investment thresholds and has a maximum cap of US\$100 million in relation to the value of investments in the fund;
- (b) there is no maximum period of operation however if it exceeds its number of investors or maximum cap on aggregate investors for a period of more than two consecutive months, it needs to either remedy this breach within 7 days of the end of such two-month period, or convert to a more sophisticated product such as a private or professional fund, or wind-up its operations;

6. **RECOGNITION OF PRIVATE AND PROFESSIONAL FUNDS**

- 6.1 Section 41 of the SIBA provides that no mutual fund shall carry on business in or from within the BVI unless it is recognised under the SIBA. Section 44 of the SIBA provides a grace period of up to 21 days within which a professional fund may carry on its business or manage or administer its affairs in from within the BVI without being recognised under the SIBA. No similar grace period applies to private or public funds.
- 6.2 In considering an application for recognition of private and professional funds, the Commission requires, among other things, details of the following functionaries to be included in the application for recognition: the investment manager and/or investment adviser, the administrator, the custodian (who must be functionally independent from the manager and administrator or have systems and controls to ensure such independence), the auditor and the authorised representative of the fund. Policy Guidelines issued by the Commission provide that the functionaries of a BVI fund must be domiciled in the BVI or in a recognised jurisdiction². Foreign functionaries that are incorporated in non-recognised jurisdictions would be considered by the Commission on a case-by-case basis.
- 6.3 An application for recognition of a private or professional fund must be accompanied by, among other things:
 - (a) a certified copy of the fund's constitutional documents;
 - (b) a certified copy of its certificate of incorporation;
 - (c) a copy of its offering document,;

² Recognised jurisdictions currently are: Argentina, Australia, Bahamas, Bermuda, Belgium, Brazil, Canada, Cayman Islands, Chile, China, Denmark, Finland, France, Germany, Gibraltar, Greece, Guernsey, Hong Kong, Ireland, Isle of Man, Italy, Japan, Jersey, Luxembourg, Malta, Mexico, the Netherlands, the Netherlands Antilles, New Zealand, Norway, Panama, Portugal, Singapore, Spain, South Africa, Sweden, Switzerland, United Kingdom and United States of America

- (d) a copy of its subscription agreements;
- (e) an auditor confirmation letter;
- (f) a confirmation letter from legal counsel; and
- (g) an undertaking regarding re-domiciliation,

In the case of professional funds, the offering documents and subscription documents must contain a statement as to the minimum initial investment in the fund along with statutory professional investor declarations.

The application fee for an application for recognition of a private or professional fund is USD700. The annual recognition fee following approval is USD1,000.

- 6.4 Written application can be made to the Commission for an exemption from the requirement to appoint an investment manager, a custodian or an auditor. The exemption application does require a clear description of the rationale why the investment manager, custodian or auditor is not required and there are limited circumstances in which the Commission would grant such an exemption.
- 6.5 Following recognition, private and professional funds are required to comply with a number of on-going obligations, including: having, at all times, at least two directors (at least one of whom must be an individual); preparing audited financial statements for each financial year and filing these with the Commission within six months after the end of each financial year; maintaining records that are sufficient to show and explain the fund's transactions, that will, at any time, allow the financial position of the fund to be determined with reasonable accuracy and that will enable the preparation of the requisite financial statements and returns from those records; paying by 31 March of each year an annual fee for recognition as a private or professional fund; filing with the Commission by 30 June each year a mutual fund annual return in respect of the previous year ending 31 December; and giving notice to the Commission in certain circumstances on a timely basis.
- 6.6 A fund must submit to the Commission a copy of its offering document with its application for recognition (or file with the Commission, within 14 days after the document's issuance, an explanation as to why the document is not submitted to the Commission). Any change to a fund's offering documentation must be filed with the Commission within 14 days after the change is made. Each potential investor must be provided with an investment warning that complies with the Mutual Fund Regulations and be included in the offering document. If the fund does not provide an offering document, the investment warning must be provided separately to each investor. No person shall be accepted as an investor unless that person provides written acknowledgement of the investment warning. In addition, all investors in professional funds must confirm that they are professional investors.

7. REGISTRATION OF A PUBLIC FUND

Section 41 of the SIBA provides that no mutual fund shall carry on business in or from within the BVI unless it is recognised under the SIBA. The application fee is USD1,000 and the annual registration is USD1,500. Fees are also due for the registration of the fund's prospectus and any amendment thereof.

The following are the key requirements for registration:

7.1 Prospectus:

- (a) the fund must issue a prospectus which must comply with the MFR and the Public Funds Code, be approved by and signed by or on behalf of the fund's board of directors and a copy thereof must be filed with the Commission;

- (b) the prospectus must contain full and accurate disclosure of all information as investors would reasonably require and expect to find for the purpose of making an informed investment decision (where any such disclosure ceases to be accurate, the fund must apply to the Commission within 14 days to register an amended Prospectus); and
- (c) an investor has a statutory right of action for rescission or damages against the fund and its directors in respect of any misrepresentation (which includes an omission to disclose required information) in the fund's prospectus; the prospectus must contain a summary statement of the investors' statutory rights under the SIBA to action for rescission or damages in the event the prospectus contain misrepresentations;

7.2 **Functional independence between functionaries:**

- (a) a public fund's functionaries (manager, administrator and custodian) must be functionally independent of each other; and
- (b) the custodian and the administrator may be the same company but clear internal separation between the two respective operational functions must be demonstrated (for example, different persons conducting the respective custodian and management/administrative functions and reporting to separate management lines);

7.3 **Appointment of an auditor:**

- (a) a public fund must have an auditor who must be a person entitled to practice as a public accountant and to perform audits under the laws of the BVI or of a recognised jurisdiction; and
- (b) the auditor of a public fund must be approved by the Commission to act as auditor of BVI public funds (approval, once granted, is given generally so that there is no need to have the auditor approved each time it wishes to act on behalf of a specific fund);

7.4 **Financial statements:**

- (a) a public fund is required by the SIBA to maintain adequate accounting records and prepare audited financial statements in respect of each financial year of operation in accordance with generally accepted accounting principles;
- (b) audited financial statements are required to be filed with the Commission within six months of the financial year end;
- (c) the financial statements must be accompanied by a directors' certificate in approved form and the report of the auditor thereon which shall include a statement of the auditing standards which have been applied in the audit of the statements; and
- (d) both the financial statements and the report of the auditor must be provided or made available for examination by the investors of the fund.

Following registration, public funds are required to comply with a number of on-going obligations. In addition to the obligations described above, these include: having, at all times, if it is a business company under the BC Act, at least two directors (both of whom must be individuals) or, if it is a unit trust, a trustee that is a body corporate; paying by 31 March of each year an annual fee; filing with the Commission by 30 June each year a mutual fund annual return in respect of the previous year ending 31 December; giving notice to the Commission in certain circumstances on a timely basis and seeking the prior approval from the Commission before effecting certain changes (such as the appointment of a new director if the fund is a business company under the BC Act).

8. **REGISTRATION OF AN INCUBATOR FUND**

The approval process for an incubator fund is very quick and the incubator fund can commence business two days following receipt of the application by the FSC.

On-going requirements

There are no requirements to appoint fund functionaries (administrator, custodian or manager), and there is no requirement to have an auditor. There is no requirement for an incubator fund to have an offering memorandum. An incubator fund must submit annual, unaudited financial statements to the FSC. The incubator fund is required to submit semi-annual returns to the FSC by 31 January and 31 July which summarise pertinent information regarding the fund's status, including the number of investors, total investments, aggregate subscriptions and redemptions, NAV and details of any significant investor complaints and how such complaints were dealt with. Each return will contain a confirmatory declaration which the directors will need to make confirming that the fund is not in breach of relevant regulations.

The incubator fund is required to notify the FSC within 14 days of any changes to the information provided in the application for approval or in relation to any matter which is likely to have a material impact on the fund.

9. **REGISTRATION OF AN APPROVED FUND**

The approval process provides for unprecedented speed of establishment; the approved fund can commence business two business days following receipt of the application by the FSC.

On-going requirements

Although it must appoint an administrator, an approved fund is not required to have a custodian, manager or an auditor. There is no requirement for an offering memorandum. There are limited on-going obligations which are substantially similar to those set out above for incubator funds.

10. **RESTRICTIONS ON THE USE OF WORDS "FUND" AND "MUTUAL FUND"**

The words "fund" and "mutual fund" are restricted words under the SIBA and no person may use them in its name, description or title under which it carries on business in or from within the BVI or make or continue to make any representation in any advertisement, letter, notice and the like or in any other manner that it is carrying on business as a fund or a mutual fund unless that person is a mutual fund within the meaning of the SIBA.

Closed-end or other types of funds (for example, venture capital funds) will be caught by this restriction.

11. **AUTHORISED REPRESENTATIVES**

Section 65 of the SIBA provides that all mutual funds must have at all times an authorised representative certified as such by the Commission unless exempted by having a significant management presence in the BVI as specified in the Regulatory Code, 2009. The authorised representative must be a business company under the BC Act, a partnership formed under the laws of the BVI, or an individual who is ordinarily or habitually resident in the BVI. Many local service providers (including our corporate services affiliate Appleby Corporate Services (BVI) Limited) have been approved and licensed as authorised representatives under the SIBA. Failure to appoint an authorised representative may result in a fine on summary conviction of USD15,000 for a company or USD10,000 for an individual.

The functions of an authorised representative are to act as the main intermediary between the mutual fund and the Commission; to accept service of notices and other documents on behalf of the mutual fund; to keep in the authorised representative's office in the BVI such records, or copies of such records, as may be prescribed; to make all submissions to the Commission, and to pay all relevant fees on the mutual fund's behalf.

12. OFFENCES AND PENALTIES

Sections 105 and 106 of the SIBA provide for offences and prescribed penalties for such offences. For example, under Section 105, it is an offence for a person to make or assist in making a representation, statement, report or return, whether oral or written, that is required or permitted by the SIBA to be made or, in the case of a document, submitted to the Commission; and that (i) contains a false statement of a material fact; or (ii) omits to state a material fact required to be provided to the Commission or necessary to avoid the statement or document being materially misleading.

For more information or specific advice on mutual funds in the British Virgin Islands, please contact one of the following:

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For the convenience of clients in other time zones, a list of contacts available in each of our jurisdictions may be found [here](#).